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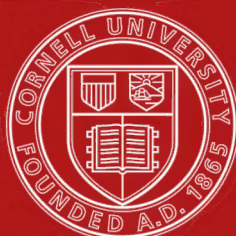
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A selection of cases on insurance.



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A
SELECTION OF CASES
ON
INSURANCE.

BY
EUGENE WAMBAUGH, LL.D.,
PROFESSOR OF LAW IN HARVARD UNIVERSITY.

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P R E F A C E.

THIS collection has been prepared for the purpose of enabling the careful student, whether he be beginner or practitioner, to ascertain from the original sources, by his own labor, what are the doctrines of Insurance; but although the collection assumes that the reader has already mastered the more elementary branches of law, experience as a teacher of Insurance suggests that it may be well to give four pieces of advice: first, that Insurance is not, as is sometimes hastily assumed, a mere application of Contracts and Agency, but is a separate subject, having peculiar doctrines of its own upon each of the topics used herein as titles to chapters, the peculiarities being due partly to the special purpose and dangers of the transaction and partly to the fact that the subject did not have its origin in England, but was of Continental birth and is a part of the Law Merchant; second, that Marine, Fire, and Life Insurance are not separate sciences, but are simply the chief applications of one science, and that consequently it is impossible to understand one of these branches without studying the others; third, that in deciding Insurance cases, rather more frequently than in deciding cases on other subjects, judges have been prone to use inartistic and inaccurate language, and that consequently it is important to ascertain exactly what was the problem presented, and exactly how it arose, and to lay stress upon what the court did and not merely upon what the judges said; and fourth, that the solution of the questions presented in the reported cases or in one's daily practice may depend not upon general principles but upon the special words of the policy.

The order of the chapters has been determined partly by theory and partly by experience in teaching; but an instructor may find it advisable to change the order from year to year, for an occasional change appears to bring new and valuable views of the relation of topics and of the essential cohesiveness of the whole subject.

In reprinting cases, the arguments of counsel have usually been omitted. All other departures from the original reports have been explained in the notes, in order that the reader may see whether the cases have been so edited as to diminish their authority.

The citations in the notes are not exhaustive, but have been selected because of supposed usefulness. Those marked "*acc.*" or "*contra*" are intended to start the reader towards ascertaining for himself whether the doctrines in the text are sustained by the weight of authority. Those marked "see" are believed to throw light upon those doctrines by discussion or by interesting application. Those marked "compare" are supposed to conflict, at first sight, with the doctrines in the text, but to be reconcilable with them by the taking of proper distinctions.

At the end of many of the sections will be found lists for the use of persons wishing more than an elementary knowledge; for in dealing with such a subject as Insurance it seems proper to keep in mind the wants both of the specialist and of the general practitioner, and in a book intended — as this is — for general use, it is quite impossible to print all the cases needed by the specialist.

Parts of the collection have appeared from time to time throughout the last four years; and now that the work is published in final form, the editor, knowing that there have been many omissions, both intentional and accidental, is reminded, as often in this long task, of a consoling sentiment attributed to Plato: "As it is the commendation of a good huntsman to find game in a wide wood, so it is no imputation if he hath not caught all."

EUGENE WAMBAUGH.

JUNE 23, 1902.

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CASES ON INSURANCE.

CHAPTER I.

INTRODUCTION.

Conventio qua unus infortunium alterius in se suscipit pretio periculi convento.

SANTERNA *de Assecurationibus*,¹ pt. I., num. 2 (1552).

Assecuratio describi potest in hæc verba: Assecuratio est alienarum rerum sive mari sive terra exportandarum periculi susceptio certo constituto pretio: et consequenter hi sunt assecuratores qui alienarum rerum sive mari sive terra exportandarum certo pretio constituto seu recepto periculum suscipiunt.

STRACCHA *de Assecurationibus*,² introd., num. 46 (1569).

Assurance est un contract par lequel on promet indemnité des choses qui sont transportées d'un pays en autre, spécialement par la mer, et ce par le moyen du prix convenu à tant pour cent, entre l'assuré qui fait ou fait faire le transport, et l'assureur qui promet l'indemnité.

Guidon de la Mer,³ c. i., art. i. (1556-1600).

THE COURT OF THE COMMISSIONERS.

St. 43 Eliz. c. 12 (1601).⁴

An act concerning matters of assurances used among merchants.

WHEREAS, it ever hath been the policy of this realm by all good means to comfort and encourage the merchant, thereby to advance and increase

¹ Reprinted in Zilettus' *Tractatus Universi Juris* (Venice, 1584, — commonly cited as *Tractatus Tractatum*), vol. VI., part 1, folio 348; and in Stracchæ, *Aliorumque . . . Juris-Consultorum, de Mercatura Decisiones et Tractatus* (Amsterdam, 1669), 796. See Levin Goldschmidt, "Benevenuto Straccha Anconitanus und Petrus Santerna Lusitanus," in *Zeitschrift für Handelsrecht*, vol. 38, p. 1 (1890-91). — ED.

² Reprinted in *Tractatus Tractatum*, vol. VI., part 1, folio 357; and in the appendix to Straccha *de Mercatura*. — ED.

³ Reprinted and annotated by Pardessus, in *Collection de Lois Maritimes*, vol. 2, p. 377. — ED.

⁴ In reprinting early English statutes, Pickering's edition of the Statutes at Large has been followed. — ED.

the general wealth of the realm, her Majesty's customs, and the strength of shipping; which consideration is now the more requisite, because trade and traffick is not at this present so open as at other times it hath been: (2) and whereas it hath been time out of mind an usage amongst merchants, both of this realm and of foreign nations, when they make any great adventure, (especially into remote parts) to give some consideration of money to other persons (which commonly are in no small number) to have from them assurance made of their goods, merchandizes, ships and things adventured, or some part thereof, at such rates and in such sort as the parties assurers and the parties assured can agree, which course of dealing is commonly termed a policy of assurance; (3) by means of which policies of assurance it cometh to pass, upon the loss or perishing of any ship, there followeth not the undoing of any man, but the loss lighteth rather easily upon many than heavily upon few, and rather upon them that adventure not than those that do adventure, whereby all merchants, especially of the younger sort, are allured to venture more willingly and more freely: (4) and whereas heretofore such assurers have used to stand so justly and precisely upon their credits, as few or no controversies have arisen thereupon, and if any have grown, the same have from time to time been ended and ordered by certain grave and discreet merchants appointed by the lord mayor of the city of London, as men by reason of their experience fittest to understand, and speedily to decide those causes, until of late years that divers persons have withdrawn themselves from that arbitrary course, and have sought to draw the parties assured to seek their monies of every several assurer, by suits commenced in her Majesty's courts, to their great charges and delays: (5) for remedy whereof, be it enacted by the authority of this present parliament, That it shall and may be lawful for the lord chancellor, or lord keeper of the great seal of England, for the time being, to award forth under the great seal of England, one general or standing commission, to be renewed yearly at the least, and otherwise so oft as unto the said lord chancellor or lord keeper shall seem good, for the hearing and determining of causes arising and policies of assurances, such as now are or hereafter shall be entered within the office of assurances within the city of London, and whereof no suit shall be depending the last day of this session of parliament, in any of her Majesty's courts: (6) which commission shall be directed to the judge of the admiralty for the time being, the recorder of London for the time being, two doctors of the civil law, and two common lawyers, and eight grave and discreet merchants, or to any five of them: (7) which commissioners or the greater part of them, shall sit and meet, shall have by virtue of this present act full power and authority to hear, examine, order and decree all and every such cause and causes concerning policies of assurances in a brief and summary course, as to their discretion shall seem meet, without formalities of pleadings or proceedings.

II. And be it further enacted by the authority aforesaid, That it shall be lawful for the said commissioners, as well to warn any of the parties

to come before them, as also to examine upon oath any witness that shall be produced, and to commit to prison without bail or mainprize, any person that shall wilfully contemn or disobey their final orders or decrees: (2) and that the said commissioners shall once every week at the least, meet and sit upon the execution of the said commission in the office of the assurances, or in some other convenient public place by them to be assigned: (3) and that no person by virtue of this act may claim or exact any fee, for any matter or cause concerning the execution of the said commission.

III. And be it further enacted by the authority aforesaid, That if any person shall be grieved by sentence or decree of the said commissioners, that such persons so grieved may at any time within two months of the said decree so made, exhibit his bill into the high court of chancery for the re-examination of such decree; (2) so as every person complainant, before he shall exhibit any such bill, do either execute and satisfy the said sentence so awarded, or at the least lay down *in deposito* with the said commissioners such sums of money as he shall be awarded to pay, and that upon so doing the said complainant shall be enlarged of his imprisonment: (3) and that the lord chancellor, or lord keeper, for the time being, shall have full power and authority by virtue of this act, upon every complaint made (in order as aforesaid) to reverse or affirm every such sentence or decree, according to equity and conscience: (4) and that the said lord chancellor, or lord keeper, in every such suit brought before him, as aforesaid, by such assurers, and decreed against the said assurers, shall award double costs to the party assured.

IV. Provided nevertheless, That no commissioner shall intermeddle in the execution of any such commission in any cause or matter of assurance, where himself shall be either a party assurer or assured in the same assurance which is brought in question: (2) nor that any commissioner (other than the said judge of the admiralty and the recorder of London) shall deal or proceed in the execution of any such commission before he have taken his corporal oath before the lord mayor and court of aldermen of the city of London, to proceed uprightly and indifferently between party and party.¹

¹ The Court of the Commissioners long ago ceased to exist. See St. 13 & 14 Car. II. c. 23 (1662); 3 Bl. Com. 74-75; Martin's History of Lloyd's, 11, 14. — Ed.

CHAPTER II.

INSURABLE INTEREST AS AFFECTING THE VALIDITY
OF THE CONTRACT.

PART I.

WHY AN INTEREST IS REQUISITE.

Principale fundamentum assecurationis est risicum, seu interesse assecuratorum, sine quo non potest subsistere assecuratio.

CASAREGIS *de Commercio*, disc. IV., num. 1 (1707).

GODDART v. GARRETT.

CHANCERY,¹ 1692. 2 Vern. 269.²

THE defendant had lent money on a bottom-rhea bond, but had no interest in the ship or cargo. The money lent was £300, and he insured £450 on the ship. The plaintiff's bill was to have the policy delivered up, by reason the defendant was not concerned in point of interest as to the ship or cargo.

CUR. Take it that the law is settled that, if a man has no interest and insures, the insurance is void, although it be expressed in the policy interested or not interested; and the reason the law goes upon is that these insurances are made for the encouragement of trade, and not that persons unconcerned in trade, nor interested in the ship, should profit by it; and where one would have benefit of the insurance he must renounce all interest in the ship. And the reason why the law allows that a man having some interest in the ship or cargo may insure more, or five times as much, is that a merchant cannot tell how much or how little his factor may have in readiness to lade on board his ship. And it was said that the usual interest allowed

¹ The great seal was in commission, the commissioners being Sir John Trevor, Sir William Rawlinson, and Sir George Hutchins. — ED.

² s. c., but not s. p., 1 Eq. Cas. Abr. 371. — ED.

on bottom-rhea was £3 per cent per mensem, and you may insure at 6 or 7 per cent for the voyage; so if this practice might be allowed, a man might be sure to gain £30 or more per cent. Per CUR. Decree the policy of insurance to be delivered up to be cancelled.¹

NOTE that in this case notice was taken in the policy that it was to insure money on bottom-rhea.²

NOTE, also, that in this case the ship survived the time limited in the bottom-rhea bond, and was lost within the time limited in the policy. So, if insurance good, defendant might be entitled to the money on the bond, and also on the policy.

DEPABA v. LUDLOW.

COMMON PLEAS, 1720. 1 Comyns, 360.

THIS was an action of assumpsit upon a policy of insurance, where the defendant insured the plaintiff, interest or no interest, against all enemies, pirates, takings at sea, and all other damages whatsoever. And upon the trial it appeared that the ship was taken by a pirate of Sweden, and was in his possession for nine days, and was retaken by an English man-of-war, and after the suit commenced, brought into Harwich. And the question was, whether in such case the defendant was responsible?

And it was reserved by the Chief Justice for the opinion of the court; and after argument by Serjeant *Whitaker* for the plaintiff, and by Dr. *Henchman* for the defendant, it was determined for the plaintiff.

For though it was objected that the insurer was only responsible where the plaintiff had a property and that the term of insuring interest or no interest was introduced since the Revolution, yet it was said that such insurance was good, and the import of it is that the plaintiff has no occasion to prove his interest, and that the defendant cannot controvert that.³

¹ In *Cousins v. Nantes*, 3 Taunt. 513, 517 (1811), MANSFIELD, C. J., said: "The courts of equity formerly exercised an odd jurisdiction upon this subject; but they could not have proceeded upon the ground that an agreement was good on one side of Westminster Hall, and not on the other." — ED.

² A bottomry interest is now conceded to be insurable. *Glover v. Black*, 3 Burr. 1394, 1401 (1763); *Simonds v. Hodgson*, 3 B. & Ad. 50 (1832). — ED.

³ In *Sadlers' Company v. Badcock*, 2 Atk. 554, 556 (1743), s. c. 1 Wils. 10, Lord HARDWICKE, C., said:—

"Now these insurances from fire have been introduced in later times, and therefore differ from insurance of ships, because there interest or no interest is almost constantly inserted, and if not inserted you cannot recover unless you prove a property.

"The insuring of ships is as old as the laws of Oleron and Rhodes, whose inhabitants were the great traders of the world; look into the books that treat of insuring and you will find the term is *aversio periculi*, the intention of all insurances being to avert any

And though the ship was here retaken, yet the plaintiff received a damage, for his voyage was interrupted; and the question is not whether the plaintiff had his ship and did not lose his property, but what damage he sustained.

THE ACT AS TO MARINE POLICIES.

St. 19 Geo. II. c. 37, §§ 1-3 (1746).

An act to regulate insurances on ships belonging to the subjects of Great Britain, and on merchandizes or effects laden thereon.

WHEREAS, it hath been found by experience, that the making assurances, interest or no interest, or without further proof of interest than the policy, hath been productive of many pernicious practices, whereby great number of ships, with their cargoes, have either been fraudulently lost and destroyed, or taken by the enemy in time of war; and such assurances have encouraged the exportation of wooll, and the carrying on many other prohibited and clandestine trades, which by means of such assurances have been concealed, and the parties concerned secured from loss, as well to the diminution of the publick revenue, as to the great detriment of fair traders: and by introducing a mischievous kind of gaming or wagering, under the pretence of assuring the risque on shipping, and fair trade, the institution and laudable design of making assurances, hath been perverted; and that which was intended for the encouragement of trade, and navigation, has in many instances been hurtful of, and destructive to the same: for remedy whereof, be it enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this parliament assembled, and by the authority of the same, That from and after the first day of August, one thousand seven hundred and forty-six, no assurance or assurances shall be made by any person or persons,

damages or loss the insured might sustain. Upon this principle, in all modern insurances of ships interest or no interest is introduced, and between the subjects of different nations for this reason, because a great deal of contraband trade is carried on, and I believe began in the Spanish trade first.

"The common law leant strongly against these policies for some time, but being found beneficial to merchants they winked at it.

"New laws have been enacted which make it felony to destroy ships, and the temptation to it has arisen from interest and no interest inserted in policies.

"No longer ago than when I first sat in the Court of King's Bench I have heard these insurances called fraudulent; but though inconveniences may have arisen from these words to the insurance companies, yet some inconvenience too may arise on the other side, because if any person may insure whether he has property or not, it may be a temptation to burn houses to receive the benefit of the policy."

For the remainder of *Sadlers' Company v. Badcock*, see *post*, p. 1118. — ED.

bodies politick or corporate, on any ship, or ships, goods, merchandizes, or effects, laden or to be laden on board of any such ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer; and that every such assurance shall be null and void to all intents and purposes.¹

¹ In *Kent v. Bird*, Cowper, 583, 584 (1777), Lord MANSFIELD, C. J., said: "A policy of insurance is, in the nature of it, a contract of indemnity, and of great benefit to trade. But the use of it was perverted by its being turned into a wager. To remedy this evil, the Stat. 19 Geo. II. c. 37, was made."

In *Lowry v. Bourdieu*, 2 Doug. 468, 470 (1780), Lord MANSFIELD, C. J., said: "There are two sorts of policies of insurance, — mercantile and gaming policies. The first sort are contracts of indemnity, and of indemnity only; and from that principle a great variety of decisions and consequences have followed. The second sort may be the same in form, but in them there is no contract of indemnity, because there is no interest upon which a loss can accrue. They are mere games of hazard, like the cast of a die. . . . This then is a gaming policy, and against an act of Parliament."

In *Craufurd v. Hunter*, 8 T. R. 13, 23 (1798), Lord KENYON, C. J., said: "I think that at common law a person might have insured without having any interest. And this is in some measure proved by the case cited from 2 Vernon [*Goddart v. Garrett*], since that was an application made to the Court of Chancery, to have the policy delivered up; for that court sometimes relieves, as was said by Sir J. Jekyll in *Cowper v. Cowper*, 2 P. Wms. 753, against the rigor of the law. . . . But the preamble and enacting part of the Stat. 19 Geo. II. c. 37, remove all doubt on this point. It recites the mischiefs and inconveniences that had arisen from the making of assurances interest or no interest, and then it enacts (not declaring) that no such assurance shall be made, except in certain cases. . . . This count is good, unless it be on an insurance prohibited by that statute. But that statute . . . does not extend to foreign ships." At p. 24, ASHURST, J., said: "The principal question in this case arises on the fourth count in the declaration; namely, whether or not it can be supported for want of an averment of interest in the plaintiffs in the subject-matter insured? As to which I am of opinion that the declaration is good without such an averment; for, in the first place, this does not seem to be a case that falls within the purview of the statute against gaming policies. But, without entering into that, it does, in the present case, appear to be sufficiently clear that the plaintiffs were interested." And at p. 25 GROSE, J., said: "Whoever reads the Stat. 19 Geo. II. must see what the law was before the passing of that act. Before that time a wagering policy was not illegal. The words of that statute clearly show that before that time any person might have insured without interest."

In *Lucena v. Craufurd*, 2 B. & P. N. R. 269, 321-322 (H. L. 1806), Lord ELDON said: "Lord Kenyon, in *Craufurd v. Hunter*, considered the 19 Geo. II. as a legislative declaration that an insurance might have been effected before that statute without interest. It is with great deference that I entertain doubts on that subject. Ld. Ch. Baron Comyns, in the case of *Depaba v. Ludlow*, Com. 360, speaking of this statute, says, that it was an act to affect the form of the policy; and Lord Hardwicke has said the same in two cases, — *The Sadlers' Company v. Badcock*, 2 Atk. 554, and *Pringle v. Hartley*, 3 Atk. 195. In the latter of which he distinctly says that the words 'interest or no interest' were meant only to dispense with the proof of interest on the trial. If then a policy with the words 'interest or no interest' were stated in a declaration, and these words meant that there should be a dispensation with the proof of interest, there would be something like an averment on the one part and an admission on the other that there was an interest. I cannot conceive how such decrees could have been made in courts of equity as were made there previous to the 19 Geo. II., if an insurance could have been made without interest, for no court of equity could relieve against the effect of a contract valid in law. But if the words 'interest or no

II. Provided always, and be it further enacted by the authority aforesaid, That assurance on private ships of war, fitted out by any of his Majesty's subjects, solely to cruize against his Majesty's enemies, may be made by or for the owners thereof, interest or no interest, free of average, and without benefit of salvage to the assurer; any thing herein contained to the contrary thereof in any wise notwithstanding.

III. Provided also, and it is hereby enacted, That any merchandizes or effects from any ports or places in Europe or America, in the possession of the crowns of Spain or Portugal, may be assured in such way and manner, as if this act had not been made.¹

THE GAMBLING ACT.

St. 14 Geo. III. c. 48 (1774).

An act for regulating insurances upon lives, and for prohibiting all such insurances, except in cases where the persons insuring shall have an interest in the life or death of the persons insured.

WHEREAS it hath been found by experience, that the making insurances on lives, or other events, wherein the assured shall have no interest, hath introduced a mischievous kind of gaming: For remedy whereof, be it enacted by King's most excellent majesty, by and with the advice and consent of the lords, spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That from and after the passing of this act, no insurance shall be made by any person or persons, bodies politick or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every assurance made, con-

interest' amounted to an agreement to dispense with the proof of interest, the principles upon which those decrees proceeded may easily be accounted for. If the insurer, having admitted an interest which he supposed capable of proof, afterwards discovered that no interest existed, he might state to a court of equity that he had been taken by surprise in his admission, and the policy would be ordered to be delivered up. There is some strange language to be found in our books respecting wagering and valued policies, the latter of which, though frequently in effect wagering policies, have been permitted, because it has been supposed that the convenience of them is greater than would result from the prohibition of them. But the language of all courts of justice has been extremely careful lest the permission of valued policies should introduce a species of gambling policies. With respect to foreign ships, the averment of interest has been dispensed with, not because insurance on them could be made without interest, but on account of the difficulty of proof." — Ed.

¹ For reasons underlying the exceptions, see 2 Bl. Com. 460; 2 Park on Mar. Ins. (8th ed.) 593; Marshall on Insurance (2d ed.), 118, n. (a); Thellusson v. Fletcher, 1 Doug. 315 (1780); Murphy v. Bell, 4 Bing. 567, 569-570 (1828). — Ed.

trary to the true intent and meaning hereof, shall be null and void, to all intents and purposes whatsoever.

II. And be it further enacted, That it shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons, name or names interested therein, or for whose use, benefit, or on whose account, such policy is so made or underwrote.

III. And be it further enacted, That in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events.

IV. Provided always, That nothing herein contained shall extend, or be construed to extend, to insurances *bona fide* made by any person or persons, on ships, goods, or merchandises; but every such insurance shall be valid and effectual in the law, as if this act had not been made.¹

AMORY v. GILMAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1806. 2 Mass. 1.

THIS was an action of assumpsit on a policy of insurance, dated June 17, 1800, wherein the plaintiff, "for whom it may concern," caused himself to be insured on the cargo of the ship "America," at and from Teneriffe to La Vera Cruz, and at and from thence to her port of discharge in the United States, with liberty to touch and trade at the Havana on her homeward passage, at a premium of twenty-eight per cent. In the printed part of the policy was a provision, now usually inserted in policies made in this country, that "The subscribers thereto shall be discharged from every risk in case the same property shall be wholly assured by any policy or policies actually prior to this; but should any part of the same property remain unassured by such prior policy or policies, or if the sum assured by this policy shall exceed the true value of the property at risk, then the first subscriber hereto, and those next in succession, shall be held to take and bear the risk of the sum written by each respectively, until the real amount of the property

¹ St. 8 & 9 Vict. c. 109, § 18 (1845), provided: "That all Contracts or Agreements, whether by Parole or in Writing, by way of gaming or wagering, shall be null and void."

St. 14 Geo. III. c. 48 (1774), was extended to Ireland by St. 29 & 30 Vict. c. 42 (1866). On the question whether insurable interest was requisite in Ireland independently of statute, see *Shannon v. Nugent*, Hayes, 536 (1832); *British Ins. Co. v. Magee*, Cooke & Alcock, 182 (1834); *Scott v. Roose*, 3 Ir. Eq. 170 (1841); s. c. Longfield & Townsend, 54. — Ed.

at risk shall be fully assured, and the subsequent subscribers to this, and policies of a later date, shall be discharged from every risk." The defendant underwrote \$1,000. On the 11th of August, 1800, the following memorandum was indorsed on the policy and subscribed by the parties, viz.: "The sum insured on cargo by this policy is warranted, by the assured, free of average, the insurer relinquishing the benefit of salvage; and the parties agree that, for so much as is insured on cargo, the policy shall be deemed sufficient proof of interest, and no part of the premium on the same to be returned for want of interest."

The plaintiff had previously insured, for himself only, \$3,000 on the same cargo, and on the same terms, in the office of the Boston Marine Insurance Company. On the 9th of August, 1800, a memorandum was indorsed on this policy, in the words of that above recited; and on the 24th of September, 1800, the following was indorsed on the policy last described, viz.: "The interest insured by this policy is understood to be derived from expenses paid at Teneriffe, on the cargo of the ship 'America,' whereby the assured became interested in the adventure to the amount of the advance, and the interest is not to be controverted."

The "America" was a ship of the United States, but sailed from Teneriffe under Spanish papers and colors, and having on board a nominal Spanish master. The whole expedition was understood to be a covered transaction, and in contravention of the commercial regulations of the Spanish government. The cargo was landed at La Vera Cruz, and afterwards seized by the governor there. The master borrowed \$1,000, which "was advanced to him on the credit of the cargo, in the hope that the same might finally be acquitted." With this sum he purchased a quantity of logwood, with which he ballasted his ship, and took on board a cargo on freight for Havana. On the passage thither, the ship was captured by a British ship of war, and carried to Jamaica, and there condemned as Spanish property. The freight money, payable at Havana, had the cargo been delivered there, would have been upwards of \$6,000.

On the 5th of October, 1802, the plaintiff received, of the Boston Marine Insurance Company, \$495.20, which, by his receipt therefor, he acknowledges to be "the amount of his interest in the cargo on board from Vera Cruz, and \$450.86 return premium for short property from Vera Cruz home."

These facts are all contained in a special verdict found at a former term of this court, and in certain documents referred to and verified by that verdict; and upon these facts the question of the plaintiff's right to recover in this action now came on to be argued.

For the plaintiff, it was urged that the several stipulations between the parties amounted to no more than a waiver, on the part of the underwriter, of the regular and legal evidence of the value of the property of the assured in case of a loss; and that it appeared in fact here that

the plaintiff was interested in the freight money, and had really sustained a loss by the capture to a greater amount than the sum underwritten by the defendant.

But if on a recurrence to all the circumstances this should be considered to be a wager policy, it was contended that such a contract was valid at common law. *Assievido v. Cambridge*, 10 Mod. 77; *Depaba v. Ludlow*, Comyns's Rep. 360; *Dean v. Dicker*, 2 Stra. 1250. The statute of 19 Geo. II. c. 37, made in restraint of these policies, proves the same point. There has been no decision of our courts adopting that statute, and, if it had been adopted, cases in the Spanish and Portuguese trade are expressly excepted from its operation. If this contract have the several ingredients which go to constitute a valid transaction, — that is, if it is made by persons able to contract, and is founded on a valuable consideration, — it should be supported, unless prohibited by some positive regulation of law, or some vice is shown to be inherent in it which should deprive it of legal countenance. Men are masters of their own property, and the law does not inquire minutely into the value of the consideration which may induce them to part with it. So neither does it regard the quality of that consideration, unless especially interdicted, or necessarily so implied from its infringement of some moral principle. As we have no reports of decisions in our own courts, cases cannot be referred to; but traditionary communications are handed down, that actions on simple and innocent wagers have been supported in the courts of this State.

For the defendant, it was observed that, if the plaintiff has sustained a loss on the freight, this policy does not cover it; and that, having received the amount of his actual loss on the cargo from the underwriters on a prior policy, he cannot entitle himself to a recovery in this action, unless a mere wager policy is a valid and legal contract in this State. The English judges, although bound by precedents to support actions on innocent wagers, uniformly admit, in all the late cases, that it would have been better to have decided originally against them. *Atherfold v. Beard*, 2 T. R. 610; *Good v. Elliot*, 3 T. R. 693. And Marshall (page 98) expresses an opinion that, if the question were now *res integra*, an action on a wager policy could not be supported. Here, it is *res integra*. By the common law, at the time of our ancestors' emigration, and for near a century afterwards, such a contract was void. Marshall, 99, 100, and the cases there cited, particularly *God-dart v. Garrett*, 2 Vern. 269; 1 Eq. Cas. Abr. 371, s. c. During the last century, the English courts began to sustain actions on this species of contracts, but their decisions have not been adopted here. The ancient law of England, and the usage of this country, must then decide this question. The forcible objections recited in the preamble to the statute 19 Geo. II. c. 37, receive additional force from our morals, manners, and the spirit of our laws. Even at this time it is doubtful, if the question should be agitated in the courts of Westminster Hall, whether the sounder reason of Justice Buller (*Good v. Elliot*) and Lord

Loughborough (*Brown v. Leeson*, 2 H. Bl. 44) would not prevail over the precedents found in the English reports on this point.

The question, whether the statute of 19 Geo. II. has been adopted here, is now before the court on another section of it (relating to reassurances), in the case of *Merry v. Prince* [2 Mass. 176; s. c. *post*, p. 31], in which it was fully argued. But it is absurd to suppose that our courts have recognized the decisions of the English courts in the early part of the last century, involving all the mischiefs of these gaming policies, and yet have failed to adopt this statute in remedy of the evil.

For the plaintiff, in reply. This is not a mere idle wager. The plaintiff had a real interest not created by the policy, viz., the freight. It is true it was not insured as freight, and the defendant is endeavoring to avail himself of this distinction, to avoid a fair contract made upon a good consideration. But if this were a mere wager policy, in which, for sport or adventure only, the assured had betted premium against loss, and no decisions of our courts are shown which go to annul such a contract, will the court here determine this to be void against the whole current of English decisions? Would not this be rather making the law than declaring it?

The court took time, and, at an after day in the term, delivered their opinions as follows:—

PARKER, J. (After stating the action and the facts as above recited.) It appears, then, that whatever cargo the insured had on board the ship, at the time of subscribing the policy on which this action was brought, had been previously covered by the policy made by the Boston Marine Insurance Company. This fact appearing, it is clear that, without the memorandum on the policy, the effect of which will presently be considered, there could be no pretence for supporting this action; for the policy contains within itself a provision intended to defeat any expectation grounded on such a state of facts. We are, therefore, necessarily brought to a consideration of the nature and legal operation of the memorandum; because, if the plaintiff is entitled to recover, it must be on the strength of the words contained therein.

The counsel for the plaintiff seem fully aware of this position in which their demand is placed; and have, therefore, endeavored to show,—

1. That this is a wagering policy; and,
2. That as such it is valid, and ought to be carried into effect by the laws of this country.

As to the second point, viz., whether a mere wager policy, without interest, can be supported here conformably to the general character of our laws, and to the principles of our government, I apprehend we need not now determine that question; though, considering the great reluctance with which that doctrine was established as the common law by the courts of England, and the immediate interference of Parliament to nullify such policies, upon the doctrine's being so established, we

may well be justified in doubts whether in this country, where the subject is in a great measure *res integra*, such contracts could be supported, more especially when the temper of our Legislature respecting every species of gaming can be so well understood by a recurrence to various statutes upon that subject.

It would seem a disgraceful occupation of the courts of any country to sit in judgment between two gamblers, in order to decide which was the best calculator of chances, or which had the most cunning of the two. There could be but one step of degradation below this, which is, that the judges should be the stakeholders of the parties.

In this case, however, collecting the meaning of the parties from the whole of the transaction appearing on the record, or referred to by it, I think it most manifest that a policy on interest, and not a wager policy, was intended. . . .¹

A mere wager policy is that in which the party assured has no interest in the thing assured, and could sustain no possible loss by the event insured against if he had not made such wager. This is not such a case, for the party assured did expect that he had on board property to the amount intended to be assured, and actually had some property on board, though less than he expected at the time.

I therefore consider this not to be a wager policy, but a policy on interest, — the memorandum relied upon amounting to nothing more than an agreement that the usual evidence of property should not be required, but the parties always presuming that such property was actually on board. In this view of the subject, the express condition of this policy being that it shall cease to operate upon so much of the property as may be found to be insured by any prior policy, — a prior policy being found by the jury, on which the plaintiff acknowledges he has received the full amount of all his interest in the cargo, deducting a *pro rata* premium, and also acknowledges that he had received a return premium for a large sum over-insured, — it seems clear to me that he is not entitled, upon any principle, to recover in this action.

THATCHER, J., concurred, for the same general reasons.

SEDGWICK, J.² It will be sufficient to observe that all the transactions relative to this voyage from Teneriffe, where the insurance commences, until the departure of the ship from La Vera Cruz for the Havana, where she had liberty to touch and trade, were intended to be masked. Although the whole interest was American, and intended to be continued such, yet it was to appear to be Spanish. Under these circumstances it was uncertain what, in fact, would be the interest of the assured; and it might be very difficult to ascertain its amount. Thence it became desirable to obviate the necessity of proof; and this was probably a principal motive in entering into the agreement of the 11th of August. But, in the view which I have taken of the subject, it is not very important to ascertain what was the real intention

¹ The discussion of the evidence on this point has been omitted. — ED.

² After stating the case. — ED.

of the parties; it either was their intention, that the policy should, that agreement notwithstanding, continue as originally designed, an insurance upon the interest of the assured, or that it should be converted into a wager policy, interest or no interest. If it be considered an insurance upon the interest of the insured, it has already been proved that the plaintiff cannot recover, because his whole interest in the subject of the insurance had been covered by a prior policy, and he had actually received therefor full satisfaction. Of course, it only remains to be considered whether, if it be construed a wager policy, the plaintiff can recover.

This is a very important question, and now for the first time comes before this court. Whether it be consistent with the dignity of the law to lend its aid to give effect to any wagers on an idle question, in which the parties have no interest except that created by the wager itself, it is not necessary upon this occasion to inquire. I shall confine my opinion merely to wager policies. Had there been a course of judicial decisions, either in England before the settlement of this country, or here since that time, I should have felt myself bound by them. But how is this fact? Mr. Park says that the practice of insuring ideal risks has only prevailed since the Revolution, — that is, long after the settlement of this country. Indeed, in the year 1692 it was determined, in the case of *Goddart v. Garrett*, 2 Vern. 269, and it is there said that “the law is settled that, if a man has no interest and insures, the insurance is void, although it be expressed in the policy interested or not interested. And the reason the law goes upon is that insurances are made for the encouragement of trade, and not that persons unconcerned, not interested in the ship, should profit by them. The reason why the law allows that a man having some interest in a ship or cargo may insure more, or five times as much, is that a merchant cannot tell how much or how little his factor may have in readiness to lade on board his ship.” It was eighteen or twenty years after this before a contrary doctrine crept in, and by means of which we have no information. Now, I understand that the common law, which our ancestors imported with themselves, was composed of such principles and maxims as were at that time established in the mother country, and applicable to their character and circumstances. There is no evidence that wager policies had been at that time enforced in courts of justice, but, as far as appears from the case of *Goddart v. Garrett*, contrary decisions had obtained, and the practice seems little consonant to the circumstances or character of the emigrants. I have already stated that the question now for the first time comes before this court, and, from what I have observed, it is to be determined on general principles.

The common law which gives to the parties an interest in contracts, which courts of justice are bound to protect, does not extend to such interests as are injurious to the public. Is it then for the public benefit that contracts of wager policies should be enforced? I think not. Mr. Park, who has considered the subject of insurance with profound intel-

ligence, disapproves upon principle of this species of contracts. Park, 161. And Serjeant Marshall, who in his treatise displays a vigorous understanding and mature judgment, details more at length the mischievous effects of this kind of gambling. He says: "Many are the contrivances which men have fallen upon for the gratification of their propensity to gaming; and the uncertain events of maritime adventure afford an obvious and extensive field for the calculation of chances and the decision of fortune. The practice of gaming, by nourishing a constant hope of gain, excites in the mind an interest which engrosses the attention and withdraws the exertions of men from useful pursuits. By pointing out a speedy though hazardous mode of accumulating wealth, it produces a contempt for the moderate but certain profits of sober industry. It perverts the activity of the mind, taints the heart, and depraves the affections. By frequent and great reverses of fortune, it becomes not only the source of great private misery, but suggests constant temptations to fraud, and the perpetration of atrocious crimes." 1 Marsh. 95.

After reflecting on these observations, which every man of experience and a knowledge of the human character knows to be well founded, there can, I think, remain no doubt that it would be hostile to the welfare of society that interests which men may choose to create by such contracts should be protected by judicial authority. Much additional weight is given to the argument by the British statute, 19 Geo. II. c. 37, prohibiting wager policies. It is the authority of a wise legislature of a nation most deeply interested in commerce, and best understanding its interests; and it prohibits them because they are "productive of many pernicious practices."

As then we are not bound in this case by authority, but are at liberty to decide on principle, and as the plaintiff must recover if at all as on a wager policy, I feel much satisfaction in saying that judgment must be rendered for the defendant. But, as the counsel for the plaintiff has relied on the words that the insurance was made "for whom it may concern," I think it proper to observe that these words can have no effect, because there is no evidence that any one was concerned except Mr. Amory.

DANA, C. J.¹ It does not appear in this case what was the amount of the plaintiff's property on board this ship at the time of the loss. But, whatever it was, he acknowledges himself to have been completely indemnified for his loss. I doubt whether either party considered this policy, including the memorandum indorsed, as a wager policy. But, it appearing in fact that the assured had no insurable interest not covered by the prior policy, it must be so considered by the court. As on a wager policy, my present opinion is that the plaintiff cannot recover. No precedent of such an action supported here has been produced, and I believe none can be produced. We must,

¹ At the beginning and the end of this opinion a few sentences have been omitted.
—ED.

therefore, decide this on general principles of justice and good policy. The very forcible reasons set forth in the preamble of the statute, 19 Geo. II. c. 37, to which I have before referred, apply equally to this and every other civilized and well-governed commercial country. Whether that statute extended to this country or not is a question not necessary now to be determined. But if it were, and we should find no precedents in our own courts to overrule us, I should be prepared to say that, as wager policies are injurious to the morals of the citizens, tend to encourage an extravagant and peculiarly hazardous species of gaming, and to expose their property, which ought to be reserved for the benefit of real commerce, they ought not to receive the countenance of this court. . . .

*Costs for defendant.*¹

Amory, for the plaintiff.

Otis and C. Jackson, for the defendant.

¹ In *Pritchett v. Insurance Co. of North America*, 3 Yeates, 458, 463 (1803), SHIP-PEN, C. J., in answer to a contention of counsel that St. 19 Geo. II. c. 37, had not been extended to Pennsylvania by practice, said: "Certainly the British act does not bind us, *proprio vigore*; but the system of national policy which dictated the law has been adopted by our courts. We believe that policies made here, at least by the incorporated companies, do not retain the words 'interest or no interest.'" And, at p. 464, YEATES, J., for the court, said: "The Chief Justice, during the argument, conveyed the sentiments of the whole court. We have adopted the policy and principles which gave rise to the act of Parliament, both in courts of justice and by commercial usage; but we are not prepared to say that every particular provision or resolution under it has been engrafted into our system of law. An insurance amongst us is a contract of indemnity. Its object is not to make a positive gain, but to avert a possible loss. A man can never be said to be indemnified against a loss which can never happen to him. There cannot be an indemnity without a loss, nor a loss without an interest. A policy, therefore, made without interest is a wager policy, and has nothing in common with insurance but name and form. 1 Marsh. 30, 97. It is not subservient to the true interests of fair trade and commerce, but is pregnant with as much mischief, both public and private, as can proceed from any species of gaming which the legislature has hitherto found it necessary to repress. Ibid. 98. Every species of gaming contracts wherein the insured having no interest, or a colorable one merely, or having a small interest much overvalues it in a valued policy, under the cloak of insurances, are reprobated both by our law and usage."

In *Love v. Harvey*, 114 Mass. 80, 82 (1873), GRAY, C. J., for the court, said:—

"In England and in New York, actions on wagers upon questions in which the parties had no previous interest were frequently sustained, until the legislature interposed and declared all wagers to be void. 1 Chit. Con. (11th Am. ed.) 735-738; 3 Kent Com. 277, 278. In Scotland, the courts refused to entertain such actions. Bruce v. Ross, 3 Paton, 107, 112; s. c. cited 3 T. R. 697, 705.

"In Massachusetts, the English law on this subject has never been adopted, used, or approved, and, although the question has not been directly adjudged, it has long been understood that all wagers are unlawful. Const. Mass. c. 6, art. 6; *Amory v. Gilman*, 2 Mass. 1, 6; *Ball v. Gilbert*, 12 Met. 397, 399; *Sampson v. Shaw*, 101 Mass. 145, 150; Met. Con. 239. There are decisions or opinions to the same effect in each of the New England States. *Lewis v. Littlefield*, 15 Maine, 233; *Perkins v. Eaton*, 3 N. H. 152; *Hoit v. Hodge*, 6 N. H. 104; *Collamer v. Day*, 2 Vt. 144; *West v. Holmes*, 26 Vt. 530; *Stoddard v. Martin*, 1 R. I. 1, 2; *Wheeler v. Spencer*, 15 Conn. 28, 30. See also *Edgell v. McLaughlin*, 6 Whart. 176; *Rice v. Gist*, 1 Strob. 82.

"It is inconsistent alike with the policy of our laws, and with the performance of the duties for which courts of justice are established, that judges and juries should be

RUSE v. THE MUTUAL BENEFIT LIFE INS. CO.

COURT OF APPEALS OF NEW YORK, 1861. 23 N. Y. 516.

APPEAL from the Supreme Court. Action to recover \$2,000, insured by the defendant, a corporation chartered by the State of New Jersey, upon the life of one Bugbee, a resident of Florida. The plaintiff, who took out the policy for his own benefit and in his own name, was a resident of Georgia. In his written application for insurance he stated: "I have an interest in the life of the said I. D. Bugbee to the full amount of the said sum of two thousand dollars; and I hereby agree that this declaration [which was in the form of answers to various interrogatories in respect to the age, health, habits, etc., of Bugbee] shall be the basis of the contract between myself and the said company."

The policy recited that it was "in consideration of the sum of ninety-seven dollars and forty cents in hand paid by John C. Ruse, and of the annual premium of ninety-seven dollars and forty cents to be paid on or before the tenth day of April in every year during the continuance of this policy." It also provided that, "in case the said John C. Ruse shall not pay the said annual premiums on or before the several days herein-before mentioned for the payment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured or any part thereof; and this policy shall cease and determine."

Upon the trial it was proved that the premium for the second year, which, by the terms of the policy, became due April 10, 1847, was not

occupied in answering every frivolous question upon which idle or foolish persons may choose to lay a wager."

In *Irwin v. Williar*, 110 U. S. 499, 510 (1884), MATTHEWS, J., for the court, said: "Generally, in this country, all wagering contracts are held to be illegal and void as against public policy. *Dickson's Executor v. Thomas*, 97 Pa. 278; *Gregory v. Wendell*, 40 Mich. 432; *Lyon v. Culbertson*, 83 Ill. 33; *Melchert v. American Union Telegraph Co.*, 3 McCrary, 521; s. c. 11 Fed. Rep. 193 and note; *Barnard v. Bockhaus*, 52 Wis. 593; *Kingsbury v. Kirwan*, 77 N. Y. 612; *Story v. Salomon*, 71 N. Y. 420; *Love v. Harvey*, 114 Mass. 80."

In *Waugh v. Beck*, 114 Pa. 422, 426, 427 (1886), TRUNKY, J., for the court, said: "In England, wagers were not unlawful or unenforceable at common law, and therefore some of the decisions in that country upon wagering contracts are inapplicable where such contracts are unlawful.

"It has never been held in the highest tribunals of Pennsylvania that a wager is recoverable, and from 1803 the uniform current of authority is to the contrary. Every species of gaming contract, whether of insurance by a valued policy where the insured has no interest, or a bet on the existence of a letter, or the purchase of stocks or other commodities without the intention to deliver or receive them, is reprobated by our law. *Pritchett v. Insurance Co.*, 3 Yeates, 458; *Edgell v. McLaughlin*, 6 Whart. 176; *Brua's Appeal*, 55 Pa. 294. In the latter case, THOMPSON, C. J., remarked: 'Anything which induces men to risk their money or property without any other hope of return than to get for nothing any given amount from another, is gambling, and demoralizing to the community. All gambling is immoral.'

The quotations in this note, with the exception of those from *Pritchett v. Insurance Co. of North America*, have not been taken from insurance cases. — ED.

then paid. Bugbee died April 13, 1847. Within a day or two afterwards, the plaintiff tendered the premium to the defendant's agent, and he declined to receive it.

The plaintiff proved, under an exception by the defendant, that, at the time of the application for insurance, the defendant's agent delivered to him a printed paper of several pages, entitled a prospectus, setting forth the advantages of life insurance in general, and the particular inducements held out by the defendant. So much of this as is material is cited in the following opinion.

The plaintiff gave no evidence of any pecuniary interest in the life of Bugbee or of any relationship to him. The defendant moved for a nonsuit, on the ground that the policy was forfeited by the failure to pay the premium on the day appointed and that the plaintiff had shown no interest in the life insured. The nonsuit was refused, and the defendant took an exception. The plaintiff had a verdict and judgment, which having been affirmed at general term in the first district, the defendant appealed to this court.

Alvin C. Bradley, for the appellant.

John W. Edmonds, for the respondent.

SELDEN, J.¹ . . . But assuming that the prospectus became a part of the policy and had the effect to modify its provisions in respect to the time for the payment of the premium, it is still insisted that there could be no recovery without proof that the plaintiff had an interest in the life of Bugbee. In considering this point, it is necessary first to ascertain by what law the question is to be determined. The contract was actually made between the plaintiff and an agent of the defendants in the State of Georgia; but the defendants, as is to be inferred from the case, were incorporated in the State of New Jersey, and the policy purports upon its face to have been executed at the city of Newark in that State. Under these circumstances, although the suit is brought in this State, the interpretation and validity of the contract cannot depend upon the laws of New York. The *lex fori* governs as to the remedy or remedies for enforcing the contract, but not as to its construction or the legal rights arising under it. These depend usually upon the laws of the place where the contract is to be performed; although where there is anything in the circumstances to show that the parties had specially in view the law of the place where the contract is made, this law will govern, although the contract is to be performed elsewhere. I see nothing in the present case to indicate that the parties contracted with special reference to the law of Georgia. As no other place was mentioned, payment was of course to be made in New Jersey, where the principal office of the company was located. The contract was to be performed there, and hence, upon the general principle adverted to, the validity of the contract and the rights and obligations of the parties under it must depend upon the law of New Jersey.

¹ After stating the case and holding that the prospectus did not control the terms of the policy. — Ed.

The defendants upon the trial read two sections from the statutes of New Jersey as having some bearing upon the point under consideration ; but neither of these can, in my view, affect the question. The only one which could reasonably be supposed to do so is the following: " All promises, agreements, notes, bills, bonds, contracts, judgments, mortgages, or other securities or conveyances which shall be made, given, granted, drawn, entered into, or executed by any person or persons, where the whole or any part of the consideration of such promises, agreements, notes, bills, bonds, contracts, judgments, mortgages, or other securities or conveyances shall be for money, goods, chattels, or other valuable thing or things whatsoever, won, laid, or betted, at cards, dice, billiards, tennis, bowls, shuffleboard, or any other game or games, or at any cock-fighting, or other sport or pastime, or for the reimbursing or repaying any money, knowingly lent or advanced at the time and place of such play, cock-fighting, or other sport or pastime, to any person or persons so gaming, laying, or betting, or who shall, at such time and place, so play, lay, or bet, shall be utterly void and of none effect."

This section does not reach this case. It avoids all contracts made for money, etc., won or betted at any game or games, or upon cock-fighting or other sports. It is aimed particularly at games, and does not avoid wagers in general. The policy in this case had nothing to do with any game or sport of any sort, and is not therefore within the purview of the act. Hence its construction and effect must depend upon the general laws of New Jersey, which, as no evidence was given on the subject, are presumed to be the same as the common law of this State. Our inquiry therefore is whether at common law, independent of any statute, it is essential to the validity of a policy, obtained by one person for his own benefit upon the life of another, that the party obtaining the policy should have an interest in the life insured.

A policy, obtained by a party who has no interest in the subject of insurance, is a mere wager policy. Wagers in general, that is, innocent wagers, are, at common law, valid ; but wagers involving any immorality or crime, or in conflict with any principle of public policy, are void. To which of these classes, then, does a wagering policy of insurance belong?

Aside from authority, this question would seem to me of easy solution. Such policies, if valid, not only afford facilities for a demoralizing system of gaming, but furnish strong temptations to the party interested to bring about, if possible, the event insured against. In respect to insurances against fire, the obvious temptation presented by a wagering policy to the commission of the crime of arson has generally led the courts to hold such policies void, even at common law. It was so held in England at an early day by Lord Chancellor King in *Lynch v. Dalzell* (4 Bro. P. C. 431), and by Lord Hardwicke, in *Saddlers' Company v. Badcock* (2 Atk. 557) ; and the courts in this country have generally acquiesced in and approved of the doctrine. In this State such policies would fall under the condemnation of our statute avoiding all wagers

and gambling contracts of every sort; but they would, no doubt, also be held void, independently of that statute, at common law. In *Howard v. The Albany Insurance Company* (3 Denio, 301), Bronson, C. J., asserted the necessity of an interest in the assured in all such cases, referring in support of the doctrine not to the statute but to the decisions of the Lord Chancellors King and Hardwicke (*supra*).

In regard, however, to marine insurances, a different rule seems to have prevailed in England; and the cases of *Clendinning v. Church* (3 Caines, 141), *Juhel v. Church* (2 Johns. Cas. 333), and *Buchanan v. Ocean Insurance Company* (6 Cow. 318), are supposed to have established the same rule in this State. No reason, that I am aware of, has ever been given for this difference between fire and marine policies. The latter, when of a wagering character, are vicious and evil in their tendencies as well as the former, and have been generally considered as noxious and dangerous, whenever the question has arisen. They should, therefore, as it would seem, for the reasons applied to policies against fire, have been held void, as contrary to public policy.

The distinction between these two classes of policies is, in my view, a mere matter of accident, and grew out of the peculiar manner in which the question was presented in respect to marine policies. The case of *Depaba v. Ludlow* (Comyns, 361), shows how the doctrine, that wagering policies upon ships are valid, originated. The defendant there had insured the plaintiff, "interest or no interest." On the trial it was objected that the plaintiff could not recover unless he had a property in the ship; but the court said that the insurance was good, and that the import of the clause, "interest or no interest," was that the plaintiff had no occasion to prove his interest. Had the question been directly presented in this case, whether a mere wagering policy was valid, the decision would, I think, have been different. The case itself shows the court to have supposed that the plaintiff actually had an interest; and it is apparent, from the authorities, that it had always been previously held, in suits upon policies not containing the words "interest or no interest," or other equivalent words, that the plaintiff must aver and prove that he had an interest. This is distinctly asserted by Lord Hardwicke, in the case of *Saddlers' Company v. Badcock* (*supra*); and in the case of *Craufurd v. Hunter* (8 Term, 14), the counsel, on looking into the precedents at the request of the court, found that it had been the uniform practice, in suits upon marine policies, to insert an averment of interest. To me, therefore, it seems clear that the decision in *Depaba v. Ludlow* was made because the court failed to distinguish between a waiver of proof at the trial, which the defendant was of course at liberty to make, and a waiver in the policy itself by which it was converted into a mere wager.

In consequence of this case and others which followed it, Parliament was forced to interfere, as it did by the act of George II. (ch. 37), reciting the mischiefs which had arisen from the making of marine insurances, "interest or no interest," and prohibiting them thereafter; and

when the question subsequently arose in *Craufurd v. Hunter* (*supra*), as to the validity at common law of a mere wagering policy upon a ship, it was held to be valid, solely upon the authority of the recitals in this act. It was in this indirect way that the doctrine in question as to marine policies first crept into the law. It was important to show this, because the effect of what I consider as the inadvertence of the court in *Depaba v. Ludlow* was not confined to policies upon ships. It must have been, I think, in consequence of the doctrine initiated by that case that it came to be understood in England that in insurances upon lives it was not necessary at common law that the party to be benefited by the policy should have any interest in the life insured. There may not have been any direct decision to that effect; yet that such was the prevalent impression is to be inferred from the enactment of the statute of 14 George III. (ch. 48), prohibiting insurances upon lives where the person insuring had no interest in the life. Angell, in speaking of this statute, says: "At common law it seemed to have been thought unnecessary that at the time of effecting the policy the assured should have had any interest which might be prejudiced by the happening of the event insured against." (Ang. on Life and Fire Ins., § 297.) In New Jersey they have no such statute; and the question now to be decided, therefore, is, whether the impression which seems to have prevailed in England prior to the statute of 14 George III. was well founded.

That impression does not appear to be supported by any adjudged case. Life insurance seems not to have been practised to a great extent in England until a comparatively modern date, and the probability is that as soon as such insurance became frequent the evils of gambling in them was so apparent that Parliament interposed upon the assumption that the same rule would be applied to them as to insurances upon ships. I cannot regard that act as affording any very strong evidence that at common law wagering policies upon lives were valid. It seems to me that were the naked question presented, whether such a policy comes within the admitted exception to the validity of wagers in general, that is, whether it is repugnant to a sound public policy, no court, not hampered by some unfortunate or mistaken precedent, would hesitate for a moment in holding the affirmative. In Massachusetts, in Vermont, in Pennsylvania, and I believe other States, it has been so held in regard to wager policies in general. But policies without interest upon lives are more pernicious and dangerous than any other class of wager policies; because temptations to tamper with life are more mischievous than incitements to mere pecuniary frauds.

Chancellor Kent was evidently embarrassed by the position of this question in England. He commences his remarks on the subject by saying that "the party insuring must have an interest in the life insured," and then immediately refers to the English statute of 14 George III., chapter 48, but says not a word upon the question whether at common law an interest was necessary. He, however, concludes by saying that "the necessity of an interest in the life insured, in order to

support the policy, prevails generally in this country, because wager contracts are almost universally held to be unlawful, either in consequence of some statute provision, or upon principles of the common law." (3 Kent Com. 368.)

This obscure manner of treating the subject is plainly to be attributed to the reluctance of the learned author to admit (notwithstanding the impression that appears to have obtained in England) that gambling in life insurance could be tolerated at common law. That impression has been here traced, as I think, with justice to the very questionable doctrine of the English courts in regard to marine policies. It has never, that I am aware of, been recognized and adopted by any American court, and is so obviously repugnant to the plainest principles of public policy that it is somewhat surprising that it should ever have existed. My conclusion, therefore, is that the statute of 14 George III., avoiding wager policies upon lives, was simply declaratory of the common law, and that all such policies would have been void independently of that act.

It is said that the defendants, by issuing the policy upon the representation of the plaintiff that he had an interest, have admitted his interest, and that the production of the policy is at least *prima facie* evidence of such interest. This position cannot be sustained. All the older authorities show that even in actions upon marine policies not containing the clause "interest or no interest," it was necessary to aver, and of course to prove, the interest of the plaintiff. It is an indispensable part of the plaintiff's case, to be made out affirmatively at the trial. Upon this ground, therefore, as well as that before considered, the judgment of the Supreme Court must be reversed; and there must be a new trial, with costs to abide the event.

All the judges, except DAVIES and MASON, JJ., concurred that the plaintiff must show an interest in the life insurance. On the question of evidence in respect to the prospectus being admissible as part of the policy or entering into the contract, COMSTOCK, C. J., DAVIES and JAMES, JJ., dissented.

*Judgment reversed, and new trial ordered.*¹

¹ See *Freeman v. Fulton F. Ins. Co.*, 38 Barb. 247 (1862); s. c. 14 Abb. Pr. 398; *Fowler v. N. Y. Indemnity Ins. Co.*, 26 N. Y. 422 (1863).

In *Trenton Mut. L. & F. Ins. Co. v. Johnson*, 24 N. J. L. (4 Zab.) 576, 583-586 (1854), ELMER, J., for the court, after citing St. 14 Geo. III. c. 48, said:—

"No such statute exists in this State. Whether an action can be sustained on a policy without interest, which is therefore in some respects like a mere wager on the life of a third person, or on any other wager relating to a transaction in itself legal, does not appear to have been decided by our courts. The case of *Mulford v. Bowen*, 4 Hal. 315, was an action upon a wager about the weight of a hog, in which the judgment was reversed upon the ground of variance, no notice having been taken by the court of the general question, although it was directly involved, and was argued by the counsel. In the case of *Hutchinson v. Targee*, 2 Green, 386, a wager policy depending upon the result of a lottery was held void upon the special ground that it contravened the policy of the act for suppressing lotteries. Wagers on indifferent questions are held good grounds of action in England; and it was there held that at common

law wagering policies of insurance were valid. *Craufurd v. Hunter*, 8 Term R. 13. In New York, actions on wager policies and other wagers were sustained, until a statute was passed declaring them illegal. *Buchanan v. Ocean Ins. Co.*, 6 Cow. 318. In several other States, where statutes existed prohibiting gaming in such terms as were held to include all wagers, wager policies have been declared illegal. *Amory v. Gilman*, 2 Mass. 1; *Babcock v. Thompson*, 3 Pick. 446; *Adams v. Penn Ins. Co.*, 1 Rawle, 107; *Lloyd v. Leisenring*, 7 Watts, 294; *Collamer v. Day*, 2 Vern. 144. The American text-writers strongly favor the doctrine that wager policies should in all cases be held bad, upon general principles of policy and morality. 3 Kent, 277; *Duer Ins.* 92; *Angell on Life and Fire Ins.*, s. 14, Intr. I confess, however, that whatever might be my opinion as to the expediency of a statute like that in England, before quoted, I must agree with the Irish courts in holding that such is not the law. Our act to prevent gaming (Rev. Stat. 572) does not, in terms or by implication, prohibit all wagers, but only particular kinds of gaming. Until the Legislature shall think proper to interfere, the courts can only adhere to the common law as they find it established. To do otherwise would be an act of legislation, and not of judicial construction.

"It was insisted by counsel, and with much apparent force, that wagers on the life of a third person are in their very nature dangerous, and contrary to the policy of the law, and to sound morality. But the danger, if any exists, would apply with great, although with not equal force, to policies where there is an interest, as well as to those where there is none. All life insurances have been prohibited in some countries. The objection made to the wager in the case of *Gilbert v. Sykes*, 16 East, 150, was not merely that a wager on the life of another would endanger his assassination, the fear of the law being deemed sufficient to countervail that, but that the bet was on the life of Napoleon, a foreign sovereign, and grew out of a conversation upon the probability of his being assassinated, so that to entertain an action on it was considered to contravene public policy. As was well remarked in the argument of that case, such an objection would apply with equal force to cases for the life of a third person, which have never been held illegal. The cases of *Earl of Chesterfield v. Jansen*, 1 Atk. 346, 2 Ves. 25, and of *March v. Pigot*, 3 Burr. 2803, are direct authorities in favor of the legality of such wagers. And the same principle is sanctioned by the cases which uphold *post obit* securities, where, in consideration of an immediate advance of money, bonds are given, or contingent or reversionary property charged, for the payment of a much larger amount, upon the death of a particular person. *Curling v. Marquis Townsend*, 19 Ves. 628; *Free v. Hinde*, 2 Sim. 7."

In *Vivar v. Knights of Pythias*, 52 N. J. L. 455, 469 (1890), s. c. *post*, p. 300, *DIXON, J.*, for the court, said: "In New Jersey, the tendency of judicial opinion seems to be in favor of the proposition, that the assured need not have an interest in the life insured in order to support the contract of insurance. *Trenton Mut. L. & F. Ins. Co. v. Johnson*, 4 Zab. 576; *Martin v. Franklin F. Ins. Co.*, 9 Vroom, 140. Elsewhere, contracts of insurance without such an interest are generally condemned, as being contrary to public policy."

In *Meyers v. Schumann*, 54 N. J. Eq. 414, 417 (1896), the Court of Errors, *per MAGIE, J.*, in affirming upon other grounds a decree partly based upon the two New Jersey cases quoted above, said: "The questions dealt with and decided in the two cases in the Supreme Court . . . have never before been presented to this court. They are of the highest importance, and ought not to be passed upon unless it is necessary to do so." — *Ed.*

PART II.

SATISFYING THE REQUIREMENT OF AN INTEREST.

SECTION I.

Marine Insurance.

LE CRAS v. HUGHES.

KING'S BENCH, 1782. 2 Park Ins. (8th ed.) 568.¹

ACTION upon a policy of insurance on the ship "St. Domingo," at and from Omoa to London; upon which a case was reserved for the opinion of the court. The facts of the case were these: Captain Luttrell, commanding five of his Majesty's ships, and Captain Dalrymple, commanding a party of the land forces, captured two Spanish register ships, lying under the protection of Fort Omoa; that the ship "St. Domingo" (on which the insurance was made) was one of the prizes, and was coming home laden with the property then captured; upon which ship the defendant underwrote £500, and that the ship was lost by perils of the sea. The question was, whether, by virtue of the prize act of the 19 Geo. III. c. 67, the officers and crews of the ships under Captain Luttrell had such an insurable interest in the "St. Domingo" as to entitle them to recover?

LORD MANSFIELD. There are two questions in this cause: 1st, Whether the sea officers had an insurable interest? This will depend on the Prize Act and proclamation. 2dly, Whether possession would entitle them to insure, upon the bare contingency of a future grant from the crown? As to the first, consider the act of Parliament which gives to all the people on board — that is, to the flag officers, commanders, and other officers; to the seamen, marines, and soldiers on board of every ship and vessel of war — the sole interest and property of and in all and every ship and vessel, goods, and merchandises which they shall take during the war, after condemnation. Does the act say that the seamen only shall take? Does it leave a joint capture by the army and navy undefined? Certainly not. Suppose, for instance, a case which I remember to have happened: A Dutch and English fleet combined captured some ships; the English sailors could not take solely; nor could the act mean that they should have nothing. In the case in question suppose Captain Dalrymple had given no assistance, is there any doubt that Captain Luttrell would have taken the whole? The only difference is that now he has not the merit of a sole capture. The word

¹ s. c. 3 Doug. 81, where are reported the arguments of counsel: *Erskine*, for the plaintiff; *Scott*, *contra*. — ED.

“soldiers” in the proclamation means soldiers on board the ship. Thus it stands on the act and proclamation. But supposing that doubtful, as far back as Queen Anne’s time down to the present, wherever a capture has been made by a king’s ship or a privateer, the crown has always given a grant of it after condemnation. There is no instance to the contrary. Is then the contingency of the ship’s coming safe such an interest as the captor may insure? Insurance is a contract of indemnity; some interest is necessary, but not any particular form of interest; it does not depend on a vested formal interest. The question is, whether this contingency is such a benefit to the assured as will make it a loss to him if the ship does not arrive? An insurance on the profits of a voyage was holden to be good. An agent of prizes may insure the arrival of a ship which will produce him profit; for though he has not the possession of the property, he has such an interest in the ship coming home as that he may insure. Here the possession is in the assured, and a certain expectation of receiving the property captured from the crown, which gives him an interest in the arrival. It is not a vested interest, but such an expectation as never was defeated.

*Judgment for the plaintiff.*¹

HILL AND ANOTHER v. SECRETAN.

KING’S BENCH, 1798. 1 B. & P. 315.

ACTION on a policy of insurance on goods on board the “San Bernardo” from St. Andero to London. The declaration averred that the plaintiffs were interested to the amount insured.

¹ On the interest of captors, see further, *Boehm v. Bell*, 8 T. R. 154 (1799); *Yelton v. Smith*, Faculty Decisions, 1801–1807, p. 7 (Court of Session, Scotland, 1801); *Lucena v. Craufurd*, 1 Taunt. 325 (H. L. 1808); *Routh v. Thompson*, 11 East, 428 (1809); *Stirling v. Vaughan*, 11 East, 619 (1809); *Routh v. Thompson*, 13 East, 274 (1811).

In *Lucena v. Craufurd*, 2 B. & P. N. R. 269, 323–324 (H. L. 1806), Lord Eldon said: “If the *Omoa* case was decided upon the expectation of a grant from the crown, I never can give my assent to such a doctrine. That expectation, though founded upon the highest probability, was not interest, and it was equally not interest, whatever might have been the chances in favor of the expectation. That which was wholly in the crown, and which it was in the power of his Majesty to give or withhold, could not belong to the captors, so as to create any right in them. I am far from saying, however, that that case might not have been put upon other ground. The captors not only had the possession, but a possession coupled with the liability to pay costs and charges if they had taken possession improperly. There was also a liability to render back property which should turn out to be neutral, and a liability as agents to act for the king as their principal; and I should be disposed to say that the king had an insurable interest as the person who had the *jus possessionis*. His right indeed was liable to be affected by a sentence of the Court of Admiralty. But as the insured is often entitled to consider the property as gone the moment the capture takes place, so I think that the king may be considered as against all the world as having an interest in the property before condemnation for the purpose of insuring.”

And see *Devaux v. Steele*, 6 Bing. N. C. 358 (1840); s. c. 8 Scott, 637. — Ed.

At the trial before EYRE, C. J., at the Guildhall sittings after Trinity Term, it was proved that the house of De la Torrè in Spain consigned twenty-nine bags of wool to the house of Dubois and Son in London, and indorsed the bill of lading to them; but that with the bill of lading came a letter annexed, directing Dubois and Son to hold fifteen bags for a house at Halifax and the remainder for the plaintiffs at Exeter, which was the subject of the present insurance. It appeared also that De la Torrè was indebted to the plaintiffs in the sum of £500, but that they had given no orders for these goods. The ship was captured by the French, but afterwards retaken. The jury found a verdict for the plaintiffs.

Shepherd, Serjt., now moved for a rule to show cause why the verdict should not be set aside and a new trial be had, insisting that the plaintiffs had no insurable interest in the goods, as the bill of lading was not indorsed to them, and as De la Torrè would still be liable for his debt to the plaintiffs, if the goods should not reach them.

But the court were clearly of opinion that as the goods were consigned to Dubois and Son to hold for the plaintiffs, the former were to be considered as trustees for the latter from the time the goods were put on board the ship; that the circumstance of the plaintiffs being creditors of De la Torrè raised a good consideration for the consignment, and therefore no doubt could be entertained of the plaintiffs having an insurable interest.

Shepherd took nothing by this motion.

BARCLAY v. COUSINS.

KING'S BENCH, 1802. 2 East, 544.

THIS was an action on a policy of insurance, dated the 27th August, 1799, and effected by the plaintiff, as agent for and on account of one Richard Wells, on the ship "Jonah," at and from Barbadoes to the coast of Africa, during her stay and trade there, and at and from thence back to her port or ports of discharge in the West Indies, at a premium of twenty-five guineas per cent, with various returns for convoy. The policy was declared to be on profits valued at £2,000, and was underwritten by the defendant. The declaration contained averments that the ship sailed on the voyage insured, with a cargo of goods and merchandises on board; and that the said Richard Wells was interested in the profits to arise and be made from the sale and disposal of the said cargo of goods and merchandises, to the amount insured; and stated a total loss by capture. The defendant pleaded the general issue, and paid the premium into court. At the trial before Lord KENYON, at the sittings at Guildhall after last Trinity Term, a verdict was found for the

plaintiff for £221 5s., subject to the opinion of this court on the following case : —

In February, 1799, Richard Wells shipped a cargo of goods on his own account, on board his own ship the “Jonah” at Barbadoes, to be carried on a trading voyage to the coast of Africa. The invoice value of the ship and cargo was about £5,880. In April, 1799, the plaintiff received an order from Mr. Wells to insure £6,000 on this ship and cargo; in consequence whereof he effected an insurance to the amount of £8,470 to cover the sum of £6,000 ordered, and the premiums of insurance thereon; which insurance was declared to be on the ship and cargo at and from Barbadoes to the coast of Africa, during her stay and trade there, and at and from thence back to her port or ports of discharge in the West Indies. On the 13th of August following, the plaintiff received a letter from Mr. Wells, directing the insurance in question, which was thereupon accordingly effected. The said ship sailed from Barbadoes on the 29th of March, 1799, upon the voyage insured, and arrived at Cape Mount, her port of discharge in Africa, on the 21st of July following; and thereupon the agents of the assured began to unload and sell her cargo, and with part of the produce thereof purchased thirty slaves; and on the 28th of August following she was captured by three French frigates; but was afterwards given up to one George Hewitt, for the purpose of conveying English prisoners to a British port, and arrived at Sierra Leone on the 6th of September, together with the said thirty slaves and the remainder of her cargo, and a number of English prisoners; but was soon after deserted by the said George Hewitt and part of her crew; and her original captain refusing to take the charge of her, Captain Gray, the then acting governor of that settlement, gave the command thereof to one Walter Stott, who accordingly took possession thereof. That by the direction of the said Walter Stott, the thirty slaves were unshipped and sent to Bance Island, where they were afterwards sold, and the remainder of the cargo was landed and sold at Sierra Leone, and produced the sum of £46 6s. 6d. That the said brig afterwards departed for Barbadoes, with prisoners on board, where she arrived, and where the Court of Admiralty adjudged to the said Walter Stott and the then crew of the said brig one full eighth part of the net proceeds thereof, and of the cargo on board her at the time she was taken possession of as aforesaid. The question for the opinion of the Court is, Whether the plaintiff is entitled to recover?

This case was very fully argued first in Easter Term, 41 Geo. III., by *J. B. Warren* for the plaintiff, and *Giles* for the defendant; and again in last Easter Term, by *Park* for the plaintiff, and *Adam* for the defendant.

LAWRENCE, J. (in the absence of GROSE, J., who was indisposed), now delivered the opinions of GROSE and LE BLANC, Justices, and his own.

The case states that the insured shipped on board the ship “Jonah” a cargo of goods, to be carried on a trading voyage; so that it appears

that he had an interest in the profits to arise from a cargo, which was liable to be affected by the perils insured against. And the question is, If, on an insurance made on the profits to arise from such cargo, the plaintiff can recover? As insurance is a contract of indemnity, it cannot be said to be extended beyond what the design of such species of contract will embrace, if it be applied to protect men from those losses and disadvantages which, but for the perils insured against, the assured would not suffer; and in every maritime adventure the adventurer is liable to be deprived not only of the thing immediately subjected to the perils insured against, but also of the advantages to arise from the arrival of those things at their destined port. If they do not arrive, his loss in such case is not merely that of his goods or other things exposed to the perils of navigation, but of the benefits which, were his money employed in an undertaking not subject to the perils, he might obtain, without more risk than the capital itself would be liable to; and if, when the capital is subject to the risks of maritime commerce, it be allowable for the merchant to protect that by insuring it, why may he not protect those advantages he is in danger of losing by their being subjected to the same risks? It is surely not an improper encouragement of trade to provide that merchants, in case of adverse fortune, should not only not lose the principal adventure, but that that principal should not, in consequence of such bad fortune, be totally unproductive; and that men of small fortunes should be encouraged to engage in commerce, by their having the means of preserving their capitals entire, which would continually be lessened by the ordinary expenses of living, if there were no means of replacing that expenditure, in case the returns of their adventures should fail. Where a capital is employed subject to such risks, in case of loss, the party is a sufferer by not having used his money in a way which might, with a moral certainty, have made a return not only of his principal but of profit; and it is but playing with words to say that, in such case, there is no loss, because there is no possession; and that it is but a disappointment. Foreign writers upon insurance, whose doctrines form the greatest part of our law on this subject, certainly do not treat of insurance on profits as a matter inconsistent with the true nature and design of such a contract; and where it is spoken of by them as a species of insurance which cannot be made, this latter doctrine will be found to be referable to the positive institutions of different nations, who have thought it wise to prohibit it. Roccus, an Italian jurist, inquiring how goods that are lost are to be valued, has in his *Notabilia de Assecurationibus*, No. 31, this passage: “Distingue, quod aut merces fuerunt æstimatæ, pro certâ quantitate, tempore contractus assecurationis, et tunc non sumus in dubio, quia dicta quantitas æstimata solvenda est; aut assecuratio fuit facta pro asportandis mercibus salvis *Romam*, et tunc æstimatio inspicienda est *Romæ*; aut assecuratio fuit facta *simpliciter*, de solvendo æstimationem seu valorem mercium, in casu periculi, si navis perierit, et tunc inspicere debet tempus obligationis, et prout tunc valebant, debet fieri æstimatio, et sic *damnum*

quod assecuratus patitur in amissione rei, non *lucrum* faciendum consideratur." And for this he cites Santerna, a Portuguese lawyer, de Assecurationibus, part the 3d. num. 40 and 41 ; in which book there is a long disquisition to show that, in this latter case, the profit on the goods is not to be paid, but only the value at the time of the insurance. So that it seems the insurance of profits is so far from being inconsistent with the nature of insurance that, *e contra*, Santerna thinks it necessary to show by argument that the profit is not to be considered in all cases ; and that where the assurance is made *simpliciter*, then *lucrum non spectatur*. And Straccha, another Italian lawyer, agrees with Santerna in his Gloss. No. 6. In France such assurances were unlawful ; but that depends, according to Valin, on the ordinance of the marine, which also forbids insurance upon freight ; and the reason given by Valin for making these ordinances, with respect to the one and the other, is the same ; so in Holland, it appears from Bynkershoek's Quæstiones Juris Privati, book 4, c. 5, that such insurances cannot be legally made there ; but that is by the positive laws of that country ; notwithstanding which, the practice has so generally obtained to insure expected profits, as that in a case he there states, the majority of the judges of the court, where the question arose, determined in favor of the assured ; and those who opposed that decision rested their opinions on the positive laws of the country, and not on such contracts being contrary to the nature of insurance. In this country there is no law forbidding such insurance ; unless it could be shown that the insurer had no interest in the profits, or that from its nature it must be a mere wager, so as to bring the case within the Stat. 19 Geo. II. ; and that they are not considered as contracts inconsistent with the general nature of insurance is proved by the instance put of an insurance on freight, which, as was very truly argued at the bar, differs only from the case now before us in the same degree as a return of capital vested in shipping differs from a return of capital vested in merchandise ; and by the cases of *Grant v. Parkinson*, in Marshall, 111, and Park, 267, which was an insurance on the profits of a cargo of molasses ; and the case of *Henrickson and Walker*, and *Henrickson and Margetson*, Mich. 1776. The authority of *Grant and Parkinson*, as applied to this case, has been attempted to be gotten rid of by observing that the thing insured there was the profits of a specific cargo ; but in that respect the two cases do not differ, for this is an insurance on a specific cargo ; and we have no ground to say that the profits of a cargo to be exchanged in the African trade, from which exchange the profits will arise, are not, to use the expression of Lord Mansfield in *Grant and Parkinson*, pretty certain ; admitting, for the sake of the argument, which it is not necessary for us now to determine, that in some mercantile adventures there may be so much uncertainty as to the profits, as to make it not possible to insure them without the policy being a wagering contract. This, however, we cannot presume of the returns to be made from an adventure, undertaken according to a long-established course of trade like that

in question, in which numbers have been engaged to great advantage for a continued succession of years. It has been objected to this sort of insurance that the subject, having no physical existence, cannot be insured. This objection would hold against insuring freight, and bottomry, and respondentia interest. Again, that the goods might be going to a losing market, in which case the assured would gain by the loss of his goods; but if that were the case, it would be evidence on *non assumpsit*, as it would prove either that the plaintiff was not damnified as to profit by the loss of the goods, or that at the time of the loss he had no interest in the thing insured. It was further objected, that there can be no average nor abandonment; but that objection does not hold in the present case, for if there be only a partial loss, the assured will only be liable to pay for the expected profits on the goods lost; and there may be an abandonment of the profits by abandoning the goods from whence the profits are to arise; and as to general average, there would be no difficulty in the case of a valued policy; and in the case of an open policy, the difficulty would be no greater than in ascertaining the damages in case of loss, the impossibility of doing which, in every case, will not prove that an insurance can be made on profits in no case. A considerable time has elapsed between the first and second argument of this case, in consequence of a writ of error in the Exchequer Chamber in another case, the decision of which might have had weight in favor of the defendant, had it been determined otherwise than it has been. The grounds of that decision we are not acquainted with, so as to say whether they will support this case; but as that determination does not militate with the opinion Mr. J. GROSE, Mr. J. LE BLANC, and I have formed, and I may add that of Lord KENYON on hearing the first argument, we do not think it fit that we should longer delay the judgment of the court.

Postea to the plaintiff.¹

¹ In *Lucena v. Craufurd*, 2 B. & P. N. R. 269 (H. L. 1806), at pp. 301-303, LAWRENCE, J., in his answer to questions proposed to the judges, said: "Insurance is a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, damage, or prejudice by the happening of the perils specified to certain things which may be exposed to them. If this be the general nature of the contract of insurance, it follows that it is applicable to protect men against uncertain events which may in any wise be of disadvantage to them; not only those persons to whom positive loss may arise by such events, occasioning the deprivation of that which they may possess, but those also who in consequence of such events may have intercepted from them the advantage or profit, which but for such events they would acquire according to the ordinary and probable course of things. . . . That a man must somehow or other be interested in the preservation of the subject-matter exposed to perils, follows from the nature of this contract, when not used as a mode of wager, but as applicable to the purposes for which it was originally introduced; but to confine it to the protection of the interest which arises out of property, is adding a restriction to the contract which does not arise out of its nature. According to *Scaccia* (*Quæstio prima*, No. 153). *Asssecurationis contractus habet locum in quâvis re, seu de quâvis re quæ subiacere possit periculo seu interitui. A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it; in quantum mea interfuit i. e. quantum mihi*

MERRY, PLAINTIFF IN REVIEW, v. PRINCE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1806. 2 Mass. 176.

THIS was a review of an action of the case upon two policies of reinsurance, both dated Dec. 11, 1795, one of which was a reinsurance upon the "brigantine 'Columbia' and cargo," upon which Merry subscribed \$350; the other was upon the "schooner 'Harmony,' appurtenances and cargo," upon which Merry subscribed \$300. In the original action, there was a verdict for Prince for \$836.35, as for a total loss.

On the review, a verdict was also given for Prince at April Term, 1803, subject to the opinion of the court on a state of facts drawn up

abest quantum que lucrari potui. Dig. lib. 46, lib. 8, c. 13. And whom it importeth, that its condition as to safety or other quality should continue: interest does not necessarily imply a right to the whole, or a part of a thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in, the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the person insuring; and where a man is so circumstanced with respect to matters exposed to certain risks or dangers as to have a moral certainty of advantage or benefit, but for those risks or dangers he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction. The property of a thing and the interest devisable from it may be very different; of the first the price is generally the measure, but by interest in a thing every benefit and advantage arising out of or depending on such thing, may be considered as being comprehended." At p. 321 Lord ELDON said: "Since the 19 Geo. II. it is clear that the insured must have an interest, whatever we understand by that term. In order to distinguish that intermediate thing between a strict right, or a right derived under a contract, and a mere expectation or hope, which has been termed an insurable interest, it has been said in many cases to be that which amounts to a moral certainty. I have in vain endeavored, however, to find a fit definition of that which is between a certainty and an expectation; nor am I able to point out what is an interest unless it be a right in the property, or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the party."

In *Hancox v. Fishing Ins. Co.*, 3 Sumner, 132, 140 (1837), STORY, J., said: "The truth is that an insurable interest is *sui generis*, and peculiar in its texture and operation. It sometimes exists where there is not any present property, or *jus in re*, or *jus ad rem*. Inchoate rights, founded on subsisting titles, unless prohibited by the policy of the law, are insurable; as, for example, freight, respondentia, and bottomry."

In *McDonald v. Black*, 20 Ohio, 185, 193 (1851), RANNEY, J., for the court, said: "It is well settled at the present day that an insurable interest need not amount to a right of property or of possession. Whenever a legal connection can be shown to exist between injury to the thing insured and the loss to the party insuring, it will suffice."

In *Wilson v. Jones*, L. R. 2 Ex. 139, 150, 151 (Ex. Ch. 1867), BLACKBURN, J., said: "I apprehend that the distinction between a policy and a wager is this: a policy is, properly speaking, a contract to indemnify the insured in respect of some interest which he has against the perils which he contemplates it will be liable to; and I know no better definition of an interest in an event than that indicated by Lawrence, J., in *Barclay v. Cousins*, and more fully stated by him in *Lucena v. Craufurd*, that if the event happens the party will gain an advantage, if it is frustrated he will suffer a loss." — ED.

and subscribed by the parties; and it was agreed that, if the court should be of opinion that the reinsurance declared on was illegal, the verdict should be set aside, and the defendant in review defaulted, and judgment accordingly. But if the court should be of opinion that the reinsurance was legal, but that the verdict was for too large a sum, then the defendant in review should release on the record such part of said sum as the court should think too much, and judgment should be rendered accordingly.

The facts agreed were, in substance, that Merry subscribed the two policies declared on; the first of which was opened for \$1,050 on the "Columbia" and cargo, "from Newburyport to any or all the ports in the West Indies, and at and from thence to Newburyport;" the other was opened for \$300 on the "Harmony," appurtenances and cargo, "at and from Lisbon to Newburyport;" both the policies were for a premium of ten per cent, and expressed that they were reassurances. That Prince, before effecting these policies, had subscribed \$500 to a policy of insurance on the "Columbia" and cargo, the risk being described in terms similar to those used in the policy of reinsurance; this last policy was opened for \$2,000 on the vessel, and \$2,700 on the cargo. T. W. Hooper also subscribed it for \$200; on the back of it was the following: "N. B. James Prince takes the risk of one hundred and thirty dollars, wrote by T. W. Hooper," written by the insurance broker, by order of Prince and Hooper, and subscribed by Prince. That he had also subscribed to another policy, dated Nov. 17, 1795, "upon effects on board the 'Columbia' to one or all the islands in the West Indies," for a premium of four per cent; and a third policy, dated Dec. 4, 1795, for \$167, "upon property on board the 'Columbia' from Newburyport to any port in the West Indies," at a premium of seven per cent. That the "Columbia" was lost by the perils of the sea on her passage from Newburyport towards the West Indies, in the voyage insured. That Prince had paid all the sums aforesaid, being, in the whole, \$1,297, as for a total loss, before he commenced the action now reviewed. That he had also, previous to his effecting the said reinsurance on the "Harmony," subscribed \$200 to a policy dated Nov. 3, 1795, "upon the schooner 'Harmony' and cargo, at and from Lisbon to Newburyport," at a premium of four per cent. That T. Bradbury, Jun., had subscribed \$200 to the same policy. On the back of this last policy was the following memorandum: "It is agreed by Prince, and T. Bradbury, Jun., that the said Prince takes the risk on one hundred dollars, wrote by said Bradbury, on the within policy." This memorandum was subscribed by the insurance broker only, and was agreed to have been made by the parties within thirty days from the date of the policy. On this \$100 Bradbury paid Prince a premium of eight per cent. That the "Harmony" was lost by the perils of the sea on her passage from Lisbon towards Newburyport, in the voyage insured; and that Prince had paid \$300, the amount of the two sums last mentioned, as for a total loss, before he commenced the action now reviewed.

The principal question upon these facts was, whether the British statute of 19 Geo. II., c. 37, among other things prohibiting reassurances, had, by its own provisions, extended to this country, — or, if not, had been “adopted, used, and approved” here; in other words, whether a policy of reassurance was, here, a legal and binding contract.

Prescott, for the plaintiff in review.

Jackson, for the defendant in review.

The opinion of the court was afterwards delivered by

SEDGWICK, J. This action is brought on two policies of reassurance, the one, dated 1st December, 1795, being on “brigantine ‘Columbia’ and cargo, from Newburyport to any or all the islands or ports in the West Indies, and from thence back to Newburyport;” the other, dated on the same day, “on the schooner ‘Harmony,’ appurtenances and cargo, at and from Lisbon to Newburyport.”

There are other facts, which will hereafter be mentioned, for the consideration of questions which have been made in the argument of the case. At present, enough is stated to expose to discussion the first and principal question in the case, namely, whether the contract itself, being a reassurance, is legal, and binding on the parties.

That a contract of reassurance is not prohibited by the principles of the common law, is admitted by the parties.¹ It is a contract which, in itself, seems perfectly fair and reasonable, and might be productive of very beneficial consequences to those concerned in this important branch of commerce; but, because it was much abused, and turned to pernicious purposes, it was prohibited by an act of the Parliament of Great Britain,² by which reassurance was rendered illegal in all cases except where the original assurer should become insolvent, a bankrupt, or die. And the only question is, whether that statute, *as such*, is law within this commonwealth.

As an act of the British Parliament *merely*, it is not pretended that its binding force was extended to the colonies. But it is said, and, in my opinion, it is true, that, from the very nature of our relation as colonies to Great Britain, the parent state at the time the act was passed, it was competent to the Parliament to have extended this provision to the colonies, if it had seen fit to do it. But if that was the intention, it ought to appear by express words, or at least by inevitable implication. Blackstone, in his Commentaries, vol. i. pp. 107, 108, while treating of the countries subject to the laws of England, speaking of these then colonies, lays it down without any restriction, that “they were subject

¹ *Acc.* *Haistie v. De Peyster*, 3 Caines, 190 (1805); *N. Y. Bowery Fire Ins. Co. v. N. Y. Fire Ins. Co.*, 17 Wend. 359 (1837); *Philadelphia Ins. Co. v. Washington Ins. Co.*, 23 Pa. 250 (1854).

And see *Reed v. Cole*, 3 Burr. 1512 (1764); *Eastern Railroad Co. v. Relief Fire Ins. Co.*, 98 Mass. 420 (1868). — Ed.

² St. 19 Geo. II. c. 37, s. 4 (1746): “And be it further enacted . . . That it shall not be lawful to make reassurance, unless the assurer shall be insolvent, become a bankrupt, or die.” This provision was repealed by St. 27 & 28 Vict. c. 56, s. 1 (1864). — Ed.

to the control of the Parliament, though (like Ireland, Man, and the rest) not bound by any acts of Parliament, unless particularly named." If this be so, it is decisive in this case, as the colonies are not at all named in the act. And I think we may pretty safely conclude that that learned and elegant writer was well acquainted with the claims of Great Britain, in relation to her colonies, and that he had no disposition to narrow their effects. But, should we even go much farther, and admit that, although the colonies are not expressly named, yet if, from the whole purview of the statute, it manifestly appears to have been the intention of the legislature that reinsurance should be prohibited in the colonies, that such ought to be the construction, yet I think that the case would be with the defendant in review; because I can discover no such intention.

There are no words in the section prohibiting contracts of reinsurance, or in any other part of the act, which manifest, or even imply, such an intention. By the most attentive consideration of the statute, I can nowhere perceive such an intention, but, on the contrary, I think it evident that no such intention existed. The observation of the counsel for the defendant in review is undoubtedly just, that part of the provisions of the act were not intended to extend, and indeed could not extend, to the colonies. Now, it can hardly be believed that the Parliament could have intended that part only of that act should, by indefinite expression, be construed to extend to the colonies. If such had been the will of the legislature, it would have been declared, and not left a subject of uncertain or difficult construction.

There is another foundation on which, it is said, a defence against this action may be bottomed. The constitution declares (chap. vi. art. 6), that "All laws which have heretofore been adopted, used, and approved in the colony, and usually practised on in the courts of law, shall remain in force until altered or repealed by the legislature." It is true that many acts of the British Parliament have been adopted here, from causes which are now unknown. And it is said that wager policies, which are only rendered illegal by the same act, are here considered as invalid, and that this could result only from an adoption here, in practice, of that act. In answer to this argument, I observe that, admitting wager policies are here illegal, I do not think the argument would be conclusive; for it is true that, at the time of the settlement of this country, and for some time afterwards, wager policies were, in England, considered and held to be illegal at common law.

I now proceed to the consideration of other circumstances in the case. The reinsurance on the "Columbia" is on the vessel and cargo to any or all the islands or ports in the West Indies, and from thence to Newburyport; and it is a reinsurance by which the assurers are to respond the full amount of all losses, damages, and misfortunes to which the assured might be liable on a like sum written by him on a former policy; and in the same proportion on vessel and cargo. The reinsurance then, in express terms, extends only to a policy of insurance, and

which was a policy of insurance on vessel and cargo. Instead of confining the reinsurance to one policy of insurance, the defendant in review would extend it to three. One is admitted as properly described by the policy of reinsurance, and here I think he must stop. The policy of reinsurance is confined, in the terms of it, to a reinsurance of a policy of insurance, and cannot be extended to three. Besides, the policies on "effects" and on "property" are confined to cargo, and are not in proportion on vessel and cargo; they also describe different voyages from that which the instrument declared on reassures. It would be infinitely too loose a construction of this contract, and altogether unsafe, in my opinion, that all these policies of insurance were comprehended in it, and reassured by it.

I am of opinion that the defendant in review has a right to recover the \$130 which he assumed as part of that which was originally subscribed by Hooper, because he was in fact, by agreement with all the parties at the time of the reinsurance, an insurer for that sum, as much as for his own original subscription. My opinion as to this sum is founded solely on the evidence, which the case affords, that Prince had, before the reinsurance, been received as a substitute for Hooper, to that amount, and that Hooper was, to the same amount, released from his engagement, — in other words, that Prince was an insurer, and as such immediately responsible to the assured. This I consider as a case altogether distinct from Prince's assuming the \$100 which had been underwritten by Bradbury. In this case, it is obvious that the agreement was not between Prince and the assured, but between Prince and Bradbury. The agreement does not, as is the case in the other instance, appear to have been subscribed by Prince, and it is certain the assured could have brought no action against Prince upon it. It could not, therefore, in my opinion, be a reinsurance to Prince of that sum, because Prince had never insured it.

But as to the \$100 assumed by Prince, which was originally subscribed by Bradbury, I have the misfortune to differ from both my brothers, who think that it is impossible to distinguish this from the \$130 which was originally subscribed by Hooper, and afterwards assumed by Prince. They think that his assent, as expressed in the broker's memorandum, in the one case, constituted Prince as much an insurer as his own subscription in the other.

By a computation, it will appear that the whole reinsurance on the "Columbia" will be completely covered by the subscriptions previous to that of the plaintiff in review.

SANSOM v. BALL.

SUPREME COURT OF PENNSYLVANIA, 1806. 4 Dall. 459.

CASE on a policy of insurance, upon the freight of the ship "Richmond," for a voyage at and from Philadelphia to Batavia, and thence back again. The premium was 20 per cent, "to return five per cent if the ship proceeds only to Batavia and back to Philadelphia, and no loss happens;" and the insurance was declared to be "on freight advanced here, and which, by agreement, is valued at \$13,500." . . .

On the trial of the cause, it appeared that the "Richmond" was owned by Messrs. Jesse and Robert Waln; that the plaintiff purchased from the owners three-eighths of the tonnage of the ship for the voyage, at the price of \$10,837.50, which was paid before the ship sailed; that the "Richmond" proceeded safely to Batavia, but, on her return thence to Philadelphia, she was captured by a French privateer. . . .

The present suit was brought to recover an average loss; and the case being submitted for the opinion of the Court, two questions were discussed.¹ . . .

TILGHMAN, C. J. In this case two questions have been made: 1st. Had the plaintiff an insurable interest?² 2d. If it was insurable, was it liable to a general average?

1st. In order to determine whether the plaintiff's interest was insurable, we must first ascertain the nature of it. It seems to be a kind of interest not much known in Europe, though well known in this city. The plaintiff advanced a sum of money to the owners of the ship, in consideration of which they gave him a right to fill up three-eighths of the tonnage of the ship, for that voyage, with goods, either his own or the property of others. It is called in the policy "freight advanced," an expression well calculated to show its meaning. All countries, and even all cities, have singularities of expression. All new inventions, either in commerce or the arts, give rise to new modes of speech, which, when once introduced into contracts, are recognized by courts of justice, whose duty it is to carry into execution the intention of the contracting parties. Now, what is there in this interest which should exclude it from the benefit of insurance? there is nothing unlawful in it. It is subject to loss; for, whether the plaintiff used the tonnage for the transportation of his own goods, or of the goods of others, he would lose his money, unless the ship performed the voyage in safety. Indeed, I think Mr. Ingersoll, in arguing for the defendant, conceded that the

¹ Mr. Fitzsimmons, a merchant and underwriter of great intelligence and experience, proved, at the trial of the cause, that the interest acquired by the plaintiff in the tonnage of the ship was a well known subject of insurance in Philadelphia. . . .
—REP.

² The reprint of the statement and of the opinion has been confined to the first question. — ED.

plaintiff's interest might have been insured if it had been properly described; but he conceived it to be in the nature of bottomry. This it certainly cannot be; there was no loan of money. Messrs. Wain were obliged to make no payment to the plaintiff, but the plaintiff was entitled to make what he could from the tonnage he had purchased. Whether it was more or less, Messrs. Wain had nothing to do with it. The testimony of Mr. Fitzsimmons goes far towards proving that the plaintiff's interest was well described, and was a proper object of insurance. In the case of *Gregory v. Christie* (Park, 11), my Lord Mansfield thus expresses himself: "I should think that the words 'goods, specie, and effects,' did not extend to the plaintiff's interest, if we were only to consider the words by themselves. But here is an express usage, which must govern our decision. A great many captains in the East India service swear that this kind of interest is always insured in this way." Now, though there have not been a great many witnesses in this cause, yet there has been one, very much conversant in the business of insurance, who stands uncontradicted. Upon this first point, therefore, the insurability of the plaintiff's interest, whether it is considered on principle or on usage, I have no doubt but the law is with the plaintiff. . . .

We are of opinion that the plaintiff is entitled to recover on this policy, according to his demand.¹

Lewis, Rawle, and J. Serjeant, for the plaintiff.

M^r Kean (Attorney-General) and *Ingersoll*, for the defendant.

HOBBS v. HANNAM.

Nisi Prius, 1811. 3 Camp. 93.

THIS was an action on a policy of insurance on the ship "Jane," valued at £3,600.² . . . The ship was the property of the plaintiff, and was chartered by him to one Woodman, who covenanted by the charter-party that in case the ship was lost he should pay the plaintiff £3,600. . . .

Garrow, for the defendant, first objected that the plaintiff had not an insurable interest in the ship, as he had a right to recover the £3,600 from Woodman the charterer.

Lord ELLENBOROUGH held that he was not bound to trust exclusively to the credit of the charterer; but might likewise protect himself by a policy of insurance. . . .

Marryat and Nolan, for the plaintiff.

Garrow, Jervis, Gurney, and Abbott, for the defendant.

¹ See *De Silvale v. Kendall*, 4 M. & S. 37 (1815); *Mansfield v. Maitland*, 4 B. & Ald. 582 (1821). — Ed.

² In all parts of the case passages not bearing on insurable interest have been omitted. There were other points, one of which caused a nonsuit. — Ed.

HAGEDORN v. OLIVERSON.

KING'S BENCH, 1814. 2 M. & S. 485.

ASSUMPSIT on a policy of assurance tried before Lord ELLENBOROUGH, C. J., at the London sittings after Michaelmas Term, when a verdict was found for the plaintiff for £200, the amount of the defendant's subscription, subject to the opinion of the Court on the following case :

The policy was effected by the plaintiff¹ on or about the 2d of August, 1810, as well in his own name as for and in the name and names of all and every other person and persons to whom the same doth, may, or shall appertain, etc., in the usual form, upon the 'ship "Fiesco," valued at £2,300, at and from Gluckstadt, and any port and ports in the river Elbe, to any port or ports in the United Kingdom, with liberty to carry simulated papers, etc., sail under any flag, etc. The declaration averred the interest to be in F. S. Schroeder,² and a loss by capture. At the time of effecting the policy Schroeder was and is a subject of the King of Denmark, then and now at war with Great Britain. In order to legalize the voyage the plaintiff had procured a license, which was granted to him by the name of J. P. H. Hagedorn, of London, on behalf of himself or other British or neutral merchants, permitting a vessel bearing any flag except the French to proceed with a cargo from within certain specified limits, within which Gluckstadt was, to any port of this kingdom north of Dover, etc. The ship was loaded at Gluckstadt in July, 1810, with a cargo on British and neutral account, and sailed from thence under Danish colors for London on the 26th of that month, and was captured by enemies, carried into a port of Holland, and condemned. The policy was effected for the benefit of Schroeder, but no letter or order was proved from Schroeder before the loss, but a letter from him to the plaintiff, dated the 26th of July, 1812, before the commencement of this action, was produced, wherein he adopted the insurance in the following terms :—

"I may now, I hope, expect that you have effected a final settlement with the underwriters per 'Fiesco,' and request you to lay out the amount for me in coffee."

No other evidence was given of the connection of Schroeder with this policy. The question for the opinion of the court is whether the plaintiff is entitled to recover ; if the court shall be of that opinion, the verdict is to stand ; if not, a nonsuit is to be entered.

¹ It was stated upon the argument, and so taken, that the plaintiff gave the order to the broker to effect the insurance. — REP.

² See *Hagedorn v. Reid*, 1 M. & S. 567, by which it appears that Schroeder was interested in a moiety of the ship. — REP.

Taddy, for the plaintiff.¹

Scarlett, *contra*.

LORD ELLENBOROUGH, C. J. The difficulty in this case arises from the situation of Schroeder, because he might, by refusing to adopt the policy in case the ship had arrived, have got clear of the premium, for if the plaintiff had brought an action against him to recover it, I do not see how he could have succeeded. That constitutes something of an anomaly, because in one event, namely, that of a loss, he might secure himself, and nevertheless might have avoided the payment of the premium, in the other event of the ship's arrival, by declaring that he chose to stand his own insurer. But I do not think that consideration governs the case now before us between this plaintiff and the underwriter. The plaintiff had a right to effect an insurance, on the chance of its being adopted, for the benefit of all those to whom it might appertain; which are the words of the policy. He might insure for those who were actually interested, and possibly for those who might be interested. Schroeder was interested, and might become privy to the benefit of this insurance by subsequent adoption, according to *Lucena v. Craufurd*, and *Routh v. Thompson*. He has adopted it, and now it is made a question whether he can become privy to the benefit of it. It appears to me upon those authorities that he may, and may make use of the name of the person at the head of the policy, as the person who had given the order to effect the insurance, which will satisfy the Stat. 28 Geo. III. c. 56. It seems to me, therefore, that this action is maintainable for the benefit of Schroeder, who was interested at the time, and has become privy by adoption.

LE BLANC, J. The difficulty thrown in the way of the plaintiff has been this, that if Schroeder, in the event of the ship's arrival, had chosen to repudiate instead of adopt the contract, he might have done so, and there would have been no means of coming upon him for the premium. But this policy was effected for the benefit of all persons interested, and Schroeder was a person interested; and I take it, that after the ship sailed on the voyage insured, the plaintiff was bound by the insurance, and could not have recovered back the premium from the underwriter, by averring that this was a policy without interest; the answer would have been Schroeder is interested; and he may elect to adopt the insurance. I therefore conceive the underwriter would have had a right to retain the premium. Then *Routh v. Thompson* is, I think, an authority to show that Schroeder being interested might subsequently adopt the insurance made by the plaintiff. There the crown adopted it after a loss; and the distinction taken in that case, that the party making the insurance was appointed by the captors who had no insurable interest, and therefore, that he stood in the relation of agent on the part of the crown, whose agents the captors

¹ Citing *Wolff v. Horncastle*, 1 B. & P. 316 (1798); *Lucena v. Craufurd*, 2 B. & P. N. R. 269 (H. L. 1806); *Lucena v. Craufurd*, 1 Taunt. 325 (H. L. 1808); and *Routh v. Thompson*, 13 East, 274 (1811). — ED.

were, does not, I think, make any difference. Here the plaintiff was not unconnected with the insurance; he obtained a license and made insurance for the benefit of the owners, though without communicating with them. Schroeder, who is an owner, afterwards adopted it. That case is an authority to show that he might afterwards adopt it. This, it must be remembered, is a question between the plaintiff and the underwriter, and not Schroeder and the underwriter; and unless we saw that the underwriter would not have been entitled to retain the premium, we cannot say that the plaintiff is not entitled to his contract, unless it could be shown that this a mere gaming policy.

BAYLEY, J. I think this is a case in which the defendant ought to pay, and the plaintiff ought to receive for a loss under the policy. A loss has happened, upon which the defendant undertook to pay, and if the premium could not have been recovered back from the defendant, there is not any circumstance here which should exonerate him from liability. I think the plaintiff never could have recovered back the premium from the underwriter, because of the uncertainty whether Schroeder would adopt the assurance, in respect of which the underwriter would have incurred the risk. While the contract was *in fieri* there was not any disposition on the plaintiff's part to have the policy vacated, and if there had been, it would have been an answer to him, that Schroeder might have adopted it. Then comes the question whether Schroeder is entitled to take the benefit of this insurance. It is stated that it was effected for his benefit, therefore it was intended to cover his specific interest at the time. Schroeder had an interest at the time, and although there was not any specific communication at the time, yet as Schroeder was connected in the concern, it was reasonable for the plaintiff to expect that Schroeder would adopt an act which could be done with no other view than for his benefit. Schroeder must be considered as under a moral if not a legal obligation to adopt it, although the ship arrived. Being under that obligation in all events, he thinks that he is warranted in adopting it even after a loss, and has adopted it. The case of *Routh v. Thompson* shows that if a policy be effected with reference to the benefit of a person interested, an adoption of it by such person after the loss will be sufficient.

DAMPIER, J. The plaintiff placed himself in an awkward situation by advancing his money for the premiums, upon the expectation that Schroeder would adopt his act, which Schroeder might have refused to do in the event of the ship's arrival; and if he had, I do not see that the plaintiff could have recovered back the premiums. The question then is whether Schroeder had an interest in the policy. He was owner of the ship, and the policy was effected for his benefit; that seems to me to give him an interest. If then he had an interest his subsequent adoption will be good. *Routh v. Thompson* is a full and clear authority to that point; there the agency was only a constructive agency, and it does not appear to me to afford any distinction, because the insurance did not come within the scope of his agency. Therefore it

seems to me to govern this case; there is no distinction in reason though there may be a difference. All the averments in this declaration are certainly fully proved, and therefore the plaintiff is entitled.

*Judgment for the plaintiff.*¹

HIGGINSON v. DALL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1816. 13 Mass. 96.

CASE upon a policy of insurance, to recover the amount underwritten by the defendant for \$1500 upon the ship "Silenus," and \$2000 upon her freight, at and from Calcutta to her port of discharge in the United States.² . . .

At the time the policy declared on was effected, there was a subsisting mortgage upon the ship to a mercantile house in Calcutta, to secure advances made to the plaintiff by that house. . . .

A verdict was taken for the plaintiff for the sum of \$2,300, subject to the opinion of the whole court upon the report of the judge. . . .

Otis and Hubbard, for the plaintiff.

Dexter and Hall, for the defendant.

PARKER, C. J. . . . The first objection to the plaintiff's recovering was, that he had not an insurable interest, in consequence of the conveyance of the ship by way of mortgage. But this objection was not much insisted on, because of the uncertainty of some of the evidence, whether the mortgage was subsisting or not at the time of making the policy. We are satisfied, however, that, if it were subsisting, it left an insurable interest in the plaintiff; even if the ship were mortgaged to her full value; for it has been settled by many decisions, that different parties, having different interests in the same subject-matter, may severally cause insurance upon it. . . .

Judgment on the verdict.

¹ *Acc.*: *Bridge v. Niagara Ins. Co.*, 1 Hall, 247 (1828); *Williams v. North China Ins. Co.*, 1 C. P. D. 757 (C. A. 1876).

And see *Stillwell v. Staples*, 19 N. Y. 401 (1859). — ED.

² In reprinting the statement and the opinion, passages not bearing on insurable interest have been omitted. — ED.

SUTHERLAND v. PRATT AND OTHERS.

EXCHEQUER, 1843. 11 M. & W. 296.

ASSUMPSIT. The declaration stated, that the plaintiff, on the 8th of September, 1841, caused to be made a policy of assurance (setting it forth *verbatim*), purporting thereby and containing therein that Messrs. Boggs, Taylor, & Co., as well in their own names as for and in the names of all and every person or persons to whom the same did, might, or should appertain in part or in all, did make assurance, and cause themselves and them and every of them to be assured with the General Maritime Assurance Company, *lost or not lost*, at and from Bombay to London.¹ . . . The insurance was declared to be on 360 bales of cotton, and the policy, after admitting the receipt of the premium, stated, that the said company were content, and did take upon them that assurance for the sum of £2,000. — The declaration then alleged, that, in consideration of the premises, and that the plaintiff at the request of the defendants (then being three of the directors of the said company), then paid to the said company the sum of £40 as a premium for the assurance of £2,000 upon the said goods, on the said voyage in the policy mentioned, and then promised the defendants to perform and fulfil all things in the policy mentioned, on the behalf of the assured to be performed and fulfilled, the defendants then promised the plaintiff that the said company would become and be assurers to the plaintiff of the said sum of £2,000, upon the said goods in the said ship in the policy mentioned, and would perform and fulfil all things therein mentioned on their part and behalf, as assurers of the said sum of £2,000, to be performed and fulfilled: that the said goods, on the 1st of September, 1841, were shipped at Bombay on the said voyage: that the plaintiff was, *during the said voyage, to wit*, on the same day and year last aforesaid, interested in the said goods in the said policy mentioned, and so loaded on board the said ship, to the amount insured: that the said insurance was made for the use and benefit, and on the account of the plaintiff as aforesaid: that the said ship afterwards sailed on the said voyage, and being injured by tempestuous weather, became filled with water, whereby the said goods were wetted and damaged, and rendered of no use or value to the plaintiff.

The defendants pleaded eight pleas. . . . The eighth plea, after stating, that although the said ship, with the said goods on board, departed and set sail upon the said voyage from Bombay to London, and although the said goods were damaged and diminished in use and value on the said voyage, as in the declaration mentioned; and although, after the commencement and during the course of the said

¹ The reporter's abstract of the policy has not been reprinted in full; and, in reprinting the statement, the arguments, and the opinion, passages not bearing on insurable interest have been omitted. — ED.

voyage, and after the ship had sailed on the said voyage for divers, to wit, thirty-five days, and for divers, to wit, 1,000 miles, the plaintiff acquired an interest in the said goods, and then, to wit, on the 10th day of September, A. D. 1841, became and was interested in the said goods, to wit, to the value and amount in that behalf mentioned: nevertheless, that the said goods were so damaged and diminished in value, as in the declaration mentioned, *before* the plaintiff acquired or had any interest therein, to wit, upon the 20th day of August, A. D. 1841. — Verification. . . .

To the eighth plea the plaintiff demurred generally: and the point marked for argument on his part was, that the policy being effected “lost or not lost,” the underwriters were responsible for the loss, notwithstanding it happened before the plaintiff acquired an interest in the goods.

Joinders in demurrer.

Martin, in support of the demurrer. The only question of substance is that which arises on the demurrer to the eighth plea, viz. whether it is legal to enter into such a contract of insurance as is mentioned in that plea. This is the case of a policy on goods, *lost or not lost*, at and from Bombay to London, beginning the adventure from the loading of the goods on board the ship. The defendants, therefore, expressly contract to be responsible to the plaintiff, lost or not lost, from the loading of the goods at Bombay till their arrival and safe discharge in London. The plaintiff is admitted by the plea to have become interested in the goods *during the voyage*: and the defendants have engaged to become responsible to him for any loss sustained during the entire course of that voyage. By the express terms of their contract with the plaintiff, therefore, they engage to be responsible for this loss. Why are they not to be held to their contract? At the common law, a contract of insurance without any interest was legal: *Craufurd v. Hunter*, 8 T. R. 13, confirmed by the Court of Exchequer Chamber in Ireland, in *British Insurance Co. v. Magee, Cooke & Alcock*, 182. Is there, then, anything in the Stat. 19 Geo. II. c. 37, to affect this case? That statute enacts, “that no assurance shall be made on any British ship, or on any goods, merchandises, or effects, laden on board of any such ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage.” This is not a case where there is no proof of interest but the policy, nor is it a case of gaming or wagering. The plaintiff has the interest of a pledgee, and to protect himself against loss as such, effects the insurance: there is nothing illegal in that, either at common law or by the statute. He had the greatest possible interest in the arrival of the goods in the condition in which he supposed them to be when he made the advance upon them, so as to secure him from loss. *Mead v. Davison*, 3 Ad. & E. 303; 4 Nev. & M. 701, goes further than the present case. There the policy was in fact executed after the loss of the ship had become known to both parties,

being made in pursuance of a contract entered into before the loss, and yet it was held valid: being assimilated to the case of a conveyance of land, where the house had been burnt down since the contract was made: *Paine v. Meller*, 6 Ves. 349. [PARKE, B. There the plaintiff was interested at the time of the loss: here he is not.] But the defendants have expressly contracted to indemnify him against that loss: and how can it be said that he effected the policy "interest or no interest," when he had the strongest possible interest that the goods should reach him undamaged. [PARKE, B. Your argument, I suppose, would be the same in case of a total loss.] There might be a difficulty there, because it might be said a person could not buy a thing which was lost: but here it is expressly stated to be a partial loss, and the goods exist *in solido*. [PARKE, B. It is not a wagering policy, because the plaintiff meant to insure against perils of the sea an interest which he would have had if the ship had arrived safe.] To render the contract illegal, it must be in the nature of a wager, and in no respect in the nature of an indemnity for a *bona fide* interest. [PARKE, B. *Stockdale v. Dunlop*, 6 M. & W. 224, may be cited for the defendants: there, however, the plaintiff had no legal interest in the goods, because there was only a verbal contract.] This is a loss expressly protected by the terms of the contract, and the plaintiff has a sufficient interest. . . .

Greenwood, contra. The object of this declaration obviously is, to defeat the answer which the plaintiff knows the defendants would be able to give to any claim by Boggs, Taylor, & Co. The mode in which the interest is averred on this record is a mere evasion of the ordinary allegation of an interest during the risk and down to the time of the loss. The plaintiff could not apply the ordinary form here, because the loss occurred before he had any interest in the goods; he therefore uses an ambiguous expression, which may mean either that he was interested during the whole of the voyage, or that he had an interest on some particular day in the course of the voyage. In the latter sense the allegation is true, because on a day after the loss he was interested in the goods, in the state in which they then were, but *he* has therefore suffered no loss. The argument on the part of the plaintiff must be the same as in the case of a total loss. [PARKE, B. But there is an averment that the goods were wetted and damaged, and so became of no use or value *to the plaintiff*; that is, that *he* received damage by means of the loss.] Anybody might say that, whosoever the goods were that were injured. If a party chooses to make such a contract by way of pledge, he may provide against loss by getting the owners to effect an insurance upon the goods, lost or not lost, and *they* may recover upon the policy as trustees for the pledgee. *Powles v. Innes*, 11 M. & W. 10; *Sparkes v. Marshall*, 2 Bing. N. C. 761; 3 Scott, 172. Independently of the provisions of the statute against wagering policies, the language of the courts has always been, that the plaintiff must be interested at the time of the loss. There is no such

allegation here, nor any direct averment that he sustained any loss. [PARKE, B. Surely the averment I have referred to means, that by the perils of the seas a loss has been caused to the plaintiff, which would not be true if he bought the goods in their damaged state.] That is a mere superfluous statement, meaning in truth no more than the words at the end of the declaration, "to the damage of the plaintiff," &c. If he proves the contract, the interest, and the damage, the right of action is complete; the rest is mere matter of evidence as to the *amount* of the damages. The allegation referred to could not have been traversed, and therefore nothing is admitted against the defendants by not putting it in issue. Could the plaintiff have recovered in case of a total loss? He has not lost anything. It is like the case of the sale in London of a particular horse, described as being "then on his voyage from Edinburgh," but which is in fact dead at the time of the sale. Surely the purchaser could not be bound in such a case to pay the price, nor, if he had insured the horse, could have recovered on the policy: for there is an implied engagement in every contract for the sale of a specific chattel, that the thing is in existence; *Barr v. Gibson*, 3 M. & W. 390; and a contract of insurance is only a contract of indemnity. *Rhind v. Wilkinson*, 2 Taunt. 237, was the first case in which it was said to be unnecessary to aver an interest at the time of effecting the policy: but it clearly must exist during the risk. But when goods are lost or destroyed, whether in whole or in part, no risk exists. It can make no difference in principle whether the loss is total or partial. If I sell this year's crop of hay from a particular field, and it is then discovered that the stack was burnt down before the contract, the purchaser is not bound to pay; but if it has been damaged by weather or otherwise, still retaining, in common acceptance, the character of hay, then he must take it as he bought it, and pay the stipulated price. Can it make any difference whether the hay was in a stack or on board ship, or whether it was damaged by rain or sea water? If the purchase is after the injury, the purchaser takes the goods as he finds them; and if he insures them, however improvident the bargain he has made, inasmuch as *his* goods were not injured, the insurers can no more be liable to pay for the partial damage than they would in case of a total loss. [PARKE, B. You say that where goods are injured to a tenth part of their value it is the same thing as if that tenth did not exist.] Yes: as to that part there is an entire loss before the plaintiff has any interest in it. In case of the insurance of a house, it has always been necessary to show that the plaintiff had a property in it at the time of the fire: *Lynch v. Dalzell*, 3 Bro. P. C. 497. Lord King there says, "The party insuring must have a property at the time of the loss, or he can sustain no loss, and consequently can be entitled to no satisfaction." So, in *The Sadlers' Company v. Badcock*, 2 Atk. 554, Lord Hardwicke says, "I am of opinion it is necessary the party insured should have an interest or property at the time of insuring, and at the time the fire happens." And he observes, "These insurances

from fire have been introduced in later times, and therefore differ from insurance of ships, because there *interest or no interest* is almost constantly inserted, and if not inserted you cannot recover, unless you prove a property." That case occurred before the Stat. 19 Geo. II. c. 36, since which statute the distinction taken by Lord Hardwicke no longer exists. There is no case in which a party has been allowed to recover who had not an interest in the property at the time of the loss. *Mead v. Davison* is distinguishable: there the party had an interest at the time of the loss, under the antecedent contract. In *Grant v. Parkinson*, cited 3 Bos. & P. 85, the insurance was on £1,000, "being profits expected to arise from the cargo of the ship *Providence* in the event of her safe arrival at Quebec," and there was an allegation in the declaration that the plaintiff, "until and at the time of the misfortune hereinafter mentioned, was interested in the profits expected to arise from the said goods, &c. to a large value, &c." In *Abitbol v. Bristow*, 6 Taunt. 464, an allegation of interest at the time of the loss is assumed by Gibbs, C. J., to be a necessary allegation. All the precedents contain such an allegation: see *Chitty on Pleading*, Vol. 2, pp. 105, 107. The ordinary plea, that the plaintiff was not interested in the goods at the time of the loss, would be altogether nugatory if the plaintiff be right, and the issue upon it would be immaterial. Besides, the contract of the insurer is merely to secure the assured against any loss the goods may sustain by perils of the seas: but here the plaintiff is no loser thereby, but by his having entered into an improvident contract with a third party. Surely it is too metaphysical and unnatural a construction to put upon the language of the parties to this policy, that because the plaintiff eventually suffers from having been a party to a contract, the subject-matter of which had previously been affected by the perils of the sea without his knowledge, *his* goods have been lost or damaged by those perils. . . .

Martin, in reply. . . . The cases cited from equity have no application: the words "lost or not lost" were not contained in the policies, and the interest had been transferred before the loss. The question here merely is, did the defendants contract to indemnify the plaintiff against a peril which in fact had already occurred, and was it lawful to do so? Now the terms of the contract are, that the plaintiff shall be indemnified against any loss the goods may sustain in the specified voyage. And the averment of interest is made necessary only by the statute, with reference to which this averment would be true: the plaintiff was interested in every particle of goods which left Bombay by this ship. It is enough to show an interest sufficient to satisfy the statute, whenever existing.

Cur. adv. vult.

PARKE, B.¹ . . . We are of opinion that the eighth plea contains no answer to the declaration. The plea admits expressly that the plaintiff

¹ The restatement of the case has been omitted; and so has so much of the opinion as explains why the second and third pleas were bad in form.—ED.

had, during the voyage, an interest in the goods on board, to the amount insured thereon, and it admits impliedly (for it does not deny that allegation), that the insurance was made for the use and benefit and on the account of the plaintiff, that is, as a contract of indemnity to the plaintiff against any loss in respect of that interest, by any of the perils insured against. This being admitted, the simple question is, whether it is any answer to an action on a policy on goods (*lost or not lost*), that the interest in them was not acquired until after the loss. We are of opinion that it is not. Such a policy is clearly a contract of indemnity against all *past*, as well as all *future* losses, sustained by the assured, in respect to the interest insured. It operates just in the same way as if the plaintiff having purchased goods at sea, the defendant, for a premium, had agreed, that if the goods had at the time of the purchase sustained any damage by perils of the sea, he would make it good. The plea, therefore, is bad in substance.

It was argued by Mr. *Greenwood*, that upon the pleadings it might be assumed that the plaintiff bought the goods in their damaged state, and consequently was not entitled to any indemnity for that damage. But it does not appear that he purchased them *as* damaged goods. If that had been true, he could not have recovered on this policy, on a plea denying the loss by the plaintiff by perils of the seas; and that would have been the proper form of plea to have raised this question. . . .

Leave to the defendant to amend, on the usual terms: otherwise

*Judgment for the plaintiff.*¹

¹ In *Rhind v. Wilkinson*, 2 Taunt. 237 (1810), the declaration alleged that at the respective times of effecting the policy, and of the loss, the plaintiff was interested in the ship and freight respectively. There was a motion for a nonsuit upon the ground, among others, that the interest did not commence until long after the date of the policy. Although the rule was made absolute upon one of the other grounds, "the court held, as to the time of the commencement of the plaintiff's interest, that if the declaration had averred that he was interested at the time of the ship's sailing, or that the policy was made on a certain day, and that afterwards on a subsequent day the plaintiff acquired an interest, it would have sufficed, and if that would have been good, the allegation of interest at the time of effecting the policy was an immaterial allegation, and needed not to be proved. It was immaterial to aver interest at any day previous to the commencement of the risk. It is every day's practice to insure goods on a return voyage, long before the goods are bought."

On the necessity of averring interest, see *Cousins v. Nantes*, 3 Taunt. 513 (Exch. 1811); *Cohen v. Hannam*, 5 Taunt. 101 (1813). And see these fire insurance cases: *Fowler v. N. Y. Indemnity Ins. Co.*, 26 N. Y. 422 (1863); *People's Fire Ins. Co. v. Heart*, 24 Ohio St. 331 (1873); *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 521-524 (1877); *Home Ins. Co. v. Duke*, 75 Ind. 535 (1881); *Commercial Fire Ins. Co. v. Capital City Ins. Co.*, 81 Ala. 320 (1886) — Ed.

SAMUEL R. PUTNAM *v.* THE MERCANTILE MARINE
INSURANCE CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1843. 5 Met. 386.

THIS was an action of assumpsit on a policy of insurance, made by the defendants on March 11, 1835, by which the plaintiff, "for Alfred Barrow, Putnam, & Co., payable to S. R. Putnam, in case of loss," insured "\$1,500 on commissions on the cargo of the brig 'Progress,' at and from St. Helena to Antwerp."¹ . . . The commissions were valued at the sum insured.

The declaration alleged that Alfred Barrow of Antwerp and Samuel R. Putnam of Boston were jointly interested in the commissions aforesaid; that the policy was made to and for the use and account of said firm, and that the plaintiff was their authorized agent to effect said insurance; that the vessel sailed from St. Helena for Antwerp with a cargo, and was lost, about March 10, 1835, by the perils of the sea; and that thus the said commissions were wholly lost. . . .

By consent a verdict was taken for the plaintiff, subject to the opinion of the whole court, who were desired to draw such inferences . . . as a jury would be warranted in drawing.

C. G. Loring and *Crowninshield*, for the plaintiff.

W. D. Sohler, for the defendants.

HUBBARD, J. Two questions are presented for the consideration of the court in this case: The one, whether the plaintiff had an insurable interest in the subject-matter of the insurance; and the other, if the plaintiff had such insurable interest, whether a loss has happened for which the defendants are answerable under their contract.

In the progress of the law of insurance, many cases have arisen for legal investigation, which exhibit the varieties of interest that grow out of the complicated business of commercial communities. Originally, the owners of the vessel and cargo, and the designated voyage, were alone the subjects of the contract; but, as commerce has been extended, the rights of persons other than those of the specific owners of the property have become involved in the results of the voyages. In consequence of it, the law of insurance has been most reasonably extended to embrace within its provisions cases where the parties, having no ownership of the property, have a lien upon it, or such an interest connected with its safety and its situation as will cause them to sustain a direct loss from its destruction, or from its not reaching its proper place of destination. Such rights have received protection, and the expectation of profits, the loan upon mortgage or respondentia, the advances of a consignee, an agent or factor, and the

¹ The reporter's statement has been abridged; and, in reprinting the opinion, passages not bearing on insurable interest have been omitted. — ED.

commissions of a master or supercargo, are all now the well recognized subjects of insurance.

The contract before us is that of an insurance on the expected commissions of a merchant upon goods on shipboard, in the progress of the voyage, and which are consigned to him for sale, but upon which he has made no advances, nor accepted bills on the faith of the consignment. This presents a case which has not yet been decided, and the question is, whether it is embraced within the principles by which contracts for the insuring of profits, and of expected freight, and commissions of supercargoes and masters, have been held valid; or whether it is to be classed with wager policies, on the ground that it is a case of mere expectation, not coupled with an interest.

The facts spread before us are these: The plaintiff is a partner in a mercantile house in Antwerp, which receives the goods of foreign merchants to sell on commission. The owners of the brig "Progress" had despatched her to India for a cargo, to be carried to and sold in Europe; and if a certain cargo was procured it was to be carried to Antwerp. Such a cargo was obtained, and the vessel sailed for that port. While at Manila the supercargo wrote to his owners.¹ On receiving the letters, they wrote, it would appear (so far as we can gather from the correspondence, the whole not being produced on the trial), to the house in Antwerp, consigning the cargo to them. They also wrote to the master and supercargo,² informing them of the consignment, and directing them to their consignees for instructions. They also gave discretionary orders to the consignees to send the vessel to Holland, if the market there was preferable to that at Antwerp. With the knowledge of these facts, and that the vessel had been heard from at St. Helena, Putnam, the partner in Boston, procured insurance on the commissions the house would receive if the vessel should arrive, as on a voyage from St. Helena to Antwerp.

There is, then, a direct consignment of the cargo to the plaintiff's house; the commissions will be earned if the vessel arrives and the cargo is sold there; and if she is lost on her way, or the voyage to Antwerp is defeated by one of the perils insured against, the plaintiff will sustain a certain loss.

The case, in its essential features, is like that of an insurance on profits, depending on the arrival of the vessel at a particular port, and founded on like expectation. It partakes not of the nature of wager; for, in the event of the wager, independent of the policy, the party insured has nothing to lose. Here, if there were no insurance, the party would lose his commissions, if there should be a loss of the cargo.

The subject of an interest like the present is treated of in the cele-

¹ This letter contained the invoice and bills of lading. The bills of lading stated that the cargo was shipped for account of the owners (naming them), and bound for Antwerp, to be delivered to the master and the supercargo (naming them) or their assigns. — ED.

² This letter was received after the loss. — ED.

brated case of *Lucena v. Craufurd*, 2 New Rep. 292. In the opinion, in which seven of the judges concurred, it was said that "a vested interest is not necessary to give the right of insuring. The commissioners had a contingent interest; and supposing the intentions of the crown to remain unaltered, nothing stood between them and the vesting of that contingent interest but the perils insured against. It is stated that they cannot be entitled to an indemnity; for they had nothing to lose. But in fact they lost, by the perils of the sea, what but for those perils would have vested in them absolutely. At the time both of the insurance and the loss, their title, like that of a consignee, was inchoate; occupancy was necessary to perfect it. It is true that their interest is revocable. But so is that of a consignee. The owner may at any time appoint another consignee or agent; he may change his intention in the course of the voyage. It is very common to direct the captain to touch at particular ports for new instructions. The powers of a consignee, therefore, are not more permanent than those of the commissioners." And in page 301, Mr. Justice Lawrence observed that "insurance is a contract, by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other, that he shall not suffer loss, damage or prejudice, by the happening of the perils specified, to certain things which may be exposed to them. If this be the general nature of the contract of insurance, it follows that it is applicable to protect men against uncertain events which may in any wise be of disadvantage to them; not only those persons to whom positive loss may arise by such events occasioning the deprivation of that which they may possess, but those also who in consequence of such events may have intercepted from them the advantage or profit which but for such events they would acquire according to the ordinary and probable course of things."

This reasoning is sound and sagacious. It introduces no novel principles into the law; it advances no position hazardous to regular trade, though its tendency is to enlarge the legitimate subjects of insurance. We cannot but be struck with the pointed bearing which the foregoing remarks have on the case at bar, and we feel justified in making a practical application of them. See also the cases of *Flint v. Le Mesurier*, Park on Ins. 403; *Barclay v. Cousins*, 2 East, 544; *Law v. Goddard*, 12 Mass. 112; *De Forest v. Fulton Fire Ins. Co.*, 1 Hall, 84.

There is also a case in our own books where the right of the consignee to effect insurance on his commissions is mentioned without expressing any doubt in regard to it. *French v. Hope Ins. Co.*, 16 Pick. 397. This was an insurance on profits on merchandise. It was held that the plaintiff had a substantial interest at risk; for, if the ship had arrived safely, he would have been entitled to profits, and they depended on her safe arrival. The learned judge who delivered this opinion says, "The objection principally relied upon is that the plaintiff was not the owner of the merchandise; that he could not have insured the goods, and *a fortiori* not the profits on the goods which did not

belong to him. The rule, if received to the extent laid down, would prevent the insurance of commissions on goods consigned to the plaintiff. If, in the case of a consignee, the goods should arrive safely, he would be entitled to commissions on the sale. So, in the case at bar, if the goods had arrived, the plaintiff would have realized a profit. The cases seem to us to be perfectly analogous. In each the party claiming profits or commissions has either to run the risk and bear the loss himself, or to get insurance against marine risk. In each case he has a real interest to protect."

The case at bar, indeed, stands on the very borders of the line — which may be deemed almost shadowy — where interest ends and expectation begins; but the line, however thin, must be drawn somewhere, or the difference between wager policies and those coupled with an interest must cease. And upon consideration we are of opinion that the regular consignee of goods has an interest in his expected commissions equivalent to that of expected profits, and that such commissions are the lawful subject of insurance.

*Judgment on the verdict.*¹

BRIGGS v. THE MERCHANT TRADERS' SHIP LOAN AND INSURANCE ASSOCIATION.

QUEEN'S BENCH, 1849. 13 Q. B. 167.

COVENANT. The declaration averred that the plaintiff was owner of the ship "Joseph Alexander," lying at Yarmouth, on which were then goods previously loaded, belonging to William Dawson and John Woods; and that there was due to the plaintiff, as such owner of the ship, by the owners of the goods in respect thereof as such owners, £700, for certain average expenses, being the average expenses mentioned in the policy thereafter mentioned, that is to say, for contribution to certain salvage of the ship and of the goods whilst the same were on board the ship, paid by the plaintiff to the salvors thereof: the declaration then averred that plaintiff, at the time of making the policy, up to the time of the loss, had a lien on the goods for the amount of the average expenses and contribution, and during all that time was interested in the goods, to wit, to the amount insured. The declaration then set out a policy of insurance under the seal of the defendants,

¹ In *Seagrave v. Union M. Ins. Co.*, L. R. 1 C. P. 305, 320 (1866), WILLES, J., for the court, said: "We are not aware that it has ever been held that a mere agent, without possession or lien, has an insurable interest to the extent of the value of the goods, simply because his name appears in the bill of lading instead of that of his principal; and the general rule is clear, that, to constitute interest insurable against a peril, it must be an interest such that the peril would by its proximate effect cause damage to the assured." — Ed.

in nearly the ordinary form, in which the policy was declared to be on average expenses per "Joseph Alexander." The count then averred a total loss of the ship and goods; and that the plaintiff thereby lost his lien on the goods, and the sum so due for average expenses and contribution. Breach, non-payment.

Pleas. 1. *Non est factum*. 2. That there was not due or owing, in respect of the goods, to the plaintiff, for average expenses, the said sum or any part thereof, *modo et formâ*. 3. That the plaintiff was not interested in the goods or any part thereof, *modo et formâ*. 4. A traverse of the plaintiff having lost the sum, *modo et formâ*, on which issues were joined. There were other issues, of which the affirmative lay on the defendant, and on which nothing turned.

On the trial, before Pollock, C. B., at the Norfolk Spring assizes, 1848, it was proved that, before the policy was made, the "Joseph Alexander" had sailed, with the goods mentioned in the declaration on board, bound to Grimsby and Goole; she met with a collision, and was abandoned by her crew; she was found derelict; and the ship and cargo were brought safe into Yarmouth. The plaintiff, who was owner of the vessel, claimed her; and the Court of Admiralty ordered the ship and cargo to be given up to him on his entering into a recognizance as a security for the salvage. The plaintiff then effected the policy, intending thereby to insure the sum he might have to pay under the recognizance. The ship and cargo were totally lost by the perils of the sea, on the voyage from Yarmouth to Goole; and the plaintiff under his recognizance was obliged to pay £700 to the salvors. The Lord Chief Baron expressed an opinion that the plaintiff had an insurable interest, as having a lien: and the plaintiff had a verdict.

Prendergast obtained a rule *nisi* for a new trial on the ground of misdirection, or to arrest the judgment.

Byles, Serjt., *Palmer*, and *Unthank* showed cause.

Prendergast and *O'Malley*, *contra*.

Cur. adv. vult.

LORD DENMAN, C. J., delivered the judgment of the court.

The question in this case was, whether the plaintiff had an insurable interest in the goods on board the "Joseph Alexander." It was contended for the plaintiff that the interest arose from average expenses in respect of the goods, and that the plaintiff had a lien upon them in respect of those expenses. The goods were shipped, and the vessel sailed upon a voyage from Yarmouth to Grimsby and Goole. Shortly after she sailed, she was struck by another vessel, and abandoned by her crew and brought back to Yarmouth by some persons who claimed and received salvage for bringing her back, which was paid by the plaintiff, the owner of the "Joseph Alexander;" and the insurance was in respect of the average proportion of the salvage expenses payable, as the plaintiff contended, by the owners of the goods.

The first question was, whether the owners of the goods were bound to contribute to the salvage at all. By Stat. 9 & 10 Vict. c. 99. s. 19,

the salvors of a vessel with goods on board are entitled to reasonable compensation for their trouble; and the vessel and goods are to remain in the custody of the officer of the Customs until the salvage is paid or security given. The plaintiff was therefore obliged to pay or secure the salvage before he could regain possession of the ship which had the goods on board. There was no decree for salvage; but the amount appears to have been ascertained by agreement.

It was said by Lord Ellenborough in *Cox v. May*, 4 M. & S. 159, that general average was analogous to the case of salvage, and that the persons to contribute to the salvage are those who would have borne the loss had there been no rescue, and who reap the benefit of that rescue. In the present case the owners of the goods, who would have lost them with the ship but for the salvage, have had the benefit of saving their goods, and would, according to the judgment of Lord Ellenborough, be bound to contribute, as in the case of general average. This view of the case is supported by several authorities cited from foreign jurists in Mr. Arnould's "Treatise on Marine Insurance," vol. ii. p. 915.

Assuming, then, that the owners of the goods were bound to contribute to the salvage as in the case of general average, the next question is, whether the plaintiff, who had paid the whole amount of the salvage, had a lien upon the goods for the amount of the contribution. Whatever doubts may have existed formerly, it seems now to be settled that the owner of the ship has a lien upon the cargo for general average. This was the opinion of Lord Tenterden intimated in *Abbott on Shipping*, 507, 8th ed., and expressed in *Scaife v. Tobin*, 3 B. & Ad. 528, and is in accordance with the decisions in the Courts of the United States, which are mentioned in Mr. Arnould's "Treatise on Insurance," vol. ii. pp. 949, 950. But, as the contribution to salvage is in the nature of general average, it is subject to the same incidents, and is in effect the same; and we therefore think that the plaintiff, as owner of the ship who had paid the whole of the salvage, and had a claim against the owner of the goods for contribution, was entitled to a lien on the goods, and consequently had an insurable interest in respect of such lien.

The rule, therefore, will be discharged.

*Rule discharged.*¹

¹ Compare *Buchanan v. Ocean Ins. Co.*, 6 Cow. 318 (1826).

In *Insurance Co. v. Baring*, 20 Wall. 159, 162, 163 (1873), CLIFFORD, J., for the court, said: "Attempt is made in argument to maintain that the plaintiffs had no insurable interest in the bark unless it be assumed that it was created by a bottomry bond, but the court is entirely of a different opinion, as it is alleged in the declaration that the advances were made to equip the vessel and to procure for her a cargo in the voyage from a foreign port to the port of destination. Founded as the declaration is upon the policy of insurance it must be construed in connection with the policy. By the terms of the policy the insurance is upon the bark, her tackle, and apparel, which is the proper language to be employed in a case where the insured had an interest in the vessel.

"Advances made on the credit of a ship for necessary repairs or supplies in a for-

FOLSOM ET AL. v. MERCHANTS' MUTUAL MARINE
INS. CO.

SUPREME JUDICIAL COURT OF MAINE, 1854. 38 Me. 414.

ON exceptions from *Nisi Prius*, APPLETON, J., presiding.

Assumpsit on a policy of insurance made to the plaintiffs on May 17, 1852, "on account of whom it may concern, loss payable to them," on the outfits of schooner "Pilot," for a fishing voyage to the "Banks," and back to port of discharge in the U. S.

The writ contained several counts, one of which averred that the insurance would be collected by plaintiffs, as agents and merchants, for owners of said "Pilot," to whom the same may in law belong, subject to the plaintiffs' lien thereon.¹ . . .

When the plaintiffs had introduced all their evidence, a nonsuit was ordered on motion of defendants, because the suit could not be maintained in the name of the plaintiffs, and because of a deviation in the voyage.

The plaintiffs excepted.

J. A. Peters, in support of the exceptions.

Rowe and Bartlett, contra.

TENNEY, J. Two material questions are presented by the exceptions. First, had the plaintiffs any insurable interest in the property described by the policy at the time of its execution, and at the time of the loss of the property? Second, had the plaintiffs so conducted in reference to the property that they were guilty of a deviation in the voyage?

1. The attempted insurance was upon the outfits of the fishing schooner "Pilot," bound to the Banks. This does not embrace goods as a part of the cargo, but in a fishing voyage consists principally in the apparatus and instruments necessary for the taking of fish, etc., and the disposing of them, when taken, in such manner as to bring home the produce of the adventure. *Hill v. Patten*, 8 East, 373. In cod fishing voyages as they are conducted in the United States, the outfits consist of the great and the small general. The great general is supplied wholly by the owners, and includes the salt for curing the fish, the bait, premium of insurance and some other small articles and

eign port create a maritime lien upon the ship, and it is well-settled law that a maritime lien is a *jus in re*, and that it constitutes an incumbrance on the property of the ship which is not divested by the death or insolvency of the owner. *The Young Mechanic*, 2 Curtis, 404; s. c. 3 Ware, 58; 1 Parsons's Maritime Law, 489; 3 Kent (11th ed.), 170; General Smith, 4 Wheat. 438. Such a lien may be enforced by a process *in rem*, which is founded on a right in the thing, the object of the process being to obtain the thing itself, or a satisfaction out of it, for some claim resting on a real or quasi proprietary right in the thing. *The Commerce*, 1 Black, 580; *Buck et al. v. Insurance Co.*, 1 Pet. 164; *The Maggie Hammond*, 9 Wall. 456. Liens of the kind constitute an insurable interest." — ED.

¹ The reporter's statement of the evidence has been omitted. — ED.

expenses. The small general is supplied by each man for himself, and consists mostly of the provisions and fuel. The insurable interest of the owners accordingly consists of their interest in the vessel, and the great general, and their proportion of the fare or stock. 1 Phil. on Ins. 145, 146.

The master of the vessel testified that Partridge was the owner of the vessel; that she was fitted by the plaintiffs; outfits came from their store in Bucksport; they have a lien on the voyage and outfits, till they get their pay out of the same; such was the understanding; and on cross-examination he stated, "I obtained the supplies of the plaintiffs as agent, and on the credit of Partridge. I told one of the plaintiffs that they might have a lien on the outfits and voyage for their pay, for that was customary; took no bill of outfits. That was the amount of conversation about the lien. Mr. Partridge, I suppose, was also liable for the goods."

From the evidence of the plaintiffs, the goods constituting the outfits were sold to the owner of the vessel unconditionally, subject only at most to a lien thereon as security for payment for the price under the contract. The evidence does not show what was designed to be the nature and extent of the lien, any further than the word itself imports. Lien has been defined to be the right of one man to retain that which is in his possession, belonging to another, until certain demands of him the person in possession are satisfied. *Hammond v. Barclay*, 2 East, 235; *Story's Agency*, § 352. And it is said by Judge Story, in the same work, § 356, that when liens arise by contract express or implied, they are more properly pledges than liens. And it is an universal principle that a voluntary parting of the goods will amount to a waiver or surrender of the lien.

In *Seamans v. Loring et al.*, 1 Mason, pp. 138 and 139, it is said by Judge Story, "a lien may be acquired for advances by a mere possession, under a contract for that purpose, but it is of the very essence of the lien on goods, that possession accompanies it." "A voluntary parting with the goods will amount to a waiver or surrender of the lien." *Brackett v. Hayden*, 15 Maine, 347.

The outfits, from their nature and character, were expected to be worn out by use, and to be so disposed of that their identity would not be preserved. And when they were suffered to go into the possession of the purchaser, and were surrendered by the plaintiffs, if it was at the moment that the sale itself was perfected, the lien did not attach; if it was after the purchase had been concluded, the lien was surrendered. It does not appear that there was any agency of the plaintiffs designed to maintain their possession, and there was no insurable interest in them after the owner of the vessel had the entire possession.

This lien, from the nature of the property and its intended use, is unlike that secured by contract, and to attach to property designed to be modified in its form, without losing its identity, for the purpose of being made more valuable; in which case the surrender of the posses-

sion is qualified, and for an object entertained by the parties to the contract, when it was made, and not inconsistent with the constructive possession of the property. *Bradeen v. Brooks*, 22 Maine, 463.

It is averred in the new count filed by leave of court that the sum covered by the insurance will be collected by the plaintiffs, as agents and merchants, for the owners of the vessel, to whom the same may in law belong, subject to the plaintiffs' lien thereon. There is nothing in the case showing that the insurance was intended for the benefit of the owner of the vessel by the plaintiffs, professing to act as his agents, or that they were ever employed for such a purpose. The policy purports to be insurance only of the plaintiffs' interest in the outfits, and it can cover nothing beyond. *King v. State Mut. Fire Ins. Co.*, 7 Cush. 1; *Cushing v. Thompson*, 34 Maine, 496.¹ . . .

*Exceptions overruled. Nonsuit confirmed.*²

SHEPLEY, C. J., and HOWARD, J., concurred in the result only. HATHAWAY, J., concurred.

WORTHINGTON *v.* BEARSE AND OTHERS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1866. 12 Allen, 382.

CONTRACT upon a policy of insurance for \$2,000, payable to the plaintiff in case of loss, issued by the defendants to David P. Nickerson, upon seven eighths of the schooner "William B. Castle," for one year from April 8, 1860.

It was agreed, in the Superior Court, that Nickerson had mortgaged his interest in the schooner to the plaintiff; and afterwards, on the 11th of October, 1860, Nickerson conveyed thirteen sixteenths of the schooner to George T. Lovell, receiving notes of Lovell, Atwood, & Co. in payment, and Nickerson was to pay to the plaintiff what was then due to him, namely, about \$4,000. About the 20th of the same month, Lovell reconveyed said interest to Nickerson, and took back the notes which had been given in payment therefor, none of them having become due. This interest was reconveyed to Nickerson because he could not carry out his contract to obtain a release from the plaintiff, as the latter would not accept said notes in payment thereof; and on the part of Lovell, because a person who was to be her master was dissatisfied with her; so that the parties acted from different motives, and each party was ignorant of the motives of the other. Upon both of these transfers, the papers were changed in the custom-house. The schooner was totally lost on or about the 16th of March, 1861.

¹ The omitted passages were to the effect that there had been a deviation, and that for this reason also the plaintiffs could not recover. — ED.

² Compare *Hancox v. Fishing Ins. Co.*, 3 Sumner, 132 (1837). — ED.

Nickerson then owned seven eighths of her, subject to the mortgage to Worthington.

On these facts judgment was rendered for the plaintiff for the amount of the policy and interest; and the defendants appealed to this court.

G. Marston, for the defendants.

T. M. Hayes and *J. D. Howe*, for the plaintiff.

BIGELOW, C. J. We entertain no doubt that the defendants are liable for the full amount insured by the policy. This liability rests upon two grounds, either of which is sufficient to sustain the plaintiff's claim.

In the first place, on the facts stated, the alleged sale by the assured of thirteen sixteenths of the vessel covered by the policy was incomplete, and never took effect so as to extinguish his insurable interest therein. One of the essential stipulations of the agreement of sale was not complied with. The vendor expressly agreed to pay the amount due on the mortgage of his share of the vessel, and to procure a release from the mortgagee. This, the case finds, he did not and could not do. Until this part of the contract was complied with, the vendee had a right to avoid the sale and rescind the whole bargain. The delivery of the bill of sale passed a title only at the election of the vendee. He might, within a reasonable time after the failure of the assured to fulfil his contract of sale by procuring a release of the mortgage on the vessel, elect to restore the legal title and recover back the consideration of the transfer. During this time the plaintiff had a continuing and subsisting interest in the vessel. The transfer could not be regarded as absolute and complete, but only conditional on a compliance with the terms of the bargain. A mere transfer of the legal title of a vessel does not extinguish a right to recover on a policy, if the party making the transfer still retains any right or interest in the vessel or her proceeds. *Gordon v. Mass. Ins. Co.*, 2 Pick. 249; *Lazarus v. Commonwealth Ins. Co.*, 19 Pick. 81; *Wilson v. Hill*, 3 Met. 66, 71. The insured clearly had an interest in the preservation of the vessel until it was certain that the contract for her sale had become complete, and the title to her had vested absolutely in the vendee. In this view of the facts, the insured did not forego his right to recover on the policy pending the transactions in relation to the transfer of the vessel.

But if it were otherwise, and it had appeared that the sale of the vessel was complete and absolute, so that for a time the insured had parted with his insurable interest, his right to recover on the policy was not gone forever. It was only suspended during the time that the title to the vessel was vested in the vendee, and was revived again on the reconveyance to the insured during the term specified in the policy. The insurance was for one year. There was no stipulation or condition in the policy that the insured should not convey or assign his interest in the vessel during this period. The contract of insurance was absolute to insure the interest of a person named in a particular subject for a specific time; for this entire risk an adequate premium was paid, and

the policy duly attached, because the assured at the inception of the risk had an insurable interest in the policy. So, too, at the time of the loss, all the facts necessary to establish a valid claim under the policy existed. The execution of the policy, the interest of the assured in the vessel, the due inception of the risk, a compliance with all warranties, expressed and implied, and the loss by a peril insured against, are all either admitted or proved. Upon what legal ground, then, can it be maintained that the policy has become extinct? No fact is shown from which any inference can be made that by the alienation of the title to the vessel during the time named in the policy, the risk of the insurers upon the subsequent re-transfer of the vessel to the assured was in any degree increased or affected, or that any loss, injury, or prejudice to the underwriter was occasioned by the fact that the absolute title to the vessel was temporarily vested in a third person. On the contrary, such temporary transfer of title would seem rather to have inured to the benefit of the insurers, because they have received a premium for a risk from which they were exempted during a portion of the time designated in the policy. In the absence of any express stipulation, as in the policy declared on, no return premium could be claimed by the assured by reason of any temporary suspension of the risk or withdrawal of the subject insured. The policy had attached, and the risk was entire. During the time that the vessel was owned by a person other than the assured, no loss could happen which would be covered by the policy. The insured, having no interest, could sustain no loss. If a total loss occurred during the period, the insurable interest would become extinct. Upon a retransfer of title to the insured, the policy would revive only to cover the renewed interest thereby acquired, and not to render the insurers liable for losses which may have happened during the intermediate period. The sole effect would be to suspend the risk for the time during which, by reason of the transfer, the assured had no interest in the subject insured, and to revive it as soon as the original interest was revested in him. The transfer of the vessel rendered the policy inoperative, and not void. It could have no effect while the insured had no interest in the subject insured. But when this interest was revived or restored during the term designated in the policy, without any increase or change of risk or other prejudice to the underwriter, there seems to be no valid reason for holding that the policy has become extinct. Inasmuch as neither the subject nor the person insured is changed, and the risk remains the same, the intermediate transfer is an immaterial fact, which can in no way affect the claim under the policy.¹ . . .

*Judgment for the plaintiff.*²

¹ The omitted passage suggested analogies, but did not deal directly with insurable interest. — Ed.

² See *Reed v. Cole*, 3 Burr. 1512 (1764), a case showing, among other things, that the original interest and the interest at the time of loss need not be identical.

In *Howard v. Albany Ins. Co.*, 3 Denio, 301, 303 (1846), a fire insurance case,

SHAW ET AL., APPELLANTS, v. ÆTNA INS. CO., RESPONDENT.

SUPREME COURT OF MISSOURI, 1872. 49 Mo. 578.

APPEAL from St. Louis Circuit Court.

Morris and Peabody, for appellants.*L. Eaton*, for respondent.

ADAMS, J. This was an action on a policy of insurance issued by defendant. The plaintiffs filed a second amended petition, to which the defendant demurred; the demurrer was sustained and judgment given thereon against the plaintiffs, from which they appealed to the general term, where the judgment of the special term was affirmed, and the plaintiffs have appealed to this court.

The petition substantially sets forth that the plaintiffs being the owners of five barges of ice, on the upper Mississippi River, consigned the same to Scherholtz & Klinesmith, of the city of St. Louis, to be sold by them on commission; that the plaintiffs ordered the consignees to have the ice insured, and that the consignees undertook the agency and agreed to have the ice insured for plaintiffs. Instead of insuring the ice in the names of the plaintiffs, they made the insurance in their own names, to indemnify themselves in case of loss, as they would be liable for such loss, having disobeyed the instructions of their principals in not procuring insurance in their names. One of the barges of ice was lost by a peril provided against, and the consignees assigned the policy to plaintiffs, and this suit was brought by them as assignees for the value of the lost cargo. The alleged ground of demurrer was that the consignees had no insurable interest in the ice.

A consignee, as such, has no insurable interest in goods consigned to him for sale on commission, unless it be to the extent of the commissions or profits, he expects to derive from such sales. This he has a right to insure regardless of any instructions from the consignor. But if he accepts a consignment with instructions from his principals to insure for their benefit, it becomes his duty to insure; and if he neglects to do so and a loss occurs, he is liable to them for the amount. The consignees, in the case under consideration, instead of taking out a new policy in the names of their principals, had the risk entered on

Bronson, C. J., in a dissenting opinion, said: "When the assured owns the property at the time the insurance is effected, a subsequent transfer of his interest cannot render the policy void. The contract will be of no value to the assured, for the reason that there is no longer anything upon which it can operate; but the subsequent transfer cannot infuse any vice into that which was originally a valid agreement. I agree that in fire policies the assured must have an interest at the time of the loss, as well as when the contract is made. (*The Sadlers Company v. Badcock*, 2 Atk. 554; *Lynch v. Dalzel*, 3 Bro. P. C. 497; 3 Kent, 371.) And so, if he has parted with all his interest before the loss happens, he cannot recover. But he does not fail on account of any vice in the contract, but for the reason that he has sustained no loss or damage."

—ED.

their own policy in their own names, as a convenient mode of indemnifying themselves against such damage as they might suffer in not insuring in the names of their principals. I think they had the right to thus protect themselves, and to this end they ought to be considered as interested to the full value of the ice. See *Bartlett et al. v. Walter*, 13 Mass. 297; *Oliver v. Green*, 3 Mass. 133; *Herkimer v. Keil*, 27 N. Y. 163.

After being ordered to insure, the consignees might have considered themselves trustees for the consignors and insured in their own names for them. My impression is that in such case the "positive stipulation of the underwriter to pay the loss to the agent would never be rendered void by the inability of the party really assured to sustain an action on the policy in his own name." (See 2 Duer Ins. 7, § 6.) In such case the policy ought to inure to the benefit of the principal, and the agent or consignee be treated as a trustee of an express trust, and the amount of recovery would go to his principal. But whether he is a trustee of an express trust or not, he is nevertheless a trustee for the consignor; and in a suit upon the policy, in the name of the consignee, this may be shown in order to show that he had an insurable interest as trustee for his consignor. The demurrer in this case ought to have been overruled.

*Judgment reversed and cause remanded.*¹

AMSINCK v. AMERICAN INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1879. 129 Mass. 185.

THREE actions of contract upon policies of marine insurance. At the trial in this court, before MORTON, J., the jury returned a verdict for the plaintiffs; the case was reported for the consideration of the full court, and appears in the opinion.

A. S. Wheeler and *E. W. Hutchins*, for the defendants.

L. S. Dabney and *R. H. Dana, Jr.*, for the plaintiffs.

ENDICOTT, J. Upon the facts reported, the court is of opinion that Machado had an insurable interest in the vessel at the time the policies

¹ In *Silloway v. Neptune Ins. Co.*, 12 Gray, 73, 89 (1858), BIGELOW, J., for the court, said: "By the charter party under which the plaintiffs hired the vessel, it appears that they were to pay the owners for the round voyage to Guayama and back again to a port in the United States the sum of seven hundred dollars, and they also thereby stipulated to insure the freight for the said sum of seven hundred dollars. Under this provision it was the right and duty of the plaintiffs to procure insurance on the freight or charter money for the use and benefit of the owner. They were his agents to procure insurance on the freight, and can well maintain the action in their own names. 2 Phil. Ins. §§ 1958, 1965. *Munson v. New England Marine Ins. Co.*, 4 Mass. 88. This was the clear intent of the parties. The plaintiffs had no insurable interest in their own right in the freight. As the vessel was lost by perils insured against during the performance of the voyage specified in the charter and before any freight was due, there was a total loss of this subject of insurance." — ED.

attached, even if we assume that they took effect on July 5, 1876, the day of their date. On that day, the plaintiffs, as agents for Machado, made an oral agreement in New York with the owners of the vessel for her purchase for the sum of \$11,000, payable on delivery of a proper bill of sale; and, having previously ascertained that the defendants would insure her, they gave directions to have the insurance closed. The policies were written on that day; the precise time of their delivery does not appear. The oral contract to purchase was reduced to writing and signed by the plaintiffs and the owners on July 7; and a portion of the purchase money was paid on that day. Possession was taken by Machado, the balance due was paid, and a bill of sale was duly executed to a third person in trust for Machado, who was a foreigner.

It is conceded by the defendants that Machado was the only person whose interest was insured, as appears by the declarations and the policies. But they contend that he had no insurable interest on July 5, for at that time he had only an oral contract for the purchase of the vessel; and that such a contract, being within the statute of frauds, and incapable of being enforced, gives no insurable interest.

But the oral contract to purchase was not void or illegal by reason of the statute of frauds. Indeed, the statute presupposes an existing lawful contract; it affects the remedy only as between the parties, and not the validity of the contract itself; and where the contract has actually been performed, even as between the parties themselves, it stands unaffected by the statute. It is therefore to be "treated as a valid subsisting contract when it comes in question between other parties for purposes other than a recovery upon it." ¹ *Townsend v. Hargraves*, 118 Mass. 325, 336; *Cahill v. Bigelow*, 18 Pick. 369; *Beal v. Brown*, 13 Allen, 114; *Norton v. Simonds*, 124 Mass. 19. See also *Stone v. Denison*, 13 Pick. 1. Machado had under his oral agreement an interest in the vessel, and would have suffered a loss by her injury or destruction. *Eastern Railroad v. Relief Ins. Co.*, 98 Mass. 420. This interest he could have assigned for a valuable consideration, and, if he had assigned it, all the rights afterwards perfected in him would have enured to the benefit of his assignee. *Norton v. Simonds*, *ubi supra*. The case of *Stockdale v. Dunlop*, 6 M. & W. 224, relied upon by the defendants, does not sustain their position, for reasons which are stated in *Townsend v. Hargraves*, *ubi supra*.¹ . . .

As we decide that Machado had an insurable interest in the ship when the policies attached, and that it was open to the defendants to show that there was unreasonable delay at Bangor, the cases must stand for trial upon the questions of delay at New York and at Bangor.

Verdicts set aside.

¹ Passages dealing with unreasonable delay have been omitted. — *Ed.*

MERCHANTS' MARINE INSURANCE CO., APPELLANTS, v.
RUMSEY AND JOHNSON, RESPONDENTS.

SUPREME COURT OF CANADA, 1884. 9 Can. S. C. 577.

APPEAL from a judgment of the Supreme Court of Nova Scotia, discharging a rule *nisi* to set aside a verdict of \$1,871.93, rendered by WETHERBE, J., without a jury, in favor of the respondents.¹

Stephen C. Tupper and William Mouzar chartered the schooner "Mabel Claire" for a trading voyage from Nova Scotia to Labrador and back, and not having sufficient means themselves to load the vessel with merchandise for the voyage, made an arrangement with the plaintiffs to supply them with a cargo. Application for this arrangement was first made to the plaintiffs at Liverpool, where the vessel then was, by Tupper, through a friend of his, who had agreed to give him a certain amount toward his supplies, and that such portion should stand as security to the plaintiffs that they should be paid first. The arrangement was not then completed, but Tupper put goods on the vessel at Liverpool to the amount of \$1,200, and took the vessel to Halifax, where the arrangement with the plaintiffs was completed, by which it was agreed between Tupper and Mouzar and the plaintiffs, that the plaintiffs should furnish the greater part of the cargo for the trading voyage, and were to have complete control of all the goods put on board the vessel until it should return, when the return cargo was to be disposed of by the plaintiffs, who were to pay themselves for their advances, and pay over any balance remaining to Tupper and Mouzar. In trading on the voyage Tupper and Mouzar were not to dispose of any goods on credit, but were to bring back such goods as they could not dispose of so as to obtain a return cargo in lieu thereof. Accordingly the plaintiffs put on board the vessel at Halifax merchandise to an amount exceeding \$6,000, and, after having done so, and upon the day on which the vessel sailed from Halifax, effected with the defendants the policy of insurance sued upon to the amount of \$2,000, on merchandise under deck, from Halifax to Labrador and back to Halifax on a trading voyage — time not to exceed four months — shipped in good order and well conditioned, on board schooner "Mabel Claire," beginning the adventure upon the said goods and merchandise from and immediately following the loading thereof on board said vessel, and to continue and endure until the said goods should be safely discharged and landed. On the 13th July, 1878, the vessel sailed on her voyage with Mouzar as master, and Tupper as supercargo. In the course of the voyage they disposed of all the goods which had been laden on the vessel, with the exception of goods to the value of about \$1,000, with which on board, together with a large return cargo, the vessel, when

¹ The following statement has been taken from the opinion of GWYNNE, J. — ED.

on her return voyage to Halifax, within the four months named in the policy, together with her cargo, was lost by the perils insured against.

Hutton, for appellants.

Graham, Q. C., for respondents.

RITCHIE, C. J.¹ Two points were raised in this case. First, Did the policy cover only the goods laden at Halifax? Second, Have the respondents proven sufficient interest to entitle them to recover? As to the first point: This case seems to me abundantly clear; the policy was, in my opinion, unquestionably intended to cover, during the trading voyage from Halifax to Labrador and back, all "the merchandise under deck" on board said vessel during the period mentioned in the policy, viz., for four months from the 13th July, 1878, shipped in good order, and was not confined to the goods shipped at Halifax and brought back to Halifax. The policy dated 13th July, 1878, insures to the extent of \$2,000 on the undermentioned property, from Halifax to Labrador and back on trading voyage—time not to exceed four months,—shipped in good order and well conditioned, on board the schooner "Mabel Claire."

Then what is the undermentioned property? Description of goods insured; merchandise under deck; amount, \$2,000; rate, 5 per cent; premium, \$100, to return two (2) if risk ends 1st October and no loss claimed.

Trading voyages are well understood. The goods are constantly shifting. The idea is simply to barter the goods taken from Halifax between that place and Labrador, and to bring back to Halifax the goods obtained by such bartering, and the goods insured were all merchandise under deck on the trading voyage from Halifax to Labrador, and back, irrespective of where the same may be taken on board, whether on the voyage from Halifax or on its return, provided they were merchandise under deck on the trading voyage. I can discover nothing whatever to limit the subject-matter of the insurance contemplated by this policy to the original cargo on board at Halifax. There is nothing, in my opinion, in the terms used, on the most strict construction of language, to justify such a conclusion—if we take the nature of the voyage—"a trading voyage"—the termini, "Halifax and Labrador and back to Halifax," that it is to be an insurance on the trading voyage from Halifax to Labrador and back to Halifax, the object of such a voyage being for trade and barter, that is, the exchange from time to time, and from place to place during the continuance of the voyage, of the delivered cargo for a return cargo, which, from the coast between Halifax and Labrador, we may take historical, if not judicial, notice, would be a fish cargo. Then, the duration of the risk—four months, the rate, 5 per cent,—everything, in my opinion, indicates that it was never intended by the parties that there was to be an insurance on a single passage from Halifax to Labrador, nor can it be supposed that it was contemplated that the cargo taken in Halifax

¹ After giving the history of the litigation and quoting the policy.—Ed.

would be brought back in specie as shipped there. On the contrary, the cargo brought back would be obtained by barter or sale of the outward cargo, and from this a return cargo, and therefore unless the term "and back" referred to such return cargo it would be meaningless. "From Halifax to Labrador" fix, in my opinion, merely the termini of the trading voyage, and the subject-matter of insurance, "merchandise under deck," "if shipped in good order and well conditioned," on such "trading voyage."

There is no language in this policy such as "beginning the adventure from the loading thereof on board at Halifax," or any language intimating that the policy is only to attach on goods loaded at that port, which is the *terminus a quo* of the trading voyage insured, viz., "from Halifax to Labrador and back," and the reason is very obvious; any such language would be utterly inconsistent with the nature of the voyage, the provisions contained in the policy, and the object the parties must have had in view in effecting the policy. Had it been the intention of the parties that the policy should be so restricted, I cannot doubt but that unequivocal language, so limiting, would have been used, and in its absence, bearing in mind the character of the voyage and the terms used, the irresistible inference is that no such limitation was contemplated.

In what in principle does this differ from the constant and every-day practice of insuring goods or stock-in-trade in a store for a given period, where the insured reproduce the same stock? Has it ever been doubted or questioned that a policy on a stock of goods covers such after acquired and substituted goods? According to defendant's contention, the return cargo in this case would not be covered at all. It cannot be supposed that either party could have contemplated that the trading voyage would be utterly fruitless, and that the goods taken from Halifax would not be used for the purpose for which they were shipped, but would be brought back to Halifax.¹ . . .

As to the second point — that the plaintiffs have no insurable interest in the goods — the evidence, I may say the uncontradicted evidence, on this point as to the transaction and the plaintiff's interest in the goods lost, is as follows: —

B. A. Rumsey, sworn: — My partner is Johnson, — Rumsey, Johnson & Co. The schooner "Mabel Claire" loaded most of cargo July, 1878. Value of cargo I think between \$9,000 and \$10,000. Had arrangement with Stephen C. Tupper to fit him out, a verbal arrangement. We were to supply most of cargo for trading voyage. We took bills of lading of it. The return cargo was to come back to us. We were to dispose of cargo and pay ourselves, and pay them the balance. It was to be a trading voyage to Newfoundland and back. The whole return cargo was to come back to us. This is the B. L. of cargo we put on board, only what we put on board. It is signed by the master of the schooner. . . . Cargo was put on board by Weir Brothers and others, which we paid for, but it is not in this B. L. Tupper put in some of

¹ Here were stated *Violett v. Allnutt*, 3 Taunt. 419 (1811), and *Barclay v. Stirling*, 5 M. & S. 6 (1816). — Ed.

the cargo himself. The whole of it, including what Tupper put in, was insured by us, and was subject to the arrangement I have spoken of.

G. R. Johnson:—Partner in R., J. & Co. I made arrangements with Tupper. He wanted supplies for a trading voyage to Labrador. Had chartered new schooner "Mabel Claire." He wanted us to supply. He applied to me at Liverpool, N. S., through a friend of his who offered to give him a certain amount toward his supplies, and that as security to us he would allow that portion to go as security as a preference that ours should be paid first. I asked him what amount. He said probably ten thousand dollars. The arrangement was not made at Liverpool. I promised to telegraph to him what we would do. When I returned, the vessel was here, and I made the arrangements for the firm with Tupper and Monzar. We were to supply them and have complete control of all the goods until they got back. They were to give no goods out on credit, and sooner than give credit they were to bring the goods back, and we would credit them with full price. They promised to bring back any goods for which they exchanged them. We were to effect insurance on them to the full extent of the cargo, and if there was not sufficient to pay everybody when they returned, we were to be paid first. They were our goods until they came back. When they went away they expected to make a profit on them. If they were successful they were to let us know what extra amount to price was needed for the benefit of the adventure.

To say that under this testimony the plaintiffs were merely unpaid vendors, with the right only of unpaid vendors, is simply to ignore the evidence in the case and the agreement which it clearly establishes. The only evidence apparently relied on in the court below as displacing the effect of this evidence is that of Rumsey, who, on cross-examination, in answer evidently to a question put to him, says:—

"If the goods had been lost on the voyage to Newfoundland without insurance, the loss, I suppose, would have been Tupper's."

I cannot see how this can possibly affect in any way the liability of the defendants to the plaintiffs. Plaintiffs had supplied Tupper, and no doubt looked to him personally for payment, as well as to the goods over which it was agreed that they should retain the control for the purpose of securing such payment. But whatever may have been the relative liabilities of the parties as between themselves, it is quite clear that the plaintiffs had such a claim on these goods supplied and shipped as on the goods acquired and shipped in good order and well conditioned during such trading voyage as would have been enforceable against Tupper, had he endeavored to dispose of them and divert the proceeds from the plaintiffs contrary to the terms of the agreement.¹

*Appeal dismissed with costs.*²

¹ Concurring opinions were delivered by STRONG, FOURNIER, HENRY (hesitating), and GWYNNE, J.J. — ED.

² See *Rhind v. Wilkinson*, 2 Taunt. 237, 243 (1810), quoted *ante*, p. 47, n. 1.

In *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383, 386, 387 (1827), STORY, J., for the court, said: "The first question arising in this case is upon the true construction of the policy itself as to the voyage insured. Is it an insurance upon the original cargo only from the time of its loading until its final discharge, or is it an insurance upon every successive cargo, which is taken on board in the course of the voyage out

and home, so as to cover the risk of a return cargo, the proceeds of the sales of the outward cargo? The argument in behalf of the defendant is, that the risk applies upon the terms of the policy only to the original cargo, laden at Alexandria. The terms of the policy are, on a voyage, 'at and from Alexandria to St. Thomas and two other ports in the West Indies, and back to her port of discharge in the United States, upon all lawful goods and merchandise laden or to be laden on board the ship, etc.; beginning the adventure upon the said goods and merchandise, from the lading at Alexandria, and continuing the same until the said goods and merchandise shall be safely landed at St. Thomas, etc., and the United States aforesaid.' It is supposed that those words tie up the adventure to the original cargo shipped at Alexandria, because the risk is to attach on the same at that port, and to continue on the same until safely landed at St. Thomas, etc., and the United States. Perhaps a very strict grammatical construction might lead to such a conclusion. But policies have never been construed in such a strict and rigid manner. The instrument itself is somewhat loose in its form, and has always received a liberal construction with reference to the nature of the voyage and the manifest intent of the parties. What is the nature of the present voyage? It is upon the face of the policy plainly an insurance upon all lawful goods, not only for the outward voyage to the West Indies, but for the homeward voyage to the United States. The underwriters must be presumed, equally with the assured, to know the nature and course of such a voyage. It is for the purpose of trade, and the exchange of the outward cargo, by sale or barter, for a return cargo of West India productions. If we could shut our eyes to the knowledge of this fact, belonging, as it does, intimately to the history and commercial policy of the nation itself, as disclosed in its laws, the whole evidence in the case furnishes abundant proofs of its notoriety. The true meaning of the policy is to be sought in an exposition of the words, with reference to this known course and usage of the West India trade. The parties must be supposed to contract with a tacit adoption of it as the basis of their engagements. The object of the clause under consideration may be thus rationally expounded, as intended only to point out the time of the commencement and termination of the risk on the goods, successively, and at different periods of the voyage, constituting the cargo. It would be pushing the argument to a most unreasonable extent, to suppose that the parties deliberately contracted for risks on a homeward voyage, on goods which, according to the known course of the trade, and the very nature of the commodities, were not, and could not be, intended to be brought back to the United States. We are of opinion that the policy was for the whole voyage round, and covered any return cargo taken on board at any of the designated ports in the West Indies. This is not like the cases cited at the bar, where a policy on goods at and from a particular port, beginning the adventure from the loading thereof, has been held not to cover goods taken on board at an antecedent port. Those are all cases of insurance upon a single passage, unaffected by any known course or usage of trade to explain the intentions of the parties."

In *Henshaw v. Mutual Safety Ins. Co.*, 2 Blatch. 99, 103 (1848), BETTS, J., for the court, said: "It was conceded, on the argument, that a policy upon an interest to be acquired after the execution of the contract is valid. This is the ordinary, and perhaps the most serviceable, class of insurances. Cargoes can be purchased and laden from port to port, on trading voyages, under the protection of policies already in existence, without waiting for the means of obtaining satisfactory insurance after the interest is acquired. The same principle applies to the changeable proprietorship of vessels."

On the topic of this section, see also:—

- Crowley v. Cohen, 3 B. & Ad. 478 (1832);
- Chase v. Washington Mut. Ins. Co., 12 Barb. 595 (1852);
- Wilson v. Jones, L. R. 2 Ex. 139 (Ex. Ch. 1867);
- Stephens v. Australasian Ins. Co., L. R. 8 C. P. 18 (1872);
- Boston Ins. Co. v. Globe F. Ins. Co., 174 Mass. 229 (1899).

And see the cases on the amount of recovery, *post.*—ED.

SECTION II.

Fire Insurance.

MCGIVNEY v. PHENIX FIRE INS. CO.

SUPREME COURT OF NEW YORK, 1828. 1 Wend. 85.

ACTION on a policy of insurance. On the 29th October, 1825, the defendants insured the plaintiff against loss or damage by fire on a two story frame building, privileged as a grocery, and on a stable and shed adjoining, situate in the city of New York, \$2,500, and on his stock of groceries, shop, furniture and fixtures, household furniture, &c., \$5,000. The plaintiff was at the time, and had been for several years, in possession of the premises. About a year previous to the destruction of the property by fire, which took place in December, 1825, he had bought the lot on which the buildings were erected, and entered into a written contract with the vendor, by which it was agreed that the plaintiff should pay the vendor for the same \$5,000, in five yearly instalments, with interest, the title not to be conveyed until all the instalments were paid. During the year preceding the fire, he had made extensive repairs on the buildings. At the time of the fire, one year's interest had been paid. After the fire, the plaintiff surrendered his contract to the vendor. The judge at the circuit ruled that the plaintiff had an insurable interest in the premises. The jury found for the plaintiff, \$5,277.17. A bill of exceptions to the opinion of the judge was tendered and signed, and the plaintiff now moved for judgment on the ground of its frivolousness.

D. Graham, for plaintiff. It is not necessary to constitute an insurable interest that the insured shall have the absolute and unqualified property of the effects insured. 2 Marsh. on Ins. 656. The plaintiff held under a contract *in presenti*. The vendor's right to the consideration money was vested the moment the contract was executed; and the destruction of the buildings would have been no bar to a bill for specific performance, nor to an action to recover the instalments. The plaintiff was liable to a direct and immediate loss by the destruction of the buildings. Phil. on Ins. 27. In a case of marine insurance, the sale of a vessel was held to vest an insurable interest, although no bill of sale was executed; and it was agreed that the vessel should continue in the names of the vendors until the whole of the purchase money was paid, part of which only was paid at the time of the sale. *Henry v. Clarkson and Van Horne*, 1 Johns. R. 385.

S. A. Foote, for defendants, denied the application of the rules regulating insurable interest in marine insurances to insurances against loss by fire. The ownership of a vessel seldom affects the risk as-

sumed, whilst that of inhabited houses very materially affects such risk. The plaintiff had a mere equitable interest in the premises. He had paid nothing towards the purchase except one year's interest, which probably did not exceed the rent he had before paid; and, for aught that appears, the jury may have allowed him in this verdict the full value of the buildings. The plaintiff did not disclose his interest at the time of the insurance.

By the Court, SAVAGE, C. J. The plaintiff is entitled to judgment. Though the fee of the premises was in another, the plaintiff was in possession under a contract of purchase, had made a payment of interest in pursuance thereof, and had made valuable improvements. He therefore had an insurable interest in the premises. The omission of disclosure of title is not presented by the bill of exceptions as a point raised at the trial, and cannot now be considered.

*Judgment for plaintiff.*¹

MARKS v. HAMILTON.

EXCHEQUER, 1852. 7 Exch. 323.

THIS was an action of covenant against the Sun Fire Office, sued in the name of their treasurer, under the 54 Geo. 3, c. ix., on a policy of insurance, effected by the plaintiff on a dwelling-house, auction room, and offices, household goods, fixtures, wearing apparel, &c. The declaration contained the usual averment, that, at the time of the making of the policy, and from thence until and at the time of the loss and damage, &c., the plaintiff was interested in the said dwelling-house, &c. The defendants pleaded (*inter alia*) that the plaintiff was not at the time of the loss interested in the said dwelling-house, *modo et formâ*.

¹ In *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25, 46-47 (1829), MARSHALL, C. J., for the court, said: "That an equitable interest may be insured is admitted. We can perceive no reason which excludes an interest held under an executory contract. While the contract subsists, the person claiming under it has undoubtedly a substantial interest in the property. If it be destroyed, the loss in contemplation of law is his. If the purchase money be paid, it is his in fact. If he owes the purchase money, the property is its equivalent, and is still valuable to him. The embarrassment of his affairs may be such that his debts may absorb all his property; but this circumstance has never been considered as proving a want of interest in it. The destruction of the property is a real loss to the person in possession, who claims title under an executory contract, and the contingency that his title may be defeated by subsequent events does not prevent this loss. We perceive no reason why he should not be permitted to insure against it. The cases cited in argument, and those summed up in *Phillips on Insurance*, 26, on insurable interest, and in 1 *Marshall*, 104, c. 4, and 2 *Marshall*, 787, c. 11, prove, we think, that any actual interest, legal or equitable, is insurable."

See also *Southern Ins. and Trust Co. v. Lewis*, 42 Ga. 587 (1871); *Redfield v. Holland Purchase Ins. Co.*, 56 N. Y. 354 (1874); *Farmers and Mechanics' Mut. Ins. Co. v. Meckes*, 10 Weekly Notes of Cases, 306 (S. C. Pa. 1881); s. c. 38 *Legal Intelligencer*, 317.—ED.

At the said trial before POLLOCK, C. B., at the Middlesex Sittings after last Term, it appeared that, in April, 1848, the plaintiff was, on his own petition, discharged under the Insolvent Debtors Act, 1 & 2 Vict. c. 110. On the 5th of September following, he effected the policy in question, on property acquired by him after his discharge. The premises and goods were destroyed by fire on the 11th of November, 1848, subsequently to which, his creditors having discovered fraud in the proceedings, he was again brought before the Court; and on a re-hearing of the case, the original order of discharge was annulled, and he was adjudged to be imprisoned for twelve months from the date of the vesting order. The learned Judge directed the jury that the plaintiff had an insurable interest in the property in question, and a verdict was found for him, with 700*l.* damages.

The Attorney-General moved (January 15) for a new trial, on the ground of misdirection. The plaintiff had no insurable interest in this property. The 1 & 2 Vict. c. 110, s. 37, vests in the provisional assignee all the property which an insolvent possessed at the time of filing his petition, and also all the future estate which he may acquire before he becomes entitled to his discharge. Now in this case, the order for the insolvent's discharge having been annulled, he was, at the time he effected the insurance, in the same position as if the order had never been made; and consequently the provisional assignee was entitled to the property in question, and might compel the insurance Company to pay the money to them. A party who insures must have a real and tangible, and not a mere speculative, interest in the property insured. [POLLOCK, C. B. It is enough, if he is *responsible* to some person for the property. There are many cases on marine policies, which show that, if a person can be called upon to account for property, he has an insurable interest in it.¹ ALDERSON, B. The insolvent, having the possession of the property, is responsible for it to his assignees; then why may he not insure it?] He has simply a naked possession by permission of his assignees. *Cur. adv. vult.*

POLLOCK, C. B. In this case, which was a motion by the Attorney-General for a new trial on the ground that there was no insurable interest in the plaintiff, who was an insolvent, and had acquired property after he had obtained his discharge, and insured it, and subsequently the discharge was revoked, we are all clearly of opinion that, as he was in possession as the apparent owner, responsible to those who were the real owners, he had, under those circumstances, an insurable interest. That is all that we have to inquire into, and we think that there ought to be no rule to consider a question which we look upon as a very plain one. *Rule refused.*²

¹ See the cases collected, 1 Arnould on Insurance, 229. — REP.

² On the question whether an assignee for the benefit of creditors can procure insurance, see *Sibley v. Prescott Ins. Co.*, 57 Mich. 14 (1885). — ED.

CONVERSE v. CITIZENS MUTUAL INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1852. 10 Cush. 37.

SHAW, C. J. This case is presented to us upon a report of evidence, submitted to the court, to draw inferences of fact and render judgment. A policy was made with the plaintiff, insuring a house, barn, and furniture. The house was burned down within the time covered by the insurance. Several grounds of defence were taken, but they ultimately resulted in one only, which was, that the plaintiff had no insurable interest; and that is the question now to be determined. The report presents an unusual state of facts; it came mainly from the testimony of the plaintiff's father. It appears that the plaintiff is twenty-nine years old, the only child and heir presumptive of the father; that since the plaintiff came of age he and his father have transacted business jointly as farmers and traders, tavern-keepers, and holders of real estate rented, that the real estate stood in the name of the father, that their entire earnings from labor, and gains, and profits, and from all other sources, were put into a common stock, from which each had drawn according to his exigencies, without any particular account, either of contributions or receipts. In this state of things, before any division or account taken, the building in question, then standing in another place, was purchased out of the common stock, and removed on to the land of the father. The house was partly occupied by the father, and a part let to a tenant by the joint act of father and son.

Upon these facts the court are of opinion that the plaintiff had an insurable interest in the building. By consent and agreement of the owner of the land, this building was purchased and fitted up out of the joint stock, the rent of it went into the common fund, and constituted part of the joint property. The whole arrangement constituted a qualified partnership and gave to each as agent of the other, the legal and equitable rights and remedies of a partner. It is now a well settled rule, that real estate, purchased out of partnership funds and held for partnership uses, although the legal estate may be held by the partners, as tenants in common, yet it is charged with a trust for the payment and satisfaction of all partnership debts and claims, including the claims of each partner upon the joint funds. *Burnside v. Merrick*, 4 Met. 537; *Dyer v. Clark*, 5 Met. 562; *Howard v. Priest*, 5 Met. 582.

And this principle we think is not the less applicable, when the legal estate is in one of the partners; it is alike chargeable with a trust for the partnership as if held by both. If this principle would raise a trust in the real estate itself, *à fortiori*, would it have this effect in regard to an interest created by the application of partnership funds in a building erected on such real estate. We are of opinion, therefore, that upon a settlement of the joint account, this building must have been treated as joint property, for his share of which, the son would have

been entitled to credit in partnership account. He therefore had such an equitable interest in the building before any account settled, that though it stood on the land of his father, he must sustain a pecuniary loss, by its destruction by fire.

The defendants acted under no misapprehension in this respect, or in not obtaining a lien on the real estate for their security; because, in the application for insurance, the plaintiff, in answer to the question "Whose is the property to be insured?" stated, "Applicant's father's." Unless, therefore, the defendant company intended to insure the plaintiff upon some interest other than that of a title to the estate, they took his money as a premium, for no equivalent, which is not to be assumed. It is more just and reasonable to conclude that they intended to insure him upon such equitable interest as he had, in a combustible building, standing on the land of his father, by the loss of which he would sustain damage. Upon these grounds, the plaintiff will be entitled to recover one half of the insurable value of the building, which was three quarters of the whole value.

*Judgment accordingly.*¹

R. A. Chapman and G. Ashmun, for the plaintiff.

H. Morris, for the defendants.

OAKMAN v. DORCHESTER MUTUAL FIRE INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1867. 98 Mass. 57.

CONTRACT by the surviving partner of the firm of Oakman & Eldridge, on a policy of insurance, made November 20, 1866, against loss by fire on "their frame church building" in Somerville. Answer, denial of any insurable interest of Oakman & Eldridge in the property, either at the date of the policy or the time of the fire.

At the trial, WELLS, J., directed a verdict for the plaintiff on facts which are stated in the opinion, and reported the case for revision by the full court.

H. W. Paine and R. D. Smith, for the defendants.

C. B. Goodrich and S. J. Thomas, for the plaintiff.

CHAPMAN, J. The legal title to the land on which the church building stood was conveyed to Oakman & Eldridge in April, 1863. At the time of the conveyance, they gave a conditional bond for a deed of the land to Carleton, the treasurer of a religious society. After the time for performance of the condition had expired he offered to perform it, and demanded a deed; but this offer and demand would not affect the legal title to the land. The society built the house on the land without any contract that they should hold it as personal property,

¹ See *Phoenix Ins. Co. v. Hamilton*, 14 Wall. 504 (1871). — ED.

or any express or implied consent that it might be removed, but with an understanding that the land should be held for them, and an evident expectation that it would after a while be conveyed to them. A building of that character, erected under such circumstances, becomes part of the realty. *Milton v. Colby*, 5 Met. 78; *Murphy v. Marland*, 8 Cush. 575; *King v. Johnson*, 7 Gray, 239; *Curtis v. Riddle*, 7 Allen, 185.

The case of *Wells v. Banister*, 4 Mass. 514, did not adjudge the right of the son to hold, as personal property, the house built on land of his father, but only that the father was under no implied obligation to pay for it. The court had no occasion to state what were the rights of the son in or to the property itself, except to show that giving the utmost effect to the consent of the father to build it on his land would only make it personal property, and removable by the son. Whether the facts of that case were such as to make the house personal property is a question which was not judicially determined in that case, and not presented for determination.

It is contended that the house became personal property by a sheriff's sale in November, 1866. The sale was on an execution against the society, and the plaintiff consented that it might be sold as personal property. But it is admitted that he gave notice at the auction, and before the sale, that the building was part of the realty, and belonged to Oakman & Eldridge, and that only the society's interest could be sold, whatever that might be. This was a revocation of his consent to its sale as personal property. No title to it passed by the sale; and at the time of the fire, December 9, 1866, the legal title was in Oakman & Eldridge. Apparently, they were tenants in common. Whatever may be the equitable rights of the society or its treasurer, they cannot be considered in this action. Oakman & Eldridge had an insurable interest in the building, and the plaintiff is entitled to recover as survivor.

*Judgment for the plaintiff on the verdict.*¹

WARREN ET AL. v. DAVENPORT FIRE INS. CO.

SUPREME COURT OF IOWA, 1871. 31 Iowa, 464.

APPEAL from Clinton District Court.

Action on a policy of insurance, issued by defendant on alleged property of Goodale & Hosford, payable, in case of loss, to the plaintiffs. It is averred in the petition that on the 20th day of April, 1870, in consideration of the premium of \$125 then agreed to be paid by one Goodale to defendant, the defendant, by its duly authorized agent, agreed to insure, and did then insure, said Goodale & Hosford, from

¹ See *Mayor of New York v. Hamilton F. Ins. Co.*, 10 Bosworth, 537 (1863); *Allen v. Sun Mutual Ins. Co.*, 36 La. Ann. 767 (1884).—ED.

twelve o'clock noon of that day until twelve o'clock noon on the 20th day of April, 1871, against loss or damage by fire, to the amount of \$2,500 on their private stock contained in a one story frame saw-mill, machinery, fixed and movable, engine and boilers therein, and known as that of the Dubuque Lumber Company, of Dubuque, Iowa, — loss, if any, payable to the plaintiffs; that the defendant, by its said agent, on the day aforesaid, for the said consideration, agreed to make and deliver to said Goodale & Hosford the defendant's policy of insurance, in writing, to evidence said insurance; and that on the 29th day of April, 1870, and after the destruction of the insured property, and with full knowledge of that fact, said defendant, by its said agent, did deliver its said policy of insurance, dated April 20, 1870. It is further alleged that the premium was duly paid by Goodale & Hosford, in pursuance of the agreement, and was received by the defendant with knowledge of all the facts. It is also averred that the said Dubuque Lumber Company, at the date of said policy, was and still is a corporation under the laws of this State; that by the "private stock" before mentioned was meant the capital stock which said Goodale & Hosford then had and still have in said corporation, all of which was known to the agent of defendant at the time of the insurance; and by means of such stock said Goodale & Hosford had and continued to have an interest in the insured property, viz.: in said saw-mill, machinery, etc., to an amount exceeding \$2,500, over and above so much of their interest therein as was covered by an insurance of \$15,000, effected by the corporation in its corporate name; that the plaintiffs are creditors of Goodale & Hosford to a large amount, and hold the certificates for a considerable amount of the stock of said corporation as security for the payment of the money due them from said Goodale & Hosford, and that the insurance was effected with the full knowledge and consent of said lumber company.

It is further averred that the true and actual cash value of the interest of Goodale & Hosford in the property covered by the insurance was, when the same was destroyed by fire on the 29th day of April, 1870, more than \$2,500 over and above their interest in said property as covered by the insurance of \$15,000, in the name of the corporation, and that said Goodale & Hosford have in all respects conformed to and observed and kept the conditions of the said policy. A copy of the policy is attached to the petition, in which it is stipulated that "the loss or damage is to be estimated according to the true and actual cash value of the property at the time the same shall happen, and be paid," etc.

To this petition the defendant demurred on two grounds: First, that it does not show that the plaintiffs have any interest in the property destroyed or in the policy; second, that the petition does not show that Goodale & Hosford had any insurable interest in the property insured at the time the insurance was effected by them. This demurrer was sustained and plaintiffs appeal.

Cotton & Cross, for the appellants.

W. E. Leffingwell, for the appellee.

MILLER, J. The question raised by the demurrer is whether the parties effecting the insurance in this case had an insurable interest in the property insured at the time the risk was taken, and at the time of loss by fire.¹ . . .

In the case under consideration, the assured were stockholders in the Dubuque Lumber Company, a corporation for pecuniary profit. The property destroyed belonged to the corporation. The insurance was upon the interest which the assured had in that property by virtue of the capital stock therein owned by them.

The object of the insurance was to indemnify the assured against loss to them in the event of a destruction of the property by fire. Could or would they sustain loss in such event? How would their interest be affected? It seems to us to be beyond controversy that, in case of the destruction of the corporate property by fire, the stockholders sustain loss to a greater or less extent, dependent on the particular circumstances. Suppose the case of a grain elevator upon some one of our numerous railroad lines, built, owned, and managed by a joint-stock corporation; that this is the only property of the corporation; that the entire capital stock is represented in and by this property; that in consequence of the profitable nature of the business large dividends are realized by the stockholders, and the stock is above par in the market. The destruction of this property by fire would at once result in the loss of dividends to the stockholders and a destruction of the value of the stock, or at least to its reduction to a nominal value. The entire property, representing the whole capital of the corporation, being destroyed, it is difficult to perceive what would give any value to the stock. It is true that, primarily, the loss is that of the corporation, and hence it may insure, but the corporation may refuse to insure, and then the real and actual loss falls on the stockholders.

The appellee argues that shares of stock in a corporation are choses in action, and are not considered to be an interest in the real property of the company, and cites numerous authorities to sustain this position. This may be admitted without denying the shareholders' "insurable interest" in the property of the corporation. A mortgage, also, is but a chose in action. The mortgagee acquires no right to the mortgaged property which can be attached, levied on under a general execution, or that can be inherited. It is a mere security for a debt. *Eaton v. Whitney*, 3 Pick. 484; *Smith v. Peoples' Bank*, 11 Shep. (Me.) 185; *Abbott v. Mutual Fire Ins. Co.*, 17 id. 414; *Middleton Savings Bank v. Dubuque*, 15 Iowa, 394; *Newman v. De Lorimer*, 19 id. 244; *Baldwin v. Thompson*, 15 id. 504; *Burton v. Hintrager*, 18 id. 348; *Hilliard on Mort.* 215.

And yet the cases are uniform to the effect that a mortgagee of real property has an insurable interest therein which he may insure on his

¹ The omitted passage stated the general doctrine as to insurable interest. — ED.

own account, but that when he does so it is but an insurance of his debt. *Eaton v. Whitney*, *supra*. And in case of damage by fire to the premises before payment of the mortgage, his loss, if any, is that his security has been impaired or lost. His interest is but a chose in action in the nature of a security which he may insure, so that in case of destruction of or damage to the property upon which his security rests, he will be indemnified for the loss he actually sustains. So, also, it seems to us that the owner of stock in a corporation for pecuniary profit has a like interest in the corporate property. A mortgagee of real property has an insurable interest in the mortgaged premises, based upon the interest he has in the preservation of the same as security for a debt. He has a legal right to contract for indemnity against injury to the value of his security.

Upon precisely the same principle, a stockholder may contract for indemnity against injury to the value of his stock, for he also has an interest in the preservation of the corporate property from destruction by fire; and in its destruction he sustains loss in so far as the value of his stock is depreciated in consequence thereof, or his dividends cut off.

The argument that if this is allowed owners of stock worth not more than ten per cent upon its nominal value may be insured at its par value, and in case of loss by fire such par value of the stock recovered from the insurer, seems to us to be unsound. Without entering into a discussion in detail of what would be the exact measure of recovery in such case, we simply answer that no more than the actual loss sustained is in any case recoverable. This rule is well established, and rests upon just principles. See Angell on Fire and Life Ins., c. 11, and cases cited in notes.

The question under consideration has not received direct judicial determination in any of the States, so far as we have been able to discover. The case of *Phillips v. Knox County Ins. Co.*, 20 Ohio, 174, is cited and claimed as an authority against the right of a stockholder to insure. The decision in that case, as a careful examination of the same fully shows, was made entirely upon a construction of the charter of the insurance company.¹ . . .

The judgment of the District Court is

*Reversed.*²

¹ Here the facts of that case were summarized. — Ed.

² *Acc.*: *Seaman v. Enterprise F. & M. Ins. Co.*, 5 McCrary, 558 (U. S. C. C., E. D. Mo. 1883); s. c. 18 Fed. Rep. 250; and these marine cases: *Wilson v. Jones*, L. R. 2 Ex. 139 (Ex. Ch. 1867), and *Riggs v. Commercial Mut. Ins. Co.*, 125 N. Y. 7 (1890). — Ed.

WILLIAMS v. ROGER WILLIAMS INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1871. 107 Mass. 377.

CONTRACT on a policy of insurance, dated July 5, 1870, by which the defendants insured "Little and Stanton, mortgagees," in consideration of a premium by them paid, \$3,500 for one year on certain buildings and fixed machinery, "situate in Huntington, Mass., and known as the C. F. Whitaker & Co.'s Mill," payable in case of loss to the plaintiff, and containing, among others, these provisions: "If the interest of the insured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, is not truly stated in this policy, this policy shall be void." "If the interest of the insured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the insured, or if the building insured stands on leased ground, it must be so represented to the company, and so expressed in the written part of this policy; otherwise the policy shall be void."

The case was submitted to the judgment of the Superior Court, and, on appeal, of this court, upon an agreed statement, the material part of which was as follows: "On May 26, 1868, Clarence F. Whitaker and his partner, being owners of the premises, gave a mortgage thereof to William A. Little and Atherton J. Stanton, partners under the firm of Little & Stanton, to secure six notes made by the mortgagors of that date, amounting in all to \$4,000, payable, with interest annually, in two, three, four, five, six, and seven years respectively, after date, to said Little & Stanton or order. On January 31, 1870, Little & Stanton, for the sum of \$4,000 received by them from the plaintiff, assigned the mortgage and indorsed the notes to the plaintiff. None of the notes have yet been paid. They and the mortgage are still held by the plaintiff. Little & Stanton have become absolutely liable to pay those notes which have matured; the same having been duly at maturity presented for payment, and payment thereof demanded and refused, and notice of such presentment, demand, and refusal, and that the holder would look to them for payment, having been duly sent to Little & Stanton. On the notes not yet matured their liability is the ordinary liability of indorsers on notes not yet due. The buildings on the premises mortgaged and described in the policy were destroyed by accidental fire in August, 1870, of which due notice and proofs were given to the defendants. The loss, if the plaintiff is entitled to recover anything, was total. The premises, apart from the buildings destroyed by fire, were and are insufficient in value to satisfy the mortgage debt. The mortgagors were at the time of the fire and ever since have been insolvent."

A. L. Soule, for the plaintiff.

G. M. Stearns, for the defendants.

GRAY, J. It is admitted that Little and Stanton are the assured in this policy, and that the plaintiff is the only person to whom any sum recoverable under it is to be paid. *Loring v. Manufacturers' Insurance Co.*, 8 Gray, 28; *Bates v. Equitable Insurance Co.*, 10 Wallace, 33. Upon the facts agreed by the parties, two questions have been argued: 1st. Whether Little and Stanton had an insurable interest; 2d. Whether, if they had, that interest is well described in the policy.

1. In the present state of the law there can be no doubt that, at the time of procuring this policy, Little and Stanton, although they had no legal title in the property, had an equitable right and an insurable interest therein. The mortgage stood as security for the payment of the mortgage notes, and the assured, having themselves indorsed those notes at the time of assigning the mortgage, would be entitled in equity, upon being charged on those notes and paying the amount thereof, to have the mortgage reassigned to them, to secure reimbursement from the original makers of the notes and mortgage. *Eastman v. Foster*, 8 Met. 19; *Bryant v. Damon*, 6 Gray, 564; *Rice v. Dewey*, 13 Gray, 47; *New Bedford Institution for Savings v. Fairhaven Bank*, 9 Allen, 175; *Matthews v. Aikin*, 1 Comst. 595. In *Gordon v. Massachusetts Insurance Co.*, 2 Pick. 249, one who had made an absolute bill of sale of a vessel, and taken back an agreement in writing from the purchasers to apply the proceeds of the vessel to the payment of certain notes and obligations due from him and indorsed by them, was held to have retained an insurable interest in the vessel. In *Strong v. Manufacturers' Insurance Co.*, 10 Pick. 40, it was held that a mortgagor of real estate, whose equity of redemption had been seized and sold on execution, had still, so long as the time of redeeming from such sale had not expired, an insurable interest in the premises. And it is now well established that even one who has no title, legal or equitable, in the property, and no present possession or right of possession thereof, yet has an insurable interest therein, if he will derive benefit from its continuing to exist, or will suffer loss by its destruction. *Putnam v. Mercantile Insurance Co.*, 5 Met. 386; *Eastern Railroad Co. v. Relief Insurance Co.*, 98 Mass. 420, 423, and other cases there cited; *Springfield Insurance Co. v. Brown*, 43 N. Y. 389.

2. We are also of opinion that the interest of the assured was sufficiently described in the policy.¹ . . .

Judgment for the plaintiff.

¹ The remainder of the opinion dealt with this point. — Ed.

CUMBERLAND BONE CO. v. ANDES INSURANCE CO.

SUPREME JUDICIAL COURT OF MAINE, 1874. 64 Me. 466.

ON report.¹*Strout & Holmes*, for the plaintiffs.*Howard & Cleaves*, and *C. W. Larrabee*, for the defendants.

BARROWS, J. The plaintiffs claim to recover a loss of \$2,000 under a policy issued by the defendants upon a stock of fish scrap contained in the Atlantic Oil Company's Works in Boothbay.

After the testimony was out a default was entered, to be taken off if upon a full report of the testimony we conclude that the jury would not be authorized to find that the plaintiffs had an insurable interest in the property.

This stipulation differs, it will be seen, in more than one particular from the more common one which presents to this court the whole case, and all the questions both of law and fact with power to draw inferences as a jury might.

As the default is to stand if the jury would be authorized to find that the plaintiffs had an insurable interest, we must accept the stipulation as equivalent to an admission that no question is made as to plaintiffs' right to recover, if they had an insurable interest, and that the testimony of plaintiffs' witnesses is to be accepted as true as to all matters respecting which there is any conflict.

In all cases of conflicting testimony the jury are authorized to find the facts in accordance with the statements of those witnesses whom they may deem most deserving of confidence and belief; and it cannot be said that they "would not be authorized to find" all the facts as plaintiffs' witnesses state them.

The jury "would be authorized to find," then, that Luther Maddox, a manufacturer of porgy oil and fish scrap, dry and crude, in pursuance of negotiations with the plaintiffs looking to his furnishing them with large quantities of dried fish scrap, had received advances from the plaintiffs before the taking out of this policy to the amount of \$2,000, and had the dried fish scrap on hand to an amount in value considerably exceeding the sum advanced by the plaintiffs.

As the fish scrap or porgy chum was not wanted by plaintiffs until the following season, it remained at the Oil Company's Works, not separated from that belonging to Maddox, under Maddox's agreement to store it for plaintiff, free of expense, and deliver it when wanted, and to get it insured in order to secure the plaintiffs' advances.

In pursuance of this agreement Maddox told the agent of the defendant company that plaintiffs had scrap at Boothbay, that they had made advances to him to the amount of \$2,000, and he wanted a policy to

¹ The reporter's statement has been omitted. — ED.

protect their interest in case of loss. He procured a policy on his own interest at the same time for a like amount. The cash value of the whole stock of fish scrap at the time of the insurance and of the fire was \$5,000, and it was very nearly a total loss. No part of it had ever been delivered to plaintiffs, but Maddox stated fully to the agent of the insurance company the situation and condition of the stock "and the risk the company was taking just as it was."

He testified in substance that the porgy chum burned was the same upon which the plaintiffs had made the advancements to him; that there were 150 tons in the whole, of which he owned three-fifths and the Cumberland Bone Company two-fifths by virtue of the advances made him; that he held it for them to be delivered as wanted.

The insurance company paid the amount of the policy running to Maddox, but resist the claims of the plaintiffs on the ground that Maddox had made no delivery to them, that the property in no specific part of the porgy chum had ever passed from Maddox to the plaintiffs, was not at their risk, and so they had no insurable interest.

If it were essential to the existence of an insurable interest that the assured should have a legal title to the property upon which the insurance is effected, the case would present a different and perhaps more difficult question. But such is not the law. An equitable interest suffices. Chancellor Kent lays down the law thus: "The interest need not be a property in the subject." "It does not necessarily imply a right to or property in the subject insured. It may consist in having some relation to, or concern in, the subject of the insurance, which relation or concern may be so affected by the peril as to produce damage."

The result is that a person so circumstanced that he is interested in the safety of a thing, derives a benefit from its existence and suffers prejudice from its destruction, has an interest in that thing which is the lawful subject of insurance.

"An equitable as well as a legal interest, and an interest held under an executory contract are valid subjects of insurance." *Columbian Ins. Co. v. Lawrence*, 1 Peters Sup. C. 25. Mortgagor and mortgagee, pledgor and pledgee, both have an insurable interest in the subject of the mortgage or pledge, — the former to the full value of the property, the latter to the amount of his debt thereby secured.

For further illustrations of interests which are deemed insurable, so as to relieve the contract from the character of a wager, and prevent it from being deemed unavailable for want of insurable interest, see *Locke v. No. American Ins. Co.*, 13 Mass. 61; *Bartlett v. Walter*, id., 267; *Oliver v. Greene*, 3 Mass. 133; *Rider v. Ocean Ins. Co.*, 20 Pick. 259; *Waters v. Monarch F. & L. Ass. Co.*, 5 El. & Bl. 870; *Godin v. London Ass. Co.*, 1 Burr. 489; *Wolff v. Horncastle*, 1 Bos. & Pul. 316; *Sutherland v. Pratt*, 12 Mees. & Wels. 16; *Wells v. Philadelphia Ins. Co.*, 9 Serg. & Rawle, 103; *Ins. Co. v. Chase*, 5 Wall. 513.

Mr. Arnould in his "Treatise on Insurance," vol. i. p. 229, premising

that "it is very difficult to give any definition of an insurable interest," states it "as the fair result of the cases, that, in order to have an insurable interest, it is not necessary to have an absolute vested ownership or property in that which is insured; it is sufficient to have a right in the thing insured, or a right derivable out of some contract about the thing insured of such a nature that the party insuring may have benefit from its preservation and prejudice from its destruction." We think that the plaintiffs under the facts here developed had such an interest in the subject of insurance. Maddox was holding it in good faith in trust for them. He recognized the interest they had acquired in it by their advances, held it subject to their order, and procured the insurance in their name to protect their advances, refraining from insuring it in his own, and making known to Mr. Plummer, the defendants' agent, the situation and condition of the property, and the fact that advancements had been made to him thereon by the plaintiffs, and that the object of the policy was to protect those advances. It is true that so long as Maddox was solvent the plaintiffs might not lose by the destruction of the property. But the same is true of every mortgagee or pledgee. We fail to see how the insurers could be injuriously affected, suppose it true that the agent understood that the part belonging to the plaintiffs had been separated, weighed off, and formally delivered. It does not appear that the risk they assumed was changed or affected. As we settle the only question presented by the report in the plaintiffs' favor, the entry must be

*Default to stand. Judgment for the plaintiffs for
\$2,000 and interest from Sept. 10, 1872.*

APPLETON, C. J., WALTON, DICKERSON, VIRGIN, and PETERS, JJ.,
concurring.¹

¹ In *Box v. Provincial Ins. Co.*, 18 Grant's Chancery, 280 (1871), a warehouseman sold 3,500 bushels of wheat, stored in his warehouse and mingled with wheat belonging to himself and to others. The warehouseman gave to the buyers a receipt that promised delivery on order. The statutes as to warehouse receipts did not apply to the case. The buyers procured insurance. The majority of the Ontario Court of Error and Appeal, though expressing an opinion that there had not been a legal transfer of the property, held that the buyers had an insurable interest.

In *Matthewson v. Royal Ins. Co.*, 16 Lower Canada Jurist, 45 (1871), there was a sale of a certain number of barrels of oil, not identified and not separated from other barrels of oil. The majority of the Quebec Court of Queen's Bench held that the buyers had an insurable interest.—ED.

ROHRBACH, RESPONDENT, v. GERMANIA FIRE INS. CO.,
APPELLANT.

COURT OF APPEALS OF NEW YORK, 1875. 62 N. Y. 47.

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, affirming a judgment in favor of plaintiff entered upon a verdict. (Reported below, 1 N. Y. S. C. [T. & C.] 339.)

This was an action upon a policy of insurance, by its terms insuring plaintiff upon "his two framed buildings" situate in the village of Jeffersonville, N. Y. Prior to the 28th June, 1868, the plaintiff had been in the employ of Margaretha Hartmann, and she was indebted to him for his labor and services. On that day they intermarried. On the thirtieth of the same month she executed and delivered to him an instrument, in writing, of the body of which the following is a copy :

"JEFFERSONVILLE, June 30th, 1868.

"I do hereby certify that I owe to John Rohrbach the sum of seven hundred dollars; and, also, twenty-five dollars for each and every month from the fourteenth day of July, 1863, and for every month he may live with me henceforth without any deduction whatsoever, which amount shall be a lien on my property."

She died intestate July 8th, 1868, leaving personal property of the value of \$600, and a lot in said village upon which were the buildings in question. The principal value of the premises was in the buildings. One Armbrust was appointed administrator of her estate. Her indebtedness, other than that to plaintiff, was from \$1,200 to \$1,400. Her indebtedness to him was about \$2,100. Plaintiff continued in the use and occupation of the buildings. In December, 1868, plaintiff negotiated for insurance on the buildings.¹ . . .

Defendant's counsel moved for a nonsuit on the ground of breach of warranty, and that plaintiff had not an insurable interest. The motion was denied, and defendant's counsel excepted.

B. C. Chetwood, for the appellants.

J. A. Thompson, for the respondents.

FOLGER, J. The plaintiff cannot maintain this action, unless he had an insurable interest in the buildings which were the subject of the risk taken by the defendants, and which were destroyed by fire. He seeks to found such an interest, upon the instrument in writing, executed by his wife after her marriage to him.

Without entering minutely into a consideration of the effect of the marriage upon her pre-existing obligations and liabilities to him, it is

¹ In the statement and in the opinion, passages not bearing on insurable interest have been omitted. — Ed.

sufficient to say, that the instrument executed by her was based upon a consideration adequate to uphold her express promise; that though made by a married woman it was in due form to affect her separate estate; and that though a transaction between a wife and her husband, yet equity would have upheld and enforced it in his favor against her, had she lived, and will enforce it against her estate now that she is dead. By it, he was an equitable creditor of her estate, at the time of the insurance; but he was no more than a general creditor. Though the instrument contains the phrase, "shall be a lien on my property," no specific lien was thereby created, and so far as that instrument had effect, no more than a general equitable lien, yet to be enforced and made specific by a judgment in an equitable action. The plaintiff stood thereby in no better plight, so far as having an insurable interest in the buildings, than would have stood a creditor of the deceased wife, who held a judgment only, rendered and docketed against her, which would have become a general lien upon her real property. He did not stand in so good plight, but for other facts now to be mentioned. She had died after giving the instrument, leaving personal and only this real estate; a person other than the plaintiff had taken out letters of administration thereon; the personal estate was by much insufficient to pay the debts against her; and this real estate, including the insured buildings, would in the due course of administration, for a space of at least three years from the granting of letters of administration, be liable to sale for the purpose of meeting her liabilities, and it was the only fund to which the plaintiff could look for payment; the plaintiff was in the possession of the buildings, occupying them at the time of the fire. Judgment creditors, if any, would have had a preference in payment from the personal estate (2 R. S. 87, § 27, subs. 3, 4), and, of course, the lien acquired by the docketing of their judgments could not be disturbed by the application of the administrator for leave to sell the real estate, for the payment of debts, and the obtaining of permission to do so. But yet the plaintiff had a right to compel an accounting by the administrator (2 R. S. 92, § 52), and a sale of the real estate (*id.* 108, § 48), for the payment of his and other debts. Thus, the real estate was to a degree subject to the payment thereof, and was in fact, from the slender amount of the personal property, substantially all that he could look to for payment. His position was not as good in some respects as that of a judgment creditor, but it was not unlike it; both had a right to have the real estate sold for the payment of their debts; for a certain space of time it could not escape the exercise of that right; and it cannot be said that the interest of a judgment creditor in the real estate, as an interest in property, was greater or nearer than that of the plaintiff. It was more manageable, but not more direct in the end.

The general definitions of the phrase "insurable interest," as given in the textbooks, are quite vague and not always concordant. (See 1 Arnould on Mar. Ins., 229; Bunyon on Life Ass., 16; Hughes on Ins.,

30; 1 Marshall on Ins., 115; 1 Phillips on Ins., 2; id. 107; Sherman on Ins., 93; Parsons on Merc. Law, 507; Parsons on Cont., 438; Angell on Ins., § 56; Flanders on Fire Ins., 342; May on Ins., § 76.) The last-cited author says, that an insurable interest sometimes exists, where there is not any present property, any *jus in re*, or *jus ad rem*, and such a connection must be established between the subject-matter insured, and the party in whose behalf the insurance has been effected, as may be sufficient for deducing the existence of a loss to him, from the occurrence of an injury to it; and that the tendency of modern decisions is to admit to the protection of the contract whatever act, event, or property bears such relation to the person seeking insurance, as that it can be said, with a reasonable degree of probability, to have a bearing upon his prospective pecuniary condition. While, on the other hand, the statement is, that the interest must be founded on some legal or equitable title; and if it be inconsistent with the only title which the law can recognize, it will not be deemed an insurable interest. (Marshall on Ins., *supra*.) But the result of a comparison of the text-writers above cited, is, that there need not be a legal or equitable title to the property insured. If there be a right in or against the property, which some court will enforce upon the property, a right so closely connected with it, and so much dependent for value upon the continued existence of it alone, as that a loss of the property will cause pecuniary damage to the holder of the right against it, he has an insurable interest. Thus a mortgagee of real estate, though he hold also the bond of the mortgagor, has an insurable interest in the buildings; while a judgment creditor of the same mortgagor, his judgment being a lien upon the same real estate and the same buildings, is said not to have an insurable interest in them. The interest of the first is said to be specific, the interest of the latter general. As a general rule, the distinction may be sound. But I think it would be difficult to show an appreciable practical difference in the pecuniary result to the two. If the mortgagor and judgment debtor should die leaving no personal property, and no real estate save that mortgaged, it principally valuable for the buildings upon it, and they should be burned, each must then look to the real estate, the lands alone, for a security for his debt; and if that be insufficient, each must with equal certainty suffer a pecuniary disaster, resulting directly from the fire. What legal reason is there, why the one may not, as well as the other, protect himself by a contract of insurance?

In *Grevemeyer v. So. Mut. F. Ins. Co.* (62 Penn. St. 340), it was held that a judgment creditor, whose judgment was taken for the purchase-money of the property burned, had no insurable interest. (See, also, *Conard v. At. Ins. Co.*, 1 Pet. 386.) The reason given is, that his lien was general, and not specific; that he was not interested in the property, but in his lien only. His judgment was distinguished from a mortgage, in that the latter is a specific pledge of definite property, and the mortgagee has necessarily an interest in it; while the judgment is a

general and not a specific lien ; so that if there be personal property of the debtor it is to be satisfied out of that ; if there be not, then it is a lien on all his real estate without discrimination. And, citing *Cover v. Black* (1 Barr, 493), it is said that a judgment creditor has neither *jus in re*, nor *jus ad rem*, as regards the judgment debtor's property. It seems to me that the decision there goes very much upon the fact or the assumption, that the judgment debtor had other property, real and personal, to look to than the real estate damaged ; and that it does not touch the case of a judgment creditor whose only or principal reliance for payment was upon the property destroyed. That there need not be an existing *jus in re*, or *jus ad rem*, is declared by Story, J., in *Hancox v. Fishing Ins. Co.* (3 Sum. 132-140) ; and also, that the right to pursue the debtor personally does not deprive the creditor of an insurable interest. (Id.)¹. . . It will be perceived, that between the case cited from 62 Pennsylvania State (*supra*) and the case in hand, there are some features of distinction : here the debtor was dead ; there was no longer any personal liability, nor sufficient personal property to satisfy the debt ; nor, as may be inferred, any other real estate than that insured. A fund for the payment of the debt was to be found only in this estate, and principally in the buildings insured. By force of these circumstances, and by operation of the statutes above referred to, this real estate was for a certain length of time bound for the payment of this debt. As it was bound, as it alone was bound, as there was naught else, nor any person, liable for the debt, it is difficult to see why, in effect, the debt was not as if a specific lien upon this real estate. A lien, in its most extensive signification, is a charge upon property for the payment or discharge of a debt or duty. A specific lien is a charge upon a particular piece of property, by which it is held for the payment or discharge of a particular debt or duty, in priority to the general debts or duties of the owner. It is not the name of the right which gives or refuses an insurable interest ; it is the character of the right. A specific lien gives an insurable interest, because a loss of the particular property is at once seen to affect disastrously the specific lienor. But when a right to payment of a debt exists, which can be satisfied only from a particular piece of property, is there not the same result from the same cause ? If I have a debt against another, and he have but one piece of real estate from which my debt may be made, and he die leaving no personal estate, though in technical language my lien may not be specific upon that real estate, it is true in fact, that there is a specific piece of property from which alone I may hope to satisfy my lien, and which is alone legally bound to satisfy it, and I am, practically, just like one to whom that piece of real property has been specifically pledged for a specific debt. If the latter, for that he may suffer pecuniary loss by the burning of that real property, has such an

¹ Here were cited *Putnam v. Mercantile Marine Ins. Co.*, ante, p. 48 (1843) ; *Wilson v. Jones*, L. R. 2 Ex. 139 (Ex. Ch. 1867) ; and *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151, 163 (1828). — ED.

interest, as that he may insure against that burning, I have such an interest also, and I too may insure. The probability, nay, the possibility, of the payment of the plaintiff's debt, out of the property of the deceased debtor, rested entirely upon the contingency of this real estate remaining without serious impairment in value.

The reports of this State are meagre upon this precise question. In *Mapes v. Coffin* (5 Paige, 296), the complainant had levied upon chattels in the hands of an executor of the judgment debtor, which had been insured by the testator in his lifetime, and which were destroyed by fire after the testator's death, and after the levy. The chancellor, in a contest between judgment creditors, gave the avails of the insurance to the creditors who had made the first levy. Perhaps the levy upon the property made a specific lien upon it, and so the case does not much aid us. In *Mickles v. Roch. City Bk.* (11 id. 118), the defendants were judgment creditors of a manufacturing corporation, had issued several executions, had sold and bid in personal property, and advertised for sale the real estate. Pending the advertisement, they took out insurance on the buildings and fixtures in the joint name of themselves and the corporation. A few days after, the real estate was sold and bid in by the defendants. After that occurred a fire, with damage to the buildings and fixtures. The insurers repaired the buildings, and paid for the damage by fire to the fixtures. The real estate was never redeemed. There seems to have been no doubt made of there being an insurable interest in the creditors. By advertising the premises for sale, they came nearer making their judgment a specific lien thereupon, though it was still a general lien upon all other like property. In *Springfield F. and M. Ins. Co. v. Allen* (43 N. Y. 389-395, 396), it is said by Allen, J.: "An insurable interest may exist, without any estate or interest in the *corpus* of the thing insured;" "it was enough that" there be "a pecuniary interest in the preservation and protection of the property, and" that one "might sustain a loss by its destruction." I know of no decision in this State bearing more directly upon this precise question than that in *Herkimer v. Rice* (27 N. Y. 163). The propositions advanced there are sufficient, if sustainable, or if to be taken as authority, to uphold an insurable interest in the plaintiff in the case in hand. Denio, Ch. J., there says: "It is certain that the creditors had no estate whatever in the real property. In a technical sense they had no lien. But they had important rights connected with it, and a pecuniary interest in its preservation. . . . The law does not require that the assured shall have an estate or property in the subject of the insurance. . . . No property in the thing insured is required. It is enough if the assured is so situated as to be liable to loss, if it be destroyed by the peril insured against. Creditors having no other means of enforcing their debts, but having a direct and certain right to subject the real estate to a sale for their benefit, have an interest as positive and absolute as one having a specific lien, or even as the owner himself. . . . The creditors, whether by simple contract or

specialty, under our laws, are parties interested in the real estate, when there is a deficiency in the personal, for they have power to subject it to the payment of their debts." It is urged that these remarks are *obiter dicta*, and that the real question to be decided and which was decided in the case, was whether an administrator of an insolvent estate had such an interest in the real estate of his intestate as was insurable.¹ . . . The direct question was, indeed, whether an administrator of an insolvent estate might insure its real property. But the reasoning of the opinion shows that this was deemed to depend upon whether the creditors of that estate had such an interest. After stating the question, he says: "It will be convenient to consider, in the first place, *whether the creditors themselves have such an interest*; and then, whether the administrator can be said to represent that interest, so as to enable him to make the contract for the benefit of the creditors." Again, . . . "the creditors of an insolvent estate are generally numerous, and having no opportunity for concerted action, except through the executor or administrators, they could scarcely ever avail themselves of the advantage of insurance, unless by the agency of the representatives. If the administrators cannot insure, *the parties interested, the creditors*, will be excluded from a remedy which all other persons having a similar interest possess." He then proceeds to show that an agent or trustee may insure the interest of a party beneficially interested, and that the administrator, though not the trustee of the land, is a trustee of a power over it, such as is recognized by law, and says: "In this case it was sufficiently apparent, from the language of the receipt for the premium, that it was the interest of the creditors which was designed to be covered by the contract; the beneficiaries of the administrator were the parties intended to be protected; the insurers, therefore, must have seen and known that it was the interest of the creditors . . . which it was the object of the policy to protect, . . . and which was the subject of the contract." There is more to the same effect; and the opinion is based upon the ground that the administrator is the representative of the creditors. Indeed, but for there being creditors, the administrator would have no concern in the land, and the concern he has with it is, that they through him may dispose of it for the payment of their debts. *Herkimer v. Rice* was a case in which there was full argument and consideration. I consider it gives reasons, as well as authority, for the determination of the question now in consideration.² . . . See also *Waring v. Loder* (53 N. Y. 581), where it is cited as authority for the proposition, that a mortgagor after he has sold the mortgaged premises has still an interest in it which is insurable, inasmuch as it stands between him and personal liability for the mortgage debt. The distinction is not perceptible, so far as this question is concerned, between a power to obtain

¹ A passage on the value of *dicta* has been omitted. — Ed.

² Here were cited *Savage v. Howard Ins. Co.*, 52 N. Y. 502 (1873), and *Clinton v. Hope Ins. Co.*, 45 N. Y. 454 (1871). — Ed.

indemnity against loss from being obliged to pay a debt owing to another, and against loss from failure to obtain payment of a debt owing to one's self. I conclude that a creditor of the estate of one deceased, whose personal property left is insufficient for the payment of his debts, has an insurable interest in the sole real estate of the deceased debtor, when it is plain that if it is damaged by fire a pecuniary loss must ensue to the creditor thereby.¹ . . . *Judgment reversed.*²

INSURANCE COMPANIES v. THOMPSON.

SUPREME COURT OF THE UNITED STATES, 1877. 95 U. S. 547.

ERROR to the Circuit Court of the United States for the District of Kentucky.

The facts are stated in the opinion of the court.

¹ In *Creed v. Sun Fire Office*, 101 Ala. 522, 529-530 (1893), COLEMAN, J., for the court, said:—

"Has a creditor an insurable interest in a building, the property of the estate of his deceased debtor, which may be subjected to his debt, the personal property being insufficient to pay the debts of the estate? After much deliberation our conclusion is that he has an interest which may be insured. We concede and affirm that a simple contract creditor, without a lien, either statutory or contract, without a *jus in re* or *jus ad rem*, owning a mere personal claim against his debtor, has not an interest in the property of his debtor. Such contracts are void as being against public policy. We do not think the principle applies after the death of the debtor, as to property liable for the debt and which, if destroyed, will result in the loss of the debt. The real estate as well as the personal property of a deceased debtor is liable for his debts, but the real estate cannot be subjected to the payment of his debts until after the personalty has been exhausted. After the death of the debtor the debt is no longer enforceable *in personam*. The proceedings to reach the property of the estate of the deceased debtor are *in rem*. The property of the debtor takes the place of the debtor, and becomes, as it were, the debtor. . . .

"The relation of debtor and creditor invests the creditor with an insurable interest in the life of his debtor. . . . It would seem upon like principles that when the property becomes directly subject to proceedings *in rem* for the satisfaction of the debt, the creditor should become invested with an insurable interest in the property. Certainly if a creditor cannot obtain satisfaction of his debt from the personal property of his deceased debtor, and has a legal right, which cannot be defeated, to enforce its collection by proceedings *in rem* against a building belonging to the estate of the deceased debtor, and if it be true that the destruction of the building by fire would immediately and necessarily result in pecuniary loss, the loss being the direct consequence of the fire, the creditor has an interest in the protection of the building. He has no lien as in the case of a mortgagee, nor such lien as the statute may confer on an attaching or execution creditor, but his right to subject the specific property to his debt invests him with an interest but little less, if any, than that of the attaching or execution creditor or mortgagee."

And see *Spare v. Home Mut. Ins. Co.*, 8 Sawyer, 618 (U. S. C. C., Dist. Oregon, 1883); *Shepard v. Peabody Ins. Co.*, 21 W. Va. 368 (1883).—Ed.

² The reversal was based upon breach of warranty and of express conditions, as explained in passages that have been omitted.—Ed.

Mr. *Charles W. Jones* and Mr. *J. Hubley Ashton*, for the plaintiffs in error.

Mr. *G. C. Wharton*, *contra*.

Mr. Justice MILLER delivered the opinion of the court.

The defendants in error recovered in the Circuit Court of the United States for the District of Kentucky a joint judgment for \$3,317.58 on a policy of insurance issued by The Germania Fire Insurance Company, The Hanover Fire Insurance Company, The Niagara Fire Insurance Company, and The Republic Fire Insurance Company, on whiskey in a distiller's bonded warehouse. The distillery and the warehouse were owned and conducted by George H. Dearen; but the spirits were distilled for and owned by the defendants in error at the time the policy was issued. They were also sureties on Dearen's distillery bond to the United States, and as such were liable for the tax on the whiskey if not paid by Dearen, or made out of the whiskey. It will be thus seen that Thompson & Walston had two distinct interests in the whiskey, — namely, the general ownership of it and their liability for the tax on it which Dearen had assumed to pay, and which, if he did not pay, might fall upon them in either of two ways; to wit, by a seizure and sale of the whiskey for the tax by the government, or by a suit on the bond on which they were sureties. The policy, which was manifestly designed to protect both these interests of the assured from loss or damage by fire, was for that reason peculiar and special in its provisions. By its terms the companies bind themselves to "insure Messrs. Thompson & Co. against loss or damage by fire to the amount of \$8,000 for the term of one year, upon whiskey, their own or held by them on a commission, including government tax thereon for which they may be liable, contained in the log bonded warehouse of G. H. Dearen."

After the whiskey was burned, these companies paid their share with others of the loss on the value of the whiskey apart from the tax; but by the receipt which they took it was stated that the claim for liability on account of tax remained undecided. Thompson & Co. were sued on their bond with Dearen for this tax; and they notified the insurance companies of the suit, and asked them to defend it, which was declined. Judgments were obtained in each case on the bonds, and Thompson & Co. replevined the judgments. By this is meant that they gave bail which operated as a stay of execution for the period which the law of Kentucky allowed in such cases. The present action was brought by Thompson & Walston to recover the amount of these judgments.

On the trial, evidence was given tending to show that before the fire Walston had sold to his partner, Thompson, all his interest in the partnership, and that Hite Thompson had become interested with the other Thompson in the business to the extent of one-fifth. And, on the hypothesis that the jury believed this, the counsel for the companies asked the court in several forms to instruct the jury that plaintiffs could not recover. This proposition was based on a provision in the policy that it should be void "if the property be sold, or transferred, or any

change take place in title or possession, whether by legal process, or judicial decree, or voluntary transfer or conveyance."

The refusal of the court to do so, and the charge of the court to the effect that this change in regard to the ownership, if true, did not defeat the right to recover the amount of the judgments against plaintiffs for taxes, are the errors on which a reversal is asked.

The argument of counsel on the effect of a mere change in the title by one partner selling to another his interest in the property insured, and the authorities presented on both sides, are very able and full, and the decisions are conflicting. So, also, the effect of the introduction of a new part owner, in a case like the present, where the possession and care of the goods remain unchanged, are well considered; but in the view we take of the case it is not necessary that this court should decide these questions.

We are of opinion that a careful consideration of the facts of this case, in their relation to some of the most elementary principles of the contract of insurance, will enable us to dispose of it without much difficulty.

It is to be observed that, whether insurance be against fire, or marine loss, or loss of life, it is neither the property nor the life that is insured. Nor does the contract propose or intend to say that there shall be no destruction of the property or loss of life. In point of fact, the obligation of the insurer is designed to come into operation after the loss either of property or life has occurred, and to give compensation to some one interested in the life or the property, for the loss of that life or injury to the property.

In regard to property this compensation is intended by the fundamental principles of insurance to bear a direct relation to the moneyed value of the interest which the party insured had in the property. Where the only interest of the assured is the full and perfect ownership of the property, that is the interest insured; and the amount to be recovered on the policy of insurance is that full value or such sum less than that as the insurer stipulates to be liable for.

But it often occurs that the interest of the party insured is not that of full ownership. His interest may be that of a trustee, or executor, or some other representative character, in which case the recovery will be in accordance with the nature of the contract. The policy before us is a striking illustration of this. The interest of the plaintiffs in the whiskey which is insured is threefold, — their own, or held on a commission, and the government tax, for which they may be held liable. If the makers of this policy intended to insure no other interest of Thompson & Co. in the whiskey than their proprietary interest, the interest which at the time of the loss they had as owners of the whiskey, the enumeration of the two other interests was useless and misleading. The facts already stated show that they had another interest; and, since they insured it, it must be presumed that it was known to the insurers. The whiskey which they owned was liable to the government for a tax; and this Dearen was primarily liable for and had promised to pay, but,

if he did not, the whiskey could be sold for it. They had also become bound with him on his bond for the payment of this tax. In the event of the whiskey being destroyed by fire, the danger of their personal liability was greatly increased. They were, therefore, right in wishing to be secured against this loss also, if the whiskey was burnt. It is impossible to give any other construction to the policy than that the company agreed to furnish this indemnity. The language, when brought into relation with the conceded facts of the case, admits of no other.

This interest was an insurable interest, as much as freights at sea or profits in an adventure. The whiskey stood between them and their loss. The whiskey when in the warehouse was loaded with this tax. It would sell for as much less as the tax, unless the tax was paid. So long as it was in the warehouse plaintiffs were not liable for the tax. The moment it was lost they became liable. This was a fair subject of insurance. *Fireman's Fire Insurance Co. v. Powell*, 13 B. Mon. (Ky.) 311; *Gordon v. Massachusetts Fire & Marine Insurance Co.*, 2 Pick. (Mass.) 249; *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47.

In regard to this interest, Walston had never parted with it. His sale of the partnership interest did not release him from his liability on Dearen's bonds; nor did the subsequent purchase of Hite Thompson of one-fifth interest in the whiskey have that effect, or destroy Walston's interest to that extent in the whiskey. As to him, it is very clear that he had the strongest interest that the whiskey should be secure from fire until the tax on it was paid, since its continued existence was his best, if not his only, security against liability on the bonds.

It is to be observed that no other interest of Thompson & Co. is in issue in this suit. They never held the whiskey on commission, and the loss in regard to the proprietary interest had been paid by the companies. This was another and a different interest in the same property. A man might insure his interest in property as an executor, and his interest as a legatee. His removal from the office of executor by the proper court might, within the terms of this policy, prevent his recovering in that character; but if his interest in the property as legatee was one-sixth, would the change of executorship bar his recovery as legatee? This would hardly be asserted by any one.

It is objected further to a recovery that plaintiffs have not actually paid the judgment. The answer to this, if any were necessary, is that by the law of Kentucky the replevin bond is a satisfaction of the judgment. It is as to this obligor a debt discharged. It is said that, in case of a loss like this, the government cannot collect the tax from the bondsmen. The answer is, that the government has sued and obtained judgment for the tax; and defendants were asked to defend that suit, and declined to do so.

Judgment affirmed.

AGRICULTURAL INS. CO. v. MONTAGUE.

SUPREME COURT OF MICHIGAN, 1878. 38 Mich. 548.

ERROR to Tuscola.

Assumpsit on insurance policy. Defendant brings error.

B. W. Huston and Hatch & Cooley, for plaintiff in error.*Timothy E. Tarsney*, for defendant in error.

COOLEY, J. The action in this case was upon a policy of insurance issued to one Graves and assigned by him after a loss to Montague, the plaintiff below. The plaintiff recovered judgment and the case is before us on error.¹ . . .

A quantity of silver ware was covered by the policy, which proved to belong, not to the insured but to his wife. In respect to this the plaintiff claimed to recover on a showing that, when the policy was drawn, Graves disclosed to the agent the real facts. The argument was that, as the company, through its agent, had knowledge of all the facts, and still granted the policy, the issuing of the policy was a waiver of all objection on that score. This view was accepted by the court, and the jury was instructed accordingly. If the instruction was correct, it is manifest that any person may obtain insurance upon property without any right in it whatsoever; he has but to disclose the facts, and the policy, though only a wager policy, will be as legal as any other. But such a doctrine is at war with the fundamental principles of insurance, which require that a person shall have an insurable interest before he can insure: a policy issued when there is no such interest is void, and it is immaterial that it is taken in good faith and with full knowledge. The policy of the law does not admit of such insurance, however willing the parties may be to enter into it. The doctrine of waiver has obviously nothing to do with such a case. The agent cannot do for the company by waiver what the company is powerless by express contract to do for itself: he cannot by waiver invest the insured with an interest he does not own. There was occasion to consider this question in *Peoria M. & F. Ins. Co. v. Hall*, 12 Mich. 202, and it was there held that an insurance of partnership property by one partner in his own name could not be made to embrace the interest of the other partner, notwithstanding it was written by the agent with full knowledge of the facts. The reason is the one above assigned: it is not competent to write an insurance where an insurable interest is wanting, whether the facts are known or not. The difficulty is inherent in the case, and is beyond the reach of waiver.

It is proper to say in this connection that under our statute the husband has no control whatever over his wife's property; so that the

¹ The passages omitted, here and near the end of the opinion, dealt with points foreign to waiver, and upon one of these points found that the lower court had committed error. — Ed.

question arises here precisely as it would had the silver been owned by a stranger.¹ . . .

The judgment must be reversed with costs and a new trial ordered.

HOWARD, APPELLANT, v. THE LANCASHIRE INS. CO.,
RESPONDENTS.

SUPREME COURT OF CANADA, 1885. 11 Can. S. C. 92.

THIS was an appeal from a judgment of the Supreme Court of Nova Scotia, 5 Russell & Geldert, 172, making absolute a rule *nisi* for a new trial.²

On 5 Aug., 1875, the Lancashire Insurance Company issued in favor of Howard & Son a fire insurance policy on a stock of dry goods and general merchandise. The amount insured was \$2,000. Howard & Son were represented in the transaction by their general manager, Jenkins. The application stated that one Strong owned the stock and that Howard & Son were mortgagees. Strong was the owner, and was indebted to Howard & Son, and had authorized Howard & Son to take out this insurance as security; but Howard & Son had no mortgage or other lien at the time of taking out the policy. On 20 Dec., 1875, Strong made an assignment under the insolvent act of 1875. On 21 Jan., 1876, a deed of composition and discharge was executed by his creditors; and, on the same day, the official assignee executed the statutory transfer of the insolvent estate to Jenkins, the assignee chosen by the creditors. On 5 May, 1876, Strong's discharge was confirmed by the court, and on 15 May Jenkins executed the statutory transfer of the estate to him. Meanwhile, on 8 March, 1876, Strong executed to Jenkins a bill of sale, containing a proviso that Jenkins would execute a reassignment if, on demand, Strong should pay \$4,000, and that until default Strong should retain possession. This bill of sale, as was contended at the trial, was taken by Jenkins as the agent of Howard & Son. It was released by Jenkins on 12 Jan., 1877; and, on the same day, Strong executed an absolute bill of sale to Henry Howard, of Howard & Son. The property was destroyed by fire on 31 March, 1877. The policy had been renewed on 5 Aug., 1876, by the issue of a receipt acknowledging payment of the premium on the policy, "which is hereby renewed and continued in force for one year."

¹ On the question whether a husband can procure insurance on his wife's property, see *Clarke v. Firemen's Ins. Co.*, 18 La. 431 (1841); *Harris v. York Mutual Ins. Co.*, 50 Pa. 341 (1865); *American Central Ins. Co. v. McLanathan*, 11 Kans. 533 (1873); *Trade Ins. Co. v. Barracloiff*, 45 N. J. L. (16 Vroom), 543 (1883); *Clark v. Dwelling House Ins. Co.*, 81 Me. 373 (1889); *Traders' Ins. Co. v. Newman*, 120 Ind. 554 (1889). — Ed.

² The statement has been rewritten upon the basis of the facts detailed in 5 Russell & Geldert, 172. — Ed.

A condition of the original policy said: "Insurances, original or renewed, shall be considered as made under the original representation, in so far as it may not be varied by a new representation in writing, which, in all cases, it shall be incumbent on the party insured to make, when the risk has been changed, either within itself or by the surrounding or adjacent buildings." Another condition said: "If the interest in property to be insured be a leasehold, trustee, mortgagee, or reversionary interest, or other interest not absolute, it must be so represented to the company, and expressed in the policy in writing, otherwise the insurance shall be void."

Howard & Son having brought action upon the policy, the defendant company pleaded numerous pleas, to the effect that there was no insurable interest in the plaintiffs and that the proofs of loss were defective.¹

The cause was tried before SMITH, J., who found a verdict in the plaintiffs' favor for \$2,000, the full amount claimed.

Gormully, for the appellant. When Strong gave the bill of sale to Jenkins he was in possession of the goods, and his discharge by the court made the mortgage of the eighth of March valid. On the fifth of August a new premium was paid, and I contend that each payment of premium is a new contract. It was not intended to make a change in the policy, but to continue a binding contract of insurance.

I am going to contend that a party need not have an interest in the property at the time of effecting the insurance; it is sufficient if he has such interest at the time of the loss.

Tremaine for the respondents was not called on.

RITCHIE, C. J. I do not think this is an arguable case at all. I think that before a man can recover on a policy of insurance he must have an insurable interest in the property when he effects the insurance. The renewal was merely a continuance of the original insurance and not a new policy. This appeal must be dismissed.

Appeal dismissed, with costs.

THE NATIONAL FILTERING OIL CO., RESPONDENT, v.
THE CITIZENS' INS. CO., APPELLANT.

COURT OF APPEALS, NEW YORK, 1887. 106 N. Y. 535.

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made January 16, 1887, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial without a jury.

The action was upon a policy of fire insurance, the substance of which and the material facts are stated in the opinion.

¹ The facts as to proofs of loss have been omitted. — ED.

G. A. Clement, for appellant.

F. R. Coudert and *Paul Fuller*, for respondent.

FINCH, J. The insurance which forms the subject of this litigation was of an unusual character, and presents a question for the solution of which we have no admitted precedent. It was an insurance upon the oil reducing and filtering works of Ellis & Co., and for the protection of specified royalties, payable by that firm to the plaintiff as compensation for an exclusive license to use in their business a certain patent which belonged to and was controlled by the plaintiff company. The policy, by its terms, insured that company "on royalties payable to insured from the business of John Ellis & Co., carried on in premises situate in Brooklyn, on block bounded by Sullivan, Walcott and Ferris Streets and Buttermilk channel," and then proceeded with a more specific statement, thus: "Whereas, the above named firm of John Ellis & Co., by virtue of an agreement with the assured, are bound to pay to them royalties for the privilege of using their patent, which royalties are guaranteed to amount to \$250 a month; now, therefore, the conditions of this insurance are that, in case the premises occupied as above by said Ellis & Co. shall be damaged by fire so as to cause a diminution of said royalties, this company will make good to the insured the amount of such diminution during the restoration of said premises to their producing capacity immediately preceding said fire. In case of the destruction by fire of said premises, then this company shall pay the full amount insured." That full amount was \$1,000.¹ . . .

We are first to ascertain what loss was insured against. The defendant company contends that the risk it assumed extended no further than diminution of royalties below the guaranteed minimum, and, since there never was such diminution, that the judgment rendered was erroneous. But such is not the proper construction of the policy. That insured the royalties payable under the contract; not merely the guaranteed proportion, but the royalties stipulated; that is, the whole of them. Up to the minimum amount they depended upon the financial responsibility of Ellis & Co., for to that extent they were payable in any event, and the risk was on the licensees. But beyond that they depended upon the running capacity of the works, and the amount of oil they could put upon the market, and which could be sold. The phrase "said royalties" in the policy refers to the royalties payable by force of the agreement, and to the whole of them, and is not restricted or narrowed by the descriptive statement that they — that is, the royalties insured — were guaranteed to be not less than \$250 a month. Whatever they should prove to be they were insured against a diminution caused by fire at the works, and not merely a minimum proportion guaranteed part of them.

But these royalties, it is argued, were not capable of supporting an insurance, and the policy was a wager policy. It is quite true that,

¹ The passages omitted did not deal with insurable interest. — Ed.

beyond the guaranteed minimum, they were contingent and dependent upon the condition of the market, and even, possibly, upon the will or choice of Ellis & Co., in the reasonable control of their business. That firm was not bound to pay except upon oil manufactured and sold, and might limit both, or be compelled by the market to limit both to a production yielding no royalties beyond the guaranteed minimum; and so, it is said, the plaintiff had no fixed or definite right to royalties beyond such minimum, no assurance of their existence, no power to compel or demand their being, and could not be said to have lost what it neither had, nor the absolute right to possess. But a further fact in the case establishes more definitely the plaintiff's risk and loss, and the direct causative connection between that loss and the fire which injured the works. The license held by Ellis & Co. to use the plaintiff's patent, was an exclusive one, and the earning power of that patent was thus narrowed to the business of Ellis & Co. If the latter did not continue their business, and so preserve the fruitfulness of the patent, by reason of some fault of their own, or from a cause for which they were responsible, the exclusive character of the license ended, and the patentees were at liberty to transfer the right to others, and thus secure the profits of their invention. But if the business of Ellis & Co. was lessened or restricted because of a fire which should destroy or impair their works, the exclusive right given them was to continue; the patentees could not license others, and must necessarily bear the loss of their diminished royalties. This was the one business risk involved in their contract. Against all others they could provide, but this one they were compelled to bear by the terms of their agreement. Against that risk they insured. It had a direct and necessary connection with the safety of the structures burned. A fire destroying them destroyed the royalties *pro tanto*, because the efficient cause of their loss, and so was established the needed connection between the premises insured and the royalties dependent upon their safety and measuring the loss resulting from their destruction. The policy was, therefore, not a mere wager, and the royalties could be protected by an insurance against the fire risk which threatened them.

The authorities in this State go far enough in their general principles to cover the case in hand. (*Herkimer v. Rice*, 27 N. Y. 163; *Springfield F. & M. Ins. Co. v. Allen*, 43 id. 389; *Rohrbach v. Germania Fire Ins. Co.*, 62 id. 47.) They decide that an interest, legal or equitable, in the property burned, is not necessary to support an insurance upon it; that it is enough if the assured is so situated as to be liable to loss if it be destroyed by the peril insured against; that such an interest in property connected with its safety and situation as will cause the insured to sustain a direct loss from its destruction is an insurable interest; that if there be a right in or against the property which some court will enforce upon the property, a right so closely connected with it and so much dependent for value upon the continued existence of it alone, as that a loss of the property will cause pecuniary damage to

the holder of the right against it, he has an insurable interest. The plaintiff brought its case within these principles. A loss measured by the diminution of its royalties was the inevitable result to it of a fire in the works of Ellis & Co. It could not substitute a new license and must await the repairs necessary to a renewal of the business. By its contract it became so situated relative to the buildings insured, that it had a direct pecuniary interest in their safety from accidental fire. That interest it could, as it did, insure. . . .

Judgment affirmed.

FARMERS' MUTUAL INSURANCE CO. v. NEW HOLLAND
TURNPIKE CO.

SUPREME COURT OF PENNSYLVANIA, 1888. 122 Pa. 37.

ERROR to the Court of Common Pleas of Lancaster County.¹

An action of covenant was brought upon a policy of insurance for \$4,000 upon a bridge over Conestoga Creek, where the New Holland Turnpike Company's road crosses. The defendant pleaded covenants performed, *absque hoc*.¹

The judge instructed the jury that the turnpike company "has an equitable interest which may be insured;" and he refused the defendant's request for an instruction that "it has not been proved . . . that the plaintiff had any insurable interest."

The jury found for the plaintiff. Judgment being entered, the defendant took this writ, and assigned many errors, of which the second was the refusal to give the instruction requested by the defendant, and the third was the passage quoted from the charge.

Mr. *H. M. North* (with him Mr. *A. O. Newpher*), for the plaintiff in error.

Mr. *A. M. Frantz* (with him Mr. *S. H. Reynolds*), for the defendant in error.

GREEN, J.² . . . The more important question . . . is whether the turnpike company had any insurable interest in the bridge. It is a novel question, but perhaps not difficult of solution. The basis, upon which the insurable interest is claimed to exist, is the fact that the turnpike company contributed \$5,500 to the cost of erecting the bridge, being one-third its total cost, \$16,500. If this contribution was compulsory — that is, legally compulsory — it would perhaps have to be admitted that an interest in the bridge, legal or equitable, would necessarily flow from it. For it cannot be supposed that the law would

¹ The reporter's statement has been omitted. — Ed.

² The omitted parts of the opinion sustained the insurer's contention that the lower court had committed other errors, and also quoted definitions of insurable interest. — Ed.

oblige any person or corporation to contribute directly to the cost of erecting a structure, without conferring an interest in the structure which the law would recognize and enforce. While saying this, we do not of course refer to that kind of contribution which is accomplished by the payment of taxes. Such contribution is, of course, for public use, and confers no title or interest upon the tax-payer in structures which may be erected with public funds. But in this case there is no pretence of any compulsion upon the turnpike company. The evidence as to the payment of the money is barren of information except as to the mere fact of the payment.

There is absolutely no testimony to prove why or upon what consideration, or for what purpose or reason, the turnpike company paid any part of the cost of erecting the bridge. It is not difficult to imagine a reason, since, as the company's road crossed the stream over which the bridge was erected, it would be quite desirable for them to have a bridge over which persons using the road could travel. But while that might be a reason for the company building a bridge of its own, it was still the fact that the bridge was a public county bridge, free to all travel, built many years before by a private person who transferred it to the county, and hence the property of the county exclusively. Being thus a free, public bridge, there could not possibly be any private estate or ownership in it. The turnpike company could charge no tolls for passing over it. They could exercise no acts of ownership over it. They could not obstruct it nor take it down, even if to rebuild it, without the consent of the county, and perhaps not even with such consent, as it was a part of the public highway.

In point of fact, while the turnpike company did contribute the third part of the cost of its erection, after the former bridge had fallen down, the county at that time paid the other two-thirds of the cost, and re-erected the bridge in discharge of its undoubted legal obligation to do so. And so, after its destruction by fire in 1882, it was again rebuilt by the county as a public county bridge in obedience to a general law of this Commonwealth, Act of May 5, 1876, P. L. 112, and the decree of this court: *Myers v. Commonwealth*, 110 Pa. 217. All this was done without any cost to this plaintiff, who now enjoys the use of the bridge in the same manner and to the same extent as before the fire. The only injury the plaintiff has sustained by the fire is in being deprived of the use of the bridge, not as its own, but as a part of the public highway, during the period of the reconstruction of the bridge. But for that injury the defendant was not responsible in any sense, and it never assumed an obligation to make compensation for it. The county was legally charged with the duty of rebuilding, and however an argument might be made against the county for not performing its duty in that regard with promptness, it is perfectly manifest that the breach of that duty by the county conferred no right of action against the defendant insurance company. What then remains to impose any liability upon the defendant? The bridge is restored without any expense to

the plaintiff. Every right which the plaintiff enjoyed before the fire is enjoyed since, so far as the bridge is concerned, without any additional cost to the plaintiff. It may be remarked in passing that the right of the plaintiff in the bridge is only the public and common right of its patrons as citizens, to use the bridge as a part of the public highway. It is therefore not a right peculiar to the plaintiff in any sense. . . .

There was clearly no interest in the bridge belonging to the turnpike company which could be recognized or enforced either at law or in equity. There could not be any right of property of any kind, nor of possession, nor of custody. Even the use of it was not a use by the plaintiff in its corporate capacity, but a mere right of passage over it which belonged to all citizens in common. The money which was contributed to its construction by the plaintiff was a mere gratuity, which it was not bound to give and which it could never recover. In such circumstances there was no interest or property in the bridge as a structure and hence no insurable interest capable of protection and enforcement. . . .

Judgment reversed.

SOPHIA BALOW *v.* TEUTONIA FARMERS' MUTUAL FIRE
INS. CO.

SUPREME COURT OF MICHIGAN, 1889. 77 Mich. 540.

ERROR to Wayne. (REILLY, J.)

Assumpsit. Defendant brings error.

James H. Pound, for appellant.

M. B. Breitenbach (*W. B. Jackson*, of counsel), for plaintiff.

SHERWOOD, C. J. The two important questions in this case were —

1. Did the plaintiff have an insurable interest in the property insured at the time the application was made for insurance?

2. If she had, did that interest continue until the time of the fire by which it was destroyed?¹ . . .

The jury found for the plaintiff. . . .

The defendant's counsel, after the evidence was closed, asked the court to instruct the jury to return a verdict for his client, under the pleadings and proofs in the case; and the court refused the request. This raises the first question to be considered. Certain evidence appears in the case, undisputed; and, if it is sufficient to dispose of the case, it will be unnecessary to go further with our discussion.

Among the facts upon which there is no dispute upon this record are the following: That the plaintiff became a member of the company, for the purpose of insurance, in April, 1884; that, before effecting the insurance in this case, the plaintiff conveyed by warranty deed the property in question to Ervin Palmer; also made, at the same time, a

¹ The omitted passages did not deal with insurable interest. — ED.

contract with him, which contains an agreement on the part of Palmer that he will try and sell and dispose of the eighty acres of land, including the insured property, and from the proceeds, provided a certain limit was reached, a portion was to go to the plaintiff; and she further covenanted that the sale, under Palmer's deed, was not to be construed conditional, in the following words:—

“It is hereby distinctly understood and agreed that the sale of said premises is absolute, and nothing herein contained shall be construed to make said sale conditional.”

That said insurance was effected October 22, 1884, and the deed to Palmer was made on August 6 preceding, as well as the said contract; that said deed to Palmer was duly recorded in the register's office in Wayne County, among the records of deeds, when the plaintiff took her insurance.

That, the complainant claiming that she had some equitable interest in the property insured, arising under the contract with Palmer, above referred to, and which, she claimed, furnished a proper basis for the insurance she obtained in the defendant company upon the property in question, she and her husband, David Balow, filed a bill of complaint against said Palmer and others on October 8, 1885, to enforce her claimed rights, and praying, among other things, that her said deed to Palmer might be decreed a mortgage, and her rights secured to her as mortgagor of the property, instead of grantor in fee. That said Palmer answered said bill fully, denying the equity of the same; that proofs were taken, and upon which, and the pleadings, the cause was heard in the Wayne Circuit Court, in chancery; and the circuit judge made a decree therein, dismissing the complainant's bill absolutely, and which is still in force, it never having been appealed from, or in any way modified; which decree was rendered previous to the destruction of the insured property by fire, on April 19, 1886.

It is claimed by counsel for the defendant that these undisputed facts show that the plaintiff, at the time the property burned, had no interest therein which would entitle her to recover; and that the circuit judge should have given his request to charge as asked. We think the counsel is correct, and the ruling otherwise was error.

The decision made in the chancery case conclusively shows the title to the insured property passed to Palmer by the plaintiff's deed to him. The contract of August 6, 1884, entered into at the time the deed was made to Palmer, contains the following clause:—

“In consideration of said deed, and the undertakings herein contained to be performed by said Palmer, it is hereby agreed that said Palmer, whenever he sells said premises, — and he agrees that whenever he can sell said premises for a fair price he will sell the same, — he will pay out of the proceeds of the premises the Miller mortgage, to whomsoever holds the same. And he is to retain in his hands sufficient to pay his said mortgages, and the indebtedness due him from said parties of the first part, or either of them. He is also to pay out of said

proceeds all liens, taxes, and other encumbrances on said premises. He is to pay, and said Palmer hereby agrees to pay, to said Sophia Balow, out of the proceeds of said sale, the sum of two thousand (\$2,000) dollars, if there shall be enough of said purchase price or proceeds remaining after paying the above amounts, including the mortgages of said Palmer; and, if there shall not be \$2,000 remaining of said proceeds after paying said amounts above specified, then said Palmer is to pay to said Sophia Balow what shall remain of said proceeds."

This clause of the contract creates no more than a personal obligation on the part of Palmer, in a certain contingency, to pay to this plaintiff an amount of money which can only be determined in the future; depending entirely upon the amount he may receive in case of sale of the property mentioned in the deed. It may be \$1, or \$2,000, or none at all. In no way is it, whatever may be the amount, made a charge upon the land, nor does it create an interest therein, in favor of the plaintiff, upon which she could obtain insurance.

It is claimed by plaintiff's counsel that the contract was part of the consideration for the deed to Palmer, and for what was secured under it to plaintiff; that she had a vendor's lien upon the property sold; and this, coupled with the possession which she held at the time the buildings were burned, gave her an equitable interest in the property, which was insurable. But this proposition cannot be maintained, under the undisputed facts in this case. A vendor's lien is always in the nature of a mortgage. The decree of the court in the chancery suit was to the effect that plaintiff had no such interest, and that she was not entitled to the possession of the property. But, independently of this, a vendor's lien must always be for some certain amount, known to exist at the time the lien is created. In this case, it was not known that any amount would ever become due to the plaintiff from Palmer under the contract by which she claims the lien. Certain it is that no indebtedness to her had been ascertained at the time this suit was brought; neither does the record disclose that any amount has become due to her since. This claim to such lien is therefore unfounded. . . .

The judgment, therefore, must be reversed, and a new trial granted.¹

¹ On the topic of this section, see also:—

Carter v. Humboldt Fire Ins. Co., 12 Iowa, 287 (1861);
Sawyer v. Dodge County Mutual Ins. Co., 37 Mich. 503 (1875);
Holbrook v. St. Paul F. & M. Ins. Co., 25 Minn. 229 (1878);
Walsh v. Fire Association, 127 Mass. 383 (1879);
Clark v. Scottish Imperial Ins. Co., 4 Can. S. C. 192 (1879);
Insurance Company v. Stinson, 103 U. S. 25 (1880);
Horsch v. Dwelling House Ins. Co., 77 Wis. 4 (1890);
Planters and Merchants Ins. Co. v. Thurston, 93 Ala. 255 (1890);
Berry v. American Central Ins. Co., 132 N. Y. 49 (1892);
Home Ins. Co. v. Mendenhall, 164 Ill. 458 (1897);
Sun Ins. Office v. Merz, 64 N. J. L. (35 Vroom) 301 (1900).—Ed.

SECTION III.

Life Insurance.

ANDERSON v. EDIE.

NISI PRIUS, KING'S BENCH, 1795. 2 Park Ins. (8th ed.) 914.

IN an action on a policy of insurance on the life of Lord Newhaven from the 1st December, 1792, to the 1st of December, 1793, the only question made by the defendant was as to the plaintiff's interest, which it was contended was not sufficient to take this case out of the statute 14 Geo. 3, c. 48. It appeared in evidence that Lord Newhaven was indebted to the plaintiff and a Mr. Mitchell in a large sum of money, part of which debt had been assigned by them to another person; the remainder, being more than the amount of the sum insured, was upon a settlement of accounts between the plaintiff and Mitchell, agreed by them to remain to the account of Mitchell only.

LORD KENYON was of opinion that this debt was a sufficient interest, and said that it was singular that this question had never been directly decided before. That a creditor had certainly an interest in the life of his debtor; the means by which he was to be satisfied may materially depend upon it, and at all events the death must in all cases in some degree lessen the security.

Verdict for the plaintiff.

LORD v. DALL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1815. 12 Mass. 115.

ASSUMPSIT on a policy of assurance, made for \$5,000, in favor of the plaintiff, upon the life of Jabez Lord, her brother, aged thirty-three years, bound on a voyage to South America, or any other place he might proceed to from Boston, commencing the risk on the 16th of December, 1809, at noon, and to continue until the 16th of July, 1810, at noon; for a premium of seven per cent. The defendant underwrote the sum of \$500.

At the trial of the cause upon the general issue, at the last November term, before the chief justice, it was proved that the said Jabez had died on the coast of Africa before the expiration of the time for which his life was insured, and not from any of the causes excepted from the risk.¹ . . .

¹ In reprinting the statement and the opinion, passages not bearing on insurable interest have been omitted. The omitted passages dealt principally with the illegality of the voyage. — Ed.

The objections made at the trial to the plaintiff's recovery were,—

1. That she had no insurable interest in the life of the said Jabez. But it being in evidence that she was a person of no property at the time, depending altogether upon the said Jabez for her support and education, and he having for several years paid her board, provided her with clothing, and paid for her education, — all which he continued to do at the time the policy was effected. — this objection was overruled, but reserved for the consideration of the whole court. . . .

The said Jabez Lord gave his note for the premium; and there was no evidence that the plaintiff knew where the said Jabez was bound.

If the court should be of opinion that the plaintiff had not an insurable interest, or that the policy was void on account of the illegality of the voyage, the verdict returned for the plaintiff was to be set aside, and she was to become nonsuit; otherwise judgment was to be rendered on the verdict.

Prescott and *Hubbard* argued for the plaintiff, and *Livermore* and *W. Sullivan*, for the defendant.

PARKER, C. J., delivered the opinion of the court.

It has been made a question in the argument, whether a policy of assurance upon a life is a contract which can be enforced by the laws of this State: the law of England, as it is suggested, applicable to such contracts never having been adopted and practised upon in this country.

It is true that no precedent has been produced from our own records of an action upon a policy of this nature. But whether this has happened from the infrequency of disputes which have arisen, it being a subject of much less doubt and difficulty than marine insurances, or from the infrequency of such contracts, it is not possible for us to decide. By the common principles of law, however, all contracts fairly made, upon a valuable consideration, which infringe no law, and are not repugnant to the general policy of the laws, or to good morals, are valid and may be enforced, or damages recovered for the breach of them.

It seems that these insurances are not favored in any of the commercial nations of Europe except England; several of them having expressly forbidden them, for what reasons, however, does not appear: unless the reason given in France is the prevailing one, viz. "that it is indecorous to set a price upon the life of man, and especially a freeman, which, as they say, is above all price." It is not a little singular that such a reason should be advanced for prohibiting these policies in France, where freedom has never been known to exist, and that it never should have been thought of in England, which for several centuries has been the country of established and regulated liberty.

This is a contract fairly made; the premium is a sufficient consideration; there is nothing on the face of it which leads to the violation of law; nor anything objectionable on the score of policy or morals. It must, then, be valid to support an action, until something is shown by the party refusing to perform it in excuse of his non-performance.

It is said that, being a contract of assurance, the law on the subject

of marine insurance is applicable to it; and therefore unless the assured had an interest in the subject-matter insured, he is not entitled to his action.

This position we agree to; for otherwise it would be a mere wager policy, which we think would be contrary to the general policy of our laws, and therefore void. Had then the plaintiff an interest in the life of her brother which was insured?

The report states the facts upon which that interest was supposed at the trial to exist. The plaintiff, a young female without property, was and had been for several years supported and educated at the expense of her brother, who stood towards her *in loco parentis*. Nothing could show a stronger affection of a brother towards his sister than that he should be willing to give so large a sum to secure her against the contingency of his death, which would otherwise have left her in absolute want. One per cent per month upon \$5,000, taken on the life of a man of thirty-three years of age, in good health at the time, was a sufficient inducement to the underwriter to take at least common chances, and proved the strong disposition of the brother to secure his sister against the melancholy consequence to her of his death. In common understanding no one would hesitate to say, that in the life of such a brother the sister had an interest; and few would limit that interest to the sum of five thousand dollars.

But it is said the interest must be a pecuniary, legal interest, to make the contract valid; one that can be noticed and protected by the law: such as the interest which a creditor has in the life of his debtor, a child in that of his parent, etc. The former case, indeed, of the creditor would have no room for doubt. But with respect to a child, for whose benefit a policy may be effected on the life of the parent, the interest, except the insurable one which may result from the legal obligation of the parent to save the child from public charity, is as precarious as that of a sister in the life of an affectionate brother. For if the brother may withdraw all support, so may the father, except as before stated. And yet a policy effected by a child upon the life of a father, who depended on some fund terminable by his death to support the child, would never be questioned; although much more should be secured than the legal interest which the child had in the protection of his father. Indeed, we are well satisfied that the interest of the plaintiff in the life of her brother is of a nature to entitle her to insure it. Nor can it be easily discerned why the underwriters should make this a question after a loss has taken place, when it does not appear that any doubts existed when the contract was made; although the same subject was then in their contemplation. . . .

Perceiving nothing in this contract unfriendly to the morals or interests of the community, and no knowledge of an illegal intention being imputed to the plaintiff, we see no reason for setting aside the verdict. Judgment will therefore be entered upon it.¹

¹ Compare *Lewis v. Phoenix Mut. L. Ins. Co.*, 39 Conn. 100 (1872). — ED.

HALFORD *v.* KYMER AND OTHERS.

KING'S BENCH, 1830. 10 B. & C. 724.

THIS was an action of covenant on a policy of insurance, dated the 13th of February, 1826, whereby the directors of the Asylum Life Insurance Company agreed with the plaintiff to insure the life of Robert Bargrave Halford, the son of the plaintiff, in the sum of £5,000, for the term of two years, and covenanted that if Robert Bargrave Halford should die at any time within the term of two years, to be computed from the day of the date of that policy, the funds of the company should be liable to pay, within six calendar months after proof of the death of the said Robert Bargrave Halford within the said term of two years, unto the said Richard Halford, his executors, &c., the sum of £5,000. Plea, first, that at the time of making the policy in the declaration mentioned, the plaintiff was not interested in the life of the said Robert Bargrave Halford. Secondly, that at the time of the death of the said Robert Bargrave Halford, the plaintiff was not interested in his life. At the trial, before LORD TENTERDEN, C. J., at the Middlesex sittings after last term, it appeared from the statement of the plaintiff's counsel, that by a settlement, dated the 18th of May, 1805, made on the marriage of the plaintiff with S. T. Bargrave, the sum of £8,000, and also the moneys to arise from the sale of certain freehold and leasehold estates, were settled, after and subject to the trusts for the plaintiff and his wife successively during their lives, in trust for the children or child of the said marriage, according to the appointment of the said plaintiff, and of his said wife, as therein mentioned; and in default of appointment, if there should be but one child of the said marriage, then in trust for such child, to become a vested interest in such child, if a son, at the age of twenty-one years; and if no child of the said marriage, or issue of such child, should become entitled to the vested interest in the said trust moneys, then upon such trusts as the said S. T. Bargrave should appoint; and in default of her appointment, in trust for her next of kin, as if she had died intestate and unmarried." There was only one child of the marriage, namely, Robert Bargrave Halford; and the marriage of the plaintiff with the said S. T. Bargrave having been dissolved by act of Parliament, the plaintiff married again, and effected the policy in question to provide against the death of his son, Robert Bargrave Halford, before he attained the age of twenty-one. The said Robert Bargrave Halford did attain the age of twenty-one years on the 2d of June, 1827, and on the 5th of January, 1828, made his will, and thereby gave all his real and personal estate to the plaintiff, his father, and appointed him sole executor, and died on the 11th of January, 1828. The plaintiff, on the 17th of July, 1828, proved his son's will in the Prerogative Court of the Archbishop of Canterbury. Upon this statement of facts, LORD TENTERDEN was of opinion that the

plaintiff, not having any pecuniary interest in the life of his son at the time when he effected the policy, the same was void by the Statute 14 Geo. III. c. 48, § 3, and he nonsuited the plaintiff, but reserved liberty to him to move to enter a verdict if the court should be of opinion that he had an insurable interest.

F. Pollock now moved accordingly. It is quite clear that but for the Statute 14 Geo. III. c. 48, this policy would be available. That statute, by § 1, enacts "that no insurance shall be made by any person or persons on the life of any person or persons, or on any event or events whatsoever, wherein the person for whose use, benefit, or on whose account such policy shall be made, shall have no interest, or by way of gaming or wagering; and that every insurance made contrary to the true intent and meaning thereof shall be null and void to all intents and purposes whatsoever." Now, the plaintiff clearly had an interest in the life of his son, for he might reasonably expect that the latter would reimburse him the expenses of his maintenance and education. This clearly was not a wagering policy within the meaning of that clause. It is true that the third section enacts, "that in all cases where the assured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer than the amount or value of the interest insured on such life or lives, or other event or events." It is clear that a man may effect an insurance on his own life, although he may have no pecuniary interest depending on it, and although his own income may be of the most ample kind, not depending on his own exertions, or on any contingency; and if that be so, upon what principle can it be said that he cannot have an insurable interest in the life of his son or his wife? If a man be deprived of the comfort, society, and assistance of his wife by the misconduct of another, he may recover damages for that loss. So, if he be deprived of the services of his daughter by her seduction, or if he lose the assistance of any other member of his family by the wrongful act of another, he may maintain an action for damages. Surely, the law which gives a man a right of action for the wrongful act of another, by which he is deprived of the assistance of his wife, daughter, or servant, will not prevent him from protecting himself against that casualty which forever deprives him of that assistance. [BAYLEY, J. In *Innes v. The Equitable Assurance Company* (which was tried before Lord Kenyon), the plaintiff had effected a policy on the life of his daughter. In order to show that he had an interest, he produced a paper, purporting to be a will, by which it appeared that he was entitled to the sum of £1,000 in the event of his daughter dying under the age of twenty-one. One Gardiner swore that he was a subscribing witness to the will, and that it was made at Glasgow, and that he was acquainted with the other subscribing witnesses; but another of those witnesses stated that it was not made at Glasgow, but by a schoolmaster in the borough. Innes was tried, convicted, and executed for the forgery, and Gardiner, who had sworn that the will was made at Glasgow, was convicted of

perjury. Lord TENTERDEN, C. J. It was in effect admitted, in that case, that it was necessary to prove that the father had a pecuniary interest in the life of his daughter, otherwise there would have been no occasion to go into the question as to the will; and unless it were a fact material in the case, the witness could not have been convicted of perjury.] That was only a *nisi prius* case. But a father has a legal interest in the life of his son sufficient to entitle him to insure. By the statute of Elizabeth, if a father become poor in his old age, and his son be capable of maintaining him, he is bound to do so. Now, why does a man insure the life of his debtor? Because the death of his debtor diminishes the chance of his being paid. So, if a son dies, the chance of the father being maintained in poverty and old age is diminished. [BAYLEY, J. The parish is bound to maintain him, and it is indifferent to him whether he be maintained by the parish or his son.] The amount of maintenance which a parish must afford may, in many cases, be much less than that which a son would be ordered to pay. Besides, a father may have a claim on his son, when he has no claim on the parish. He may not be able to show his settlement in the parish from which he claims relief. In that case the life of his son would be of importance to him, as affording him the certainty of having a comfortable provision. The word "interest" in the act of Parliament is not to be confined in construction to *pecuniary* interest, but may be taken to mean *legal* interest; and the third section, which allows the insured to recover to the amount or value of his interest, shows that the law would recognize an interest of any kind, provided a value can be set upon it.

Lord TENTERDEN, C. J. I retain the opinion which I expressed at the trial, that the word interest in this statute means pecuniary interest.

BAYLEY, J. It is enacted by the third section, "that no greater sum shall be recovered than the amount of the value of the interest of the insured in the life or lives." Now, what was the amount or value of the interest of the party insuring in this case? Not one farthing, certainly. It has been said that there are numerous instances in which a father has effected an insurance on the life of his son. If a father, wishing to give his son some property to dispose of, make an insurance on his son's life in his (the son's) name, not for his (the father's) own benefit, but for the benefit of his son, there is no law to prevent his doing so; but that is a transaction quite different from the present; and if a notion prevails that such an insurance as the one in question is valid, the sooner it is corrected the better.

LITTLEDAILE and PARKE, JJ., concurred.

Rule refused.

CYRUS K. MORRELL v. TRENTON MUTUAL LIFE AND
FIRE INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1852. 10 Cush. 282.

ACTION on a policy of life insurance, issued by the defendant company, February 16, 1850, insuring the plaintiff, in the sum of \$1,000, on the life of William C. Morrell, with leave to make a journey to California and back, and also to reside there.

On the trial in this court, before BIGELOW, J., it was proved or admitted, that said William C. Morrell died near Sacramento in the State of California, on the 12th of May, 1850; that due notice of his death was given, and payment demanded, before the action was commenced. It appeared by the evidence of John H. Morrell (who with the said William C. composed the firm of Morrell and Company), that prior to the issuing of said policy, it was agreed between the plaintiff and the said William C. that the latter should work in the California mines one year, and that one fourth part of the proceeds of his labor there should belong to the plaintiff, and that, as a consideration therefor, the plaintiff was to labor for the said William C. in the store of Morrell and Company, and that said arrangement was assented to by the other partner, John H. Morrell.

It further appeared, that the plaintiff did in fact labor in said store for the said William C. Morrell, by virtue of said agreement, till the news of the death of the said William C. was received, which was in July, 1850. It also appeared in evidence that, on the 22d day of January, 1849, the said firm of Morrell and Company purchased of the plaintiff a stock of goods and gave him their note for \$2,000, which note was unpaid, except one year's interest thereon, at the time of the death of the said William C., and at the trial of this suit. No administrator of the estate of the said William C. Morrell was ever appointed, and the father of the said William C. was the only heir to his estate. It was agreed that the estate of the said William C. was more than sufficient to pay all his debts and liabilities.

On the 9th day of September, 1850, it was agreed between said John H. Morrell, and the father of the said William C., that the said John H. should take to himself all the property of the said William C., and that he should assume and pay his debts, and should moreover pay his father the further sum of \$300, and the plaintiff knew of, and did not object to, said arrangement. Upon these facts, the presiding judge ruled that the plaintiff had an insurable interest in the life of the said William C., and was entitled to a verdict for the full amount insured. The verdict therefore being for the plaintiff, the defendants alleged exceptions.

A. H. Nelson, for the defendants.

J. G. Abbott, for the plaintiff.

SHAW, C. J. The court are of opinion that, upon the facts stated, the plaintiff had an interest such as is recognized as a good insurable interest in the life of the person on which this policy was made by the defendant company to the plaintiff. He held a promissory note signed by a firm, of which the said William C. Morrell was one of the partners, to an amount larger than the amount insured; this was due and owing at the time the insurance was made; at the death of the party whose life was insured, and at the time of the trial. Each partner is a debtor *in solido* to the whole amount of a joint debt. It is no answer, we think, that the estate of the deceased was solvent, and that the other joint debtor might be able to pay it; it was enough, we think, that by the contract of the defendants, made on a valuable consideration, they guaranteed to the plaintiff that if his debtor should die within the time, and the debt remained unpaid, they would pay the amount stipulated. *Anderson v. Edie*, cited in *Park on Ins.* 640; *Tidswell v. Ankerstein*, *Peake's Cas.* 151.

But the court are strongly inclined to the opinion that the plaintiff had another interest in the life of the person, on whose life he was insured by the defendants. He had a subsisting contract with that person, made on a valuable consideration, by which he was to receive one quarter part of his earnings in the mines of California for one year. Such an interest cannot, from its nature, be valued or apportioned. It was an interest upon which the policy attached. By the loss of his life within the year, the person whose life was insured lost the means of earning anything more, and the plaintiff was deprived of receiving his share of such earnings, to an uncertain and indefinite amount.

*Exceptions overruled.*¹

DALBY v. INDIA AND LONDON LIFE ASSURANCE CO.

EXCHEQUER CHAMBER, 1854. 15 C. B. 365.

THIS was an action² on a policy effected by the plaintiff on January 9, 1847, for and on behalf of the directors of the Anchor Life Assurance Co., in the sum of £1,000, on the life of the Duke of Cambridge, for the whole term of his life.

The pleadings and the facts are abstracted in the opinion of the court.

The cause came on for trial before CRESWELL, J., when, a point being reserved for the opinion of the Court of Common Pleas involving a question as to the propriety of the decision in *Godsall v. Boldero*, 9 East, 72, it was, at the suggestion of that court, agreed that the facts

¹ *Acc.*: Connecticut Mut. L. Ins. Co. v. Luchs, 108 U. S. 498 (1883). — ED.

² The statement has been condensed. — ED.

should be stated for the opinion of the Court of Error in the shape of a bill of exceptions.

According to the bill of exceptions, the judge directed the jury that there was no evidence that the Anchor Life Assurance Company was interested in the life of the Duke of Cambridge, in manner and form as the declaration had alleged; and thereupon the jury gave their verdict for the defendants; but the counsel for the plaintiff, before verdict, excepted to the direction.

Bramwell (with whom were *H. Tindal Atkinson* and *F. J. Smith*), for the plaintiff.¹

Channell, Serjt. (with whom were *Partridge* and *Coxon*), *contra*.²

Cur. adv. vult.

PARKE, B., now delivered the judgment of the court.³ . . .

It is an action on what is usually termed a policy of life assurance, brought by the plaintiff as a trustee for the Anchor Assurance Company, on a policy for £1,000 on the life of his late Royal Highness, the Duke of Cambridge.

The Anchor Life Assurance Company had insured the Duke's life in four separate policies, — two for £1,000, and two for £500 each, granted by that company to one Wright. In consequence of a resolution of their directors, they determined to limit their insurances to £2,000 on one life; and, this insurance exceeding it, they effected a policy with the defendants for £1,000 by way of counter-insurance.

At the time this policy was subscribed by the defendants, the Anchor Company had unquestionably an insurable interest to the full amount. Afterwards, an arrangement was made between the office and Wright for the former to grant an annuity to Wright and his wife, in consideration of a sum of money, and of the delivery up of the four policies to be cancelled, which was done; but one of the directors kept the present policy on foot, by the payment of the premiums till the Duke's death.

It may be conceded, for the purpose of the present argument, that these transactions between Wright and the office totally put an end to that interest which the Anchor Company had when the policy was effected, and in respect of which it was effected; and that at the time of the Duke's death, and up to the commencement of the suit, the plaintiff had no interest whatever.

This raises the very important question, whether, under these circumstances, the assurance was void, and nothing could be recovered thereon.

¹ In the midst of this argument, ALDERSON, B., said: "The case of *Godsall v. Boldero*, 9 East, 72, starts with the palpable fallacy that it is a mere contract of indemnity. In the case of a fire or marine insurance, the office does not necessarily pay anything. Life assurance is altogether different: every life must come to an end. In *Godsall v. Boldero*, it happened to be the contract of a creditor." — ED.

² PARKE, B., interrupted counsel thus: "You had better address yourself to the question whether or not an interest at the time of the contract is sufficient." — ED.

³ The omitted passage stated how the case came before this court. — ED.

If the court had thought some interest at the time of the Duke's death was necessary to make the policy valid, the facts attending the keeping up of the policy would have undergone further discussion.

There is the usual averment in the declaration, that, at the time of the making of the policy, and thence until the death of the Duke, the Anchor Assurance Company was interested in the life of the Duke, and a plea that they were not interested *modo et formâ*, — which traverse makes it unnecessary to prove more than the interest at the time of making the policy, if that interest was sufficient to make it valid in point of law. *Lush v. Russell*, 5 Exch. 203. We are all of opinion that it was sufficient; and, but for the case of *Godsall v. Boldero*, 9 East, 72, should have felt no doubt upon the question.

The contract commonly called life assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, — the amount of the annuity being calculated, in the first instance, according to the probable duration of the life; and, when once fixed, it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except when bonuses have been given by prosperous offices) the same, on the other. This species of insurance in no way resembles a contract of indemnity.

Policies of assurance against fire and against marine risks, are both properly contracts of indemnity, — the insurer engaging to make good, within certain limited amounts, the losses sustained by the assured in their buildings, ships, and effects. Policies on maritime risks were afterwards used improperly, and made mere wagers on the happening of those perils. This practice was limited by the 19 Geo. II., c. 37, and put an end to in all except a few cases. But, at common law, before this statute with respect to maritime risks, and the 14 Geo. III., c. 48, as to insurances on lives, it is perfectly clear that all contracts for wager policies, and wagers which were not contrary to the policy of the law, were legal contracts; and so it is stated by the court in *Cousins v. Nantes*, 3 Taunt. 315, to have been solemnly determined in the case of *Lucena v. Craufurd*, 2 Bos. & P. 324; 2 N. R. 269, without even a difference of opinion among all the judges. To the like effect was the decision of the Court of Error in Ireland, before all the judges except three, in *The British Insurance Company v. Magee, Cooke & Alcock*, 182, that the insurance was legal at common law.

The contract, therefore, in this case, to pay a fixed sum of £1,000 on the death of the late Duke of Cambridge, would have been unquestionably legal at common law, if the plaintiff had had an interest thereon or not; and the sole question is, whether this policy was rendered illegal and void by the provisions of the statute 14 Geo. III., c. 48. This depends upon its true construction.

The statute recites that the making insurances on lives and other events wherein the assured shall have no interest hath introduced a

mischievous kind of gaming ; and, for the remedy thereof, it enacts “ that no insurance shall be made by any one on the life or lives of any person or persons, or on any other events whatsoever, wherein the person or persons for whose use and benefit, or on whose account, such policy shall be made, shall have no interest, or by way of gaming or wagering ; and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever.”

As the Anchor Assurance Company had unquestionably an interest in the continuance of the life of the Duke of Cambridge, — and that to the amount of £1,000, because they had bound themselves to pay a sum of £1,000 to Mr. Wright on that event, — the policy effected by them with the defendants was certainly legal and valid, and the plaintiff, without the slightest doubt, could have recovered the full amount, if there were no other provisions in the act.

This contract is good at common law, and certainly not avoided by the first section of the 14 Geo. III. c. 48. This section, it is to be observed, does not provide for any particular amount of interest. According to it, if there was any interest, however small, the policy would not be avoided.¹ . . .

*Judgment reversed and venire de novo.*²

LOOMIS, ADMINISTRATOR, v. EAGLE LIFE AND HEALTH INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1856. 6 Gray, 396.

ACTION of contract upon a policy of insurance, dated February 2, 1849, for seven years, for the sum of \$700 upon the life of Freedom Keith, a minor son of Bela M. Keith, the plaintiff's intestate, to whom this policy was made.

At the trial in the Court of Common Pleas at October term, 1853, before MELLE, J., there was evidence of the following facts : Freedom was twenty years of age on the 6th of January, 1849, and resided with his father in Manchester, Conn., and worked in a factory there ; the father, with his other children, working in the same factory, and usually receiving the wages of all his children, which together with his own wages constituted the principal support of his family.

On the 17th of February, 1849, Freedom sailed for California, having on the 8th of January previous made an agreement in writing with Aaron Cook, in consideration of the sum of \$300 paid by Cook into the treasury of a trading and mining company, of which Freedom was a member, to devote his services to said company during its continuance,

¹ The remainder of the opinion dealt with the amount of recovery. It will be found *post*, p. 932. — Ed.

² See Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457 (1876). — Ed.

and to pay half of his share of the profits to Cook; and his father assented to this agreement, and relinquished any claim to his services, so far as Cook was concerned; and supplied Freedom with an outfit out of his former earnings. On the 2d of February, 1849, Cook procured from the defendants a policy of insurance for \$500 on Freedom's life. Freedom died on board of the ship on the 1st of December, 1849, soon after arriving in California.¹ . . .

The defendants contended that the plaintiff's intestate had no insurable interest in the life of Freedom Keith. . . .

But the judge ruled that upon the facts proved the intestate had an insurable interest to the amount of the policy, . . . and directed the jury to return a verdict for the full amount of the policy; which they did; and the defendants alleged exceptions.

H. Vose and *L. Norton*, for the plaintiff.

H. Morris, for the defendants.

SHAW, C. J. . . . The ground principally relied on is, that the assured had no pecuniary interest in the life of his son at the time the policy was made, and no insurable interest at the time the loss occurred.

We understand that the law of Connecticut (where the parties resided) is similar to that of Massachusetts, and that by the law of both States a father who supports, maintains, and educates a son, under twenty-one years of age and not emancipated, is entitled to the earnings of such son, and may maintain an action for them. Here, when the father had in terms relinquished his right to a share in the son's earnings, for a valuable stipulation on the other side, designed and intended to increase those earnings, by a necessary implication he reserved his right to the other share of those earnings. According to any, the strictest rule of construction, the assured in this case, we think, had a direct and pecuniary interest in the life of the *cestui que vie*, his son. It is argued, that the time which would remain after his probable arrival in California, before coming of age, would be so short that his earnings, if anything, would be very small. Supposing he was to have a passage of three or five months, he might still have five or six months to work in California; and this being a contract dealing with chances and probabilities, and even possibilities, and to be construed as such, it may well be supposed that the parties had it in contemplation that, by working a few weeks or days in a gold mine, or by a lucky hit in a single day, he might gain gold enough to make his share exceed the whole sum insured. But nearness or remoteness of this chance is immaterial; the parties regulate that matter for themselves in fixing the sum to be insured and the rate of premium. It seems to us therefore that, according to the rule relied on by the defendants, the assured in the present case had a direct and pecuniary interest in the life of the son, sufficient to enable him to maintain this action.

¹ In the statement and the opinion, passages foreign to insurable interest have been omitted. — ED.

But, upon broader and larger grounds, we are of opinion that, independently of the fact that the son was a minor, and the assured had a pecuniary interest in his earnings, the assured had an insurable interest sufficient to maintain this action.

The case in this State must be governed by the rules and principles of the common law, there being no regulation of the subject by statute. This was distinctly stated as the ground of decision in the leading and principal case decided in this commonwealth.¹ . . .

In discussing the question in this commonwealth, we are to consider it solely as a question at common law, unaffected by the St. of 14 Geo. III. c. 48, passed about the time of the commencement of the Revolution, and never adopted in this State. All therefore which it seems necessary to show, in order to take the case out of the objection of being a wager policy, is that the insured has some interest in the life of the *cestui que vie*; that his temporal affairs, his just hopes and well-grounded expectations of support, of patronage, and advantage in life will be impaired; so that the real purpose is not a wager, but to secure such advantages supposed to depend on the life of another; such, we suppose, would be sufficient to prevent it from being regarded as a mere wager. Whatever may be the nature of such interest, and whatever the amount insured, it can work no injury to the insurers, because the premium is proportioned to the amount; and whether the insurance be to a large or small amount, the premium is computed to be a precise equivalent for the risk taken. Perhaps it would be difficult to lay down any general rule as to the nature and amount of interest which the assured must have. One thing may be taken as settled, that every man has an interest in his own life to any amount in which he chooses to value it, and may insure it accordingly.

We cannot doubt that a parent has an interest in the life of a child, and, *vice versa*, a child in the life of a parent; not merely on the ground of a provision of law that parents and grandparents, children and grandchildren, are bound to support their lineal kindred when they may stand in need of relief, but upon considerations of strong morals, and the force of natural affection between near kindred, operating often more efficaciously than those of positive law. In the case of Lord v. Dall, it was held that it might be inferred from particular circumstances.² . . .

Prima facie the plaintiff in the present case has an interest in the life of his son, the policy of insurance was a valid one, and the plaintiff is entitled to recover upon it.

*Exceptions overruled.*³

¹ Here was quoted Lord v. Dall, *ante*, p. 101 (1815). — ED.

² The omitted passage bore indirectly on insurable interest, but more directly on amount of recovery. — ED.

³ *Acc.*: Mitchell v. Union L. Ins. Co., 45 Me. 104 (1858). — ED.

MARGARET CAMPBELL v. NEW ENGLAND MUTUAL
LIFE INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1867. 98 Mass. 381.

CONTRACT against a mutual insurance company on a policy of insurance made by them to Andrew Campbell upon his life, payable to him, his executors, administrators, and assigns, for the benefit of the plaintiff.¹ . . .

The declaration alleged . . . that the plaintiff was the wife of a brother of the deceased. . . .

The answer . . . declared the defendants' ignorance whether the plaintiff was his brother's wife or the person to whom the policy was made payable; and averred that she had not an insurable interest in his life; and also that the policy was made upon the faith of an application therefor, signed by Andrew Campbell. . . .

A trial . . . resulted in a verdict for the plaintiff, which was set aside as against evidence.

At the second trial . . . before WELLS, J., the plaintiff proved that she was the person named in the policy and for whose benefit it was made; and rested her case; whereupon the defendants asked the judge to rule that in order to maintain her action she must prove an insurable interest in the life of her brother-in-law; but he declined so to rule. . . .

The judge . . . instructed the jury . . . "that an untrue statement innocently made, in regard to a latent disease of which the applicant was unconscious, would not avoid the policy." . . .

The jury returned a verdict for the plaintiff; and the defendants alleged exceptions.

T. K. Lothrop and *G. W. Baldwin*, for the defendants.

H. G. Hutchins, for the plaintiff.

WELLS, J.² The policy in this case is upon the life of Andrew Campbell. It was made upon his application; it issued to him as "the assured;" the premium was paid by him; and he thereby became a member of the defendant corporation. It is the interest of Andrew Campbell in his own life that supports the policy. The plaintiff did not, by virtue of the clause declaring the policy to be for her benefit, become the assured. She is merely the person designated by agreement of the parties to receive the proceeds of the policy upon the death of the assured. The contract (so long as it remains executory), the interest by which it is supported, and the relation of membership, all continue the same as if no such clause were inserted. *Fogg v. Middlesex Insurance Co.*, 10 Cush. 337, 346; *Sanford v. Mechanics' Insurance Co.*, 12

¹ In the statement and the opinion, many passages foreign to insurable interest have been omitted. — ED.

² HOAR and FOSTER, JJ., did not sit in this case. — REP.

Cush. 541; Hale v. Mechanics' Insurance Co., 6 Gray, 169; Campbell v. Charter Oak Insurance Co., 10 Allen, 213; Forbes v. American Insurance Co., 15 Gray, 249. It was not necessary therefore that the plaintiff should show that she had an interest in the life of Andrew Campbell, by which the policy could be supported as a policy to herself as the assured. The defendants raise no question as to her right to bring this action, if the policy can be supported for her benefit.¹ . . .

The instruction "that an untrue statement innocently made, in regard to a latent disease, of which the applicant was unconscious, would not avoid the policy," as a general statement of the law applicable to representations in insurance contracts, was incorrect. . . .

As the instruction was in itself incorrect, it seems to be necessary that the verdict should be set aside, and the

Exception upon this single point is sustained.

¹ In *Rawls v. American Mutual L. Ins. Co.*, 27 N. Y. 282, 287 (1863), WRIGHT, J., for the majority of the court, said: "The defendants, in form, contracted with Fish for an insurance upon his life. In consideration of certain statements and representations made, and a premium of \$117, to be paid annually, in advance, the defendants promised and agreed with Fish, his heirs or other legal representatives, to pay the sum of \$5,000 to the plaintiff, within twenty days after the proof of the death of Fish, provided the policy should then be in force. If this is to be regarded and treated as a contract with Fish to insure his own life, then the question attempted to be raised on the motion for a nonsuit, viz., that the plaintiff had no insurable interest in the life of Fish, and, hence, that it was a gaming or wagering policy, cannot arise. If the contract is with the party whose life is insured, he may have the loss payable to his own representatives, or to his assignee or appointee; and whichever be the form, his own interest is the same. It can only be by holding the policy in substance and legal effect, that of a creditor upon the life of his debtor, that an interest was necessary on the part of the plaintiff to support it.

"I am inclined to regard the insurance as effected by the plaintiff on the life of Fish, although the policy, in form, purports to have been procured by the latter. The plaintiff applied for and obtained it as the creditor of Fish, to protect his interest as such creditor, in Fish's life. He took the initiatory steps for procuring the policy; the application stated it to be for his benefit; he paid the original and all subsequent premiums; it was delivered to him, and he sues upon it as the party in interest, and as the only party connected with the policy who could maintain an action upon it. So far as the question of its validity is involved, it will, therefore, be treated as a contract, in substance, between the plaintiff and the defendants."

And see *Bloomington Mut. Benefit Assn. v. Blue*, 120 Ill. 121 (1887); *Heinlein v. Imperial L. Ins. Co.*, 101 Mich. 250 (1894); and *post*, p. 117, n. 1.

In Pennsylvania and Texas the law upon this point is peculiar, and possibly not finally settled. *Gilbert v. Moose*, 104 Pa. 74, 78 (1883); *Scott v. Dickson*, 108 Pa. 6, 16 (1884); *Mayher v. Manhattan L. Ins. Co.*, 87 Tex. 169 (1894).—ED.

CHISHOLM, RESPONDENT, *v.* NATIONAL CAPITOL LIFE
INS. CO., APPELLANT.

SUPREME COURT OF MISSOURI, 1873. 52 Mo. 213.

APPEAL from St. Louis Circuit Court.

Henderschott and Chandler, for appellant.*Isaac T. Wise*, for respondent.

WAGNER, J. The main error assigned and relied upon for the reversal of this case is the action of the court in refusing to declare that the plaintiff had no such insurable interest in the life of the person insured as would entitle her to recover.

The record shows that there was a contract of marriage existing between plaintiff and Robert Peel Clark, and that on the 17th day of July, 1869, the defendant made and delivered to plaintiff its policy of insurance whereby it insured the life of the said Clark for the term of his natural life, for the sum of \$5,000. The policy was issued and delivered to plaintiff and made payable to her as the intended wife of Clark, she paying the annual premium of \$90.20. The first premium was duly paid by her, and on the 12th day of January, 1870, whilst the policy was in full force, but before the contemplated marriage had been solemnized, Clark died.

What interest or whether any is necessary in the life of the person insured to support the contract of insurance is left in some confusion by the adjudged cases, as the authorities are contradictory.¹

In this State we have no statute on the subject covering the case, and as the policy is not void by the common law, it can only be declared so on the ground that it is against public policy. There is nothing to show that the contract was a mere wagering one, or that it is in any wise against or contrary to public policy. . . .

The insurance was not a mere wagering contract, and therefore cannot be said to contravene any principle of public policy. The plaintiff had an interest in the life of Clark; a valid contract of marriage was subsisting between them. Had he lived, and violated the contract, she would have had her action for damages. Had he observed and kept the same, then as his wife she would have been entitled to support. In my opinion she had such an interest as was entirely sufficient to render the contract valid. The defence in this case is devoid of merit, and is not creditable to the defendant making it. There is no pretence that there was any concealment of facts at the time of making the contract. Upon the facts there was no hesitation in entering into the agreement, and obtaining the premium and issuing the policy. Had the defendant

¹ Passages discussing authorities have been omitted. — Ed.

been as willing to observe and fulfil its obligations as it was to receive premiums, then this case would have never occupied the time of the courts.

The judgment should be affirmed.¹

RESERVE MUTUAL INS. CO. v. KANE.

SUPREME COURT OF PENNSYLVANIA, 1876. 81 Pa. 154.

ERROR to the District Court of Philadelphia.

This was an action of debt, brought May 3, 1873, by James P. Kane against the Reserve Mutual Life Insurance Company, on a policy of insurance for \$2,000, issued April 1, 1872, by the defendants to the plaintiff, on the life of his father, John Kane.

The case was tried April 15, 1874, before Briggs, J.

The plaintiff gave evidence of the death of John Kane on the 26th of June, 1872. The father had come from Ireland; had lived in this country two or three years; plaintiff paid \$120 for bringing his father and family to this country; \$50 had been repaid him by the mother; the father intended to repay him, but had not; the father was a laborer; kept house from April to June, 1872; was fifty-five years old when he died; left a widow, three sons, and a daughter; the plaintiff paid through affection, but expected the father would have paid it had he lived; the money paid by him brought over the father, mother, brothers, and sister; he expected the father would compel the brothers to pay their passage-money back.

The defendants' points were, —

1. If the jury find from the evidence that the plaintiff was, at the execution of the policy of life insurance, an adult son of John Kane, then as such he had no insurable interest in the father's life, and the verdict should be for the defendants.² . . .

The court refused the points, and directed the jury to render a verdict in favor of the plaintiff for the amount of said policy, — \$2,000, less six months' premium unpaid, and for the interest, amounting to \$2,085.34. The jury so found.

The defendants took a writ of error, and assigned the refusal of their points and the instruction of the court for error.

H. M. Dechert, for plaintiffs in error.

D. C. Harrington, for defendant in error.

PER CURIAM. By the 28th section of the Poor Law of June 13, 1876, the father and grandfather, and the mother and grandmother, and the children and grandchildren of every poor person not able to work, shall, at their own charge, being of sufficient ability, relieve and main-

¹ See *McCarthy v. Supreme Lodge*, 153 Mass. 314 (1891); *Alexander v. Parker*, 144 Ill. 355 (1893). — Ed.

² Nothing ultimately turned on the points omitted. — Ed.

tain such poor person, at such rate as the Court of Quarter Sessions of the proper county shall order and direct. Maintenance of a father or mother unable to work is, therefore, a legal liability. When we add to this the feelings of natural affection and the desire produced by these feelings to provide for the comforts of parents, the right to effect an insurance on the life of the parent, to carry out these purposes, ought not to be denied. It would be technical in the extreme to say that a son has no insurable interest in his father's life. Poverty may overtake the father in his lifetime, and thus both father and mother be cast upon the son; or if the father die before her, the necessity may fall at once upon the son. Why then should he not be permitted to make a provision, by insurance, to reimburse himself for his outlays, past or future? What injury is done to the insurance company? They receive the full premium, and they know, in such case, from the very relationship of the parties, that the contract is not a mere gambling adventure, but is founded in the best feelings of our nature, and on a legal duty which may arise at any time. We are of opinion that the policy is not void.

*Judgment affirmed.*¹

¹ *Contra*: People's Mut. Benefit Society v. Templeton, 16 Ind. App. 126 (1896).

Compare Guardian Mut. L. Ins. Co. v. Hogan, 80 Ill. 35 (1875); Continental Life Ins. Co. v. Volger, 89 Ind. 572 (1883).

In Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457, 460 (1876), BRADLEY, J., for the court, said:—

"It is generally agreed that mere wager policies—that is, policies in which the insured party has no interest whatever in the matter insured, but only an interest in its loss or destruction—are void, as against public policy. This was the law of England prior to the Revolution of 1688. But after that period, a course of decisions grew up sustaining wager policies. The legislature finally interposed, and prohibited such insurance: first, with regard to marine risks, by statute of 19 Geo. II. c. 37; and next, with regard to lives, by the statute of 14 Geo. III. c. 48. In this country, statutes to the same effect have been passed in some of the States; but where they have not been, in most cases either the English statutes have been considered as operative, or the older common law has been followed. But precisely what interest is necessary, in order to take a policy out of the category of mere wager, has been the subject of much discussion. In marine and fire insurance the difficulty is not so great, because there insurance is considered as strictly an indemnity. But in life insurance the loss can seldom be measured by pecuniary values. Still, an interest of some sort in the insured life must exist. A man cannot take out insurance on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of some real interest to him.

"It is well settled that a man has an insurable interest in his own life, and in that of his wife and children; a woman in the life of her husband; and the creditor in the life of his debtor. Indeed, it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. And there is no doubt that a man may effect an insurance on his own life for the benefit of a relative or friend; or two or more persons, on their joint lives, for the benefit of the survivor or survivors. The old tontines were based substantially on this principle, and their validity has never been called in question.

"The essential thing is, that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest."

In Warnock v. Davis, 104 U. S. 775, 779 (1881), FIELD, J., for the court, said: "It is not easy to define with precision what will in all cases constitute an insurable inter-

ROMBACH v. PIEDMONT AND ARLINGTON LIFE INS. CO.

SUPREME COURT OF LOUISIANA, 1883. 35 La. Ann. 233.

APPEAL from the Third District Court for the Parish of Orleans.
MONROE, J.

A. & W. Voorhies, for plaintiff and appellant.

Singleton & Browne, for defendant and appellee.

The opinion of the court was delivered by

MANNING, J. The plaintiff insured the life of his mother-in-law in the defendant company in February, 1873, for \$2,000, the policy reciting that it is issued "for the sole use of her son-in-law, L. Rombach." His wife, the daughter of Eliza Geisler, had died leaving two children of tender years. Mrs. Geisler had insured her own life a month before in this company for the benefit of two of her own children, for the same sum as this policy.

The agent of the company sought Rombach, and told him of the policy Mrs. Geisler had taken, and asked if he did not want to take another, to which Rombach answered approvingly, provided the consent of Mrs. Geisler was not necessary. He avowed his object to be the benefit of his only child, one of them having died. The agent assured him it was of no consequence whether she consented or not, provided he paid the premiums promptly.

The first quarterly premium of \$22.86 was paid on the spot. Mrs. Geisler soon heard of the matter, and on March 20 she wrote to the company expressing strong disapproval, and exhibiting bad feeling to her son-in-law, and demanding the cancellation of the policy. On the next day the agent, by direction of the company, offered to pay back the premium to Rombach and demanded the return of the policy for cancellation. Rombach refused to receive the money, and denied the

est, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful — as operating more efficaciously — to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned, as being against public policy." — *Ed.*

company's right to cancel the policy, whereupon the company cancelled it, and notified both Rombach and Mrs. Geisler thereof.

Thereafter, Rombach on each quarter-day tendered the premium then payable on this policy to the company, until Mrs. Geisler's death in December, 1877, and the company refused to receive it.

The defendant pleads in answer that the policy is void because obtained through false and fraudulent representations of Rombach, viz., that he applied personally to the company for the policy, requesting its issuance, and represented that his mother-in-law desired the policy to be taken by him. We do not believe that. Rombach's plain, unvarnished statement is given already, and it is so perfectly in accord with the habit of insurance agents that it carries home conviction of its accuracy.

The additional defence is that the policy is "void for want of interest and consideration — that there was no love and affection between the assured and the beneficiary," and that he had not "such interest as the law requires to maintain such a policy."

The phraseology of this first quotation from the answer, as well as the interrogatories to all the witnesses, implies that the personal relations of the parties — their affection or hatred — is conceived to be the test of insurable interest. They do not affect it all. Much time was wasted on both sides in exhibiting Mrs. Geisler's antipathy to her son-in-law at one time, and her reconciliation to him at another.

The insurable interest in the life of another is a pecuniary interest. A policy of insurance, procured by one for his own benefit upon the life of another, the beneficiary being without interest in the continuance of the life insured, is against public policy and therefore void. It is thoroughly settled, because universally held, that a wife has an insurable interest in the life of her husband, and although in that case especially it might be assumed that love and affection furnished a sufficient basis for it, the decisions do not place it on that ground, but rather on the support she is entitled to from him. The books formulate the general principle somewhat in this way: when the insurable interest arises, or is implied from relationship, it will be deemed to exist when the relationship is such that the insurer has a legal claim upon the insured for services or support. Even though such legal claim does not exist, yet where, from the personal relations of the two, and the kindness and good feeling displayed by the insured to the insuree, the latter has a reasonable right to expect some pecuniary advantage from the continuance of the life of the former or to fear loss from his death, an insurable interest will be held to exist. *Bliss' Life Ins.*, § 31; *May's Life Ins.*, §§ 74, 106.

It was said in *Phenix Mut. Life Ins. Co. v. Bailey*, 13 Wall. 616, "it is sufficient to show that the policy is not invalid, as a wager policy, if it appears that the relation of consanguinity or affinity was such . . . as warrants the conclusion that the beneficiary had an interest, whether pecuniary, or arising from dependence, or natural affection, in the life

of the person assured," but this is a *dictum* of Clifford, J., and is not in accord with the decisions generally. A majority of the reported cases will be found to be rested upon pecuniary considerations or expectations.

Thus it has been held that a sister had an insurable interest in the life of her brother, where the fact was that she had been supported by him, *Lord v. Dall*, 12 Mass. 115, and a father in the life of his *minor* son, because entitled to his earnings, *Mitchell v. Un. Life Co.*, 45 Maine, 104; but that he has none from mere relationship to a son, *Halford v. Kymer*, 10 Barn. & Cres. 724; nor does the mere relation of brother suffice to furnish an insurable interest, *Lewis v. Phenix Co.*, 39 Conn. 100.

It must be admitted that the courts are not in accord upon the kind or quality of the insurable interest. Sometimes statutory law has intervened and prescribed in general terms what is insurable interest. We have no statute on the subject, and therefore are not hampered by special restrictions, but are at liberty to apply the general principles that underlie the whole system of insurance law.

Rombach was in none of the categories of permissible insurers. He had no insurable interest in the life of his mother-in-law. This is conceded by his counsel, but inasmuch as he is natural tutor to his child, who is the grandchild of Mrs. Geisler, it is claimed that "the relationship of plaintiff by affinity to the deceased, and by blood to his own child, and the latter's relationship by blood, as a forced heir, to both his father and grandmother, does constitute a substantial insurable interest."

This lengthened tie long drawn out is too attenuated to support a policy of insurance.

Besides, the policy on its face expresses that it is for his sole use. If he had died, and the policy was collectible, it would have enured to the benefit of his succession — to his creditors exclusively, if he had died insolvent.

*Judgment affirmed.*¹

¹ In *Stoner v. Line*, 16 Weekly Notes of Cases, 187 (S. C. Pa. 1885), there was this opinion *per curiam*: "The court correctly held that the son-in-law, in whose favor the policy was taken, had no insurable interest in the life of his mother-in-law. He was not a creditor of hers nor in any manner legally liable for her support or maintenance. Neither could inherit from the other. There was no consanguinity between them. The mere fact that he married her daughter gave him no such pecuniary interest in the preservation of her life as to permit him to effect a valid insurance thereon for his benefit. As to him it was purely a gambling contract."

Acc.: *Stambaugh v. Blake*, 15 Atl. R. 705 (S. C. Pa. 1888). — Ed.

CURRIER v. CONTINENTAL LIFE INS. CO.

SUPREME COURT OF VERMONT, 1885. 57 Vt. 496.

ASSUMPSIT to recover upon a contract of life insurance, issued by the defendant upon the life of Sarah M. Currier for the benefit of the plaintiff. Plea, the general issue, tender, and offset. Trial by jury, September Term, 1883. REDFIELD, J., presiding. Verdict ordered for the plaintiff.¹ . . .

Charles W. Porter, for the defendant.

S. C. Shurtleff, for the plaintiff.

TAFT, J. After the testimony was closed, the defendant moved that a verdict be directed in its favor on the ground that the plaintiff had not proved an insurable interest in the life of his deceased wife, the said Sarah M. Currier. The motion was denied. The defendant insists that the plaintiff had no insurable interest in the life of his wife, and that, therefore, the contract was against public policy and void. This objection would have come with more grace from the defendant, at the time it was asked to enter into the contract, and before the receipt of nearly \$3,000 of the plaintiff's money. As Parker, Ch. J., said in the leading case of *Lord v. Dall*, 12 Mass. 115, where a like objection was made: "Nor can it be easily discerned why the underwriters should make this a question after a loss has taken place, when it does not appear that any doubts existed when the contract was made, although the same subject was then in their contemplation."

Admitting that the rule as to the interest necessary to support a contract of life insurance is, that the interest must be a pecuniary one, we think that where no facts are shown in relation to the wife, the presumption is, that the husband has an insurable pecuniary interest in her life. He is entitled to her services. There are many cases where she is the real support of her husband and family, or, as is sometimes said, she is the "man of the house." In all ordinary cases the husband has a deep interest in the continued life of the wife. Cases may exist where the husband has no interest whatever in his wife's life. She may be a burden,—a hopeless maniac, or invalid; and such facts may require the application of a different rule. There are none such in this case; and we only hold that the presumption is, that the wife is a helpmeet, and the husband has an interest of a pecuniary nature in her living.² . . .

Judgment affirmed.

¹ The statement of facts has been omitted. The premiums were paid by the plaintiff; and from the report in 13 Ins. L. J. 737, it is clear that the policy was taken out by him.—ED.

² The remainder of the opinion dealt with other topics.—ED.

BARNES *v.* LONDON, EDINBURGH, AND GLASGOW LIFE INS. CO.

QUEEN'S BENCH DIVISION, 1891. '92, 1 Q. B. 864.

APPEAL from a decision of the judge of the Leeds County Court. The action was brought to recover £21 10s., the amount of a policy of insurance effected by the plaintiff upon the life of her step-sister. The insurance was effected in November, 1889, when the child was ten years old; the child died in May, 1891. At the trial before the learned county court judge, the plaintiff stated in her evidence that she had promised the child's mother before she died that she would take care of the child, and help to maintain her, and no evidence was called to contradict this statement. It was also stated that after her mother's death the child lived near, but not with, the plaintiff. No objection was taken that the plaintiff had not in fact spent any money upon the child, or as to the amount (if any) expended by her; and the learned judge held that the plaintiff had an insurable interest in the child's life, and was entitled to recover the amount of the policy. Other points, including misrepresentation on the part of the plaintiff as to the state of the child's health and misrepresentation by the defendants' agent, were taken, and decided in favor of the plaintiff; but it is unnecessary in this report to state the facts upon these points, as the question of insurable interest was the sole question of law raised upon the appeal.

F. Dodd, for the defendants.

No counsel appeared on behalf of the plaintiff.

LORD COLERIDGE, C. J. I am of opinion that this appeal must be dismissed. The facts are simple. The person insured was a little girl of ten, and the plaintiff, who effected the insurance for her own benefit, was her step-sister; the child had no mother, though her father was apparently alive; this is, however, not clear upon the evidence. The evidence of the plaintiff was to the effect that she had promised her mother that she would maintain and keep the child; and there was evidence that she had undertaken that burden. That was a duty not cast upon her by law, but was wholly self-imposed; and in carrying out her undertaking the plaintiff might have had to pay for the education and maintenance of the child, possibly also for its burial. In that state of circumstances it is said that the plaintiff had no insurable interest in the child's life. Now, I agree that the insurable interest must be a pecuniary interest, and that the interest must be in existence at the time when the policy is effected; that is perfectly clear upon the authorities. Is there such a pecuniary insurable interest here? I think there is. The expenses to which the plaintiff undertook to put herself for the maintenance of the child were, as I have said, not expenses which she was bound to incur; and in my judgment the plaintiff undoubtedly had an insurable interest in the child's life so far as to

secure the repayment of the expenses incurred by her. I cannot find that anything has been said in any case to a contrary effect. Taking the ordinary course of business as the guide to determine the law, I should have thought that it was matter of common knowledge that obligations of this sort were obligations the repayment of which was habitually secured in this way. In my judgment the plaintiff had an insurable interest in the child's life, at least up to the amount of the payments actually made by her on the child's account. No point was taken before the county court as to whether any money had been paid by the plaintiff, or as to the amount, if any, paid by her. The question of amount is, therefore, not before us; and on the point of law we must uphold the judgment of the county court judge.

A. L. SMITH, J. I am of the same opinion. No doubt the contention of the defendants is correct, that unless the plaintiff had a pecuniary interest in the child's life at the time the contract of insurance was made, the policy would be void under the provisions of the statute. I think, however, that the plaintiff had such an interest. A man can insure the life of his debtor. For instance, suppose an agreement by a debtor to pay his creditor £1,000 by successive monthly instalments of £100, the creditor could insure his debtor's life, and at his death recover in an action on the policy against the insurance company. In the present case there is sufficient evidence of an undertaking on the plaintiff's part to incur expense in maintaining, bringing up, and perhaps in burying the child. This decision does not trench on the cases in which it has been held that a father has no insurable interest in the life of his son. There is an obligation in law on a father to maintain his son; there is no such obligation here, but an undertaking to incur expense; and I can see no reason why the plaintiff, having incurred and incurring such expense, has not a pecuniary insurable interest to the extent of each sum of money as it was successively expended by her for the child's benefit—of course, so long as the total amount does not exceed the amount of the policy. We have nothing to do with the question of amount expended, which point was not taken below; the sole point is whether the plaintiff had any pecuniary interest at the date of the policy, and of that there was evidence. The appeal must be dismissed.

*Appeal dismissed.*¹

¹ On the topic of this section, see also:—

Hebdon v. West, 3 B. & S. 579 (1863);

Rawls v. American Mutual Life Ins. Co., 27 N. Y. 282, 288–289 (1863);

Langdon v. Union Mutual Life Ins. Co., 14 Fed. R. 272 (U. S. C. C., E. D. Mich. 1882);

U. B. Mutnal Aid Soc. v. McDonald, 122 Pa. 324 (1888);

Burton v. Connecticut Mut. L. Ins. Co., 119 Ind. 207 (1889);

Trinity College v. Traveler's Ins. Co., 113 N. Car. 244 (1893);

Carpenter v. U. S. Life Ins. Co., 161 Pa. 9 (1894).

In examining decisions on life insurance, it must be borne in mind that in a few jurisdictions a beneficiary must have an insurable interest, and that an assignee must have it in still more. See *ante*, p. 115, n. 1, and *post*, Chap. XII., Sect. III.—ED.

CHAPTER III.

CONCEALMENT.

PART I.

THE GENERAL THEORY.

CARTER v. BOEHM.

KING'S BENCH, 1766. 3 Burr. 1905.

THIS was an insurance cause upon a policy underwritten by Mr. Charles Boehm, of interest or no interest, without benefit of salvage. The insurance was made by the plaintiff for the benefit of his brother, Governor George Carter.

It was tried before Lord MANSFIELD at Guildhall, and a verdict was found for the plaintiff by a special jury of merchants.

On Saturday, the 19th of April last, Mr. Recorder (*Eyre*), on behalf of the defendant, moved for a new trial.

His objection was, "That circumstances were not sufficiently disclosed."

A rule was made to show cause; and copies of letters and depositions were ordered to be left with Lord MANSFIELD.

N. B. Four other causes depended upon this.

The counsel for the plaintiff, viz., Mr. *Morton*, Mr. *Dunning*, and Mr. *Wallace*, showed cause on Thursday, the first of this month. But first, —

Lord MANSFIELD reported the evidence; that it was an action on a policy of insurance for one year, viz., from 16th of October, 1759, to 16th of October, 1760, for the benefit of the governor of Fort Marlborough, George Carter, against the loss of Fort Marlborough, in the island of Sumatra, in the East Indies, by its being taken by a foreign enemy. The event happened; the fort was taken by Count d'Estaigne within the year.

The first witness was Cawthorne, the policy broker, who produced the memorandum given by the governor's brother (the plaintiff) to him; and the use made of these instructions was to show, "That the

insurance was made for the benefit of Governor Carter, and to insure him against the taking of the fort by a foreign enemy."

Both sides had been long in chancery, and the chancery evidence on both sides was read at the trial.

It was objected, on behalf of the defendant, to be a fraud, by concealment of circumstances which ought to have been disclosed; and particularly the weakness of the fort, and the probability of its being attacked by the French, which concealment was offered to be proved by two letters. The first was a letter from the governor to his brother, Roger Carter, his trustee, the plaintiff in this cause; the second was from the governor to the East India Company.

The evidence in reply to this objection consisted of three depositions in chancery, setting forth that the governor had £20,000 in effects, and only insured £10,000; and that he was guilty of no fault in defending the fort.

The first of these depositions was Captain Tryon's, which proved that this was not a fort proper, or designed to resist European enemies, but only calculated for defence against the natives of the island of Sumatra; and also that the governor's office is not military, but only mercantile; and that Fort Marlborough is only a subordinate factory to Fort St. George.

There was no evidence to the contrary, and a verdict was found for the plaintiff by a special jury.

After his lordship had made his report, —

The counsel for the plaintiff proceeded to show cause against a new trial.

They argued that there was no such concealment of circumstances (as the weakness of the fort, or the probability of the attack) as would amount to a fraud sufficient to vitiate this contract: all which circumstances were universally known to every merchant upon the exchange of London. And all these circumstances, they said, were fully considered by a special jury of merchants, who are the proper judges of them.

And Mr. *Dunning* laid it down as a rule, "That the insured is only obliged to discover facts, not the ideas or speculations which he may entertain upon such facts."

They said this insurance was in reality no more than a wager: "Whether the French would think it their interest to attack this fort, and if they should, whether they would be able to get a ship of war up the river or not."

Sir *Fletcher Norton* and Mr. Recorder (*Eyre*) argued *contra* for the defendant (the under-writer).

They insisted that the insurer has a right to know as much as the insured himself knows.

They alleged, too, that the broker is the sole agent of the insured.

These are general, universal principles in all insurances.

Then they proceeded to argue in support of the present objection.

The broker had, they said, on being cross-examined, owned that he did not believe that the insurer would have meddled with the insurance if he had seen these two letters.

All the circumstances ought to be disclosed.

This wager is not only "Whether the fort shall be attacked," but "Whether it shall be attacked and taken."

Whatever really increases the risk ought to be disclosed.

Then they entered into the particulars which had been here kept concealed. And they insisted strongly that the plaintiff ought to have discovered the weakness and absolute indefensibility of the fort. In this case, as against the insurer, he was obliged to make such discovery, though he acted for the governor. Indeed, a governor ought not, in point of policy, to be permitted to insure at all; but, if he is permitted to insure, or will insure, he ought to disclose all facts.

It cannot be supposed that the insurer would have insured so low as £4 per cent if he had known of these letters.

It is begging the question to say, "That a fort is not intended for defence against an enemy." The supposition is absurd and ridiculous. It must be presumed that it was intended for that purpose; and the presumption was "That the fort, the powder, the guns, etc., were in a good and proper condition." If they were not (and it is agreed that in fact they were not, and that the governor knew it) it ought to have been disclosed. But if he had disclosed this, he could not have got the insurance. Therefore this was a fraudulent concealment, and the underwriter is not liable.

It does not follow that because he did not insure his whole property, therefore it is good for what he has judged proper to insure. He might have his reasons for insuring only a part, and not the whole.

Cur. adv. vult.

LORD MANSFIELD now delivered the resolution of the court.

This is a motion for a new trial.

In support of it the counsel for the defendant contend, "That some circumstances in the knowledge of Governor Carter, not having been mentioned at the time the policy was underwrote, amount to a concealment, which ought, in law, to avoid the policy."

The counsel for the plaintiff insist, "That the not mentioning these particulars does not amount to a concealment which ought, in law, to avoid the policy, either as a fraud, or as varying the contract."

1. It may be proper to say something in general of concealments which avoid a policy.

2. To state particularly the case now under consideration.

3. To examine whether the verdict which finds this policy good, although the particulars objected were not mentioned, is well founded.

First. Insurance is a contract upon speculation.

The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only; the underwriter trusts to his representation, and proceeds upon confidence

that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist.

The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void, because the risk run is really different from the risk understood and intended to be run at the time of the agreement.

The policy would equally be void against the underwriter if he concealed, as if he insured a ship on her voyage which he privately knew to be arrived; and an action would lie to recover the premium.

The governing principle is applicable to all contracts and dealings.

Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary.

But either party may be innocently silent as to grounds open to both to exercise their judgment upon. "*Aliud est celare; aliud, tacere; neque enim id est celare quicquid reticeas; sed cum quod tu scias, id ignorare emolumenti tui causa velis eos, quorum intersit id scire.*"

This definition of concealment, restrained to the efficient motives and precise subject of any contract, will generally hold to make it void in favor of the party misled by his ignorance of the thing concealed.

There are many matters as to which the insured may be innocently silent; he need not mention what the underwriter knows, — *scientia utrinque par pares contrahentes facit.*

An underwriter cannot insist that the policy is void because the insured did not tell him what he actually knew, what way soever he came to the knowledge.

The insured need not mention what the underwriter ought to know; what he takes upon himself the knowledge of, or what he waives being informed of.

The underwriter needs not be told what lessens the risk agreed and understood to be run by the express terms of the policy. He needs not be told general topics of speculation, as, for instance, the underwriter is bound to know every cause which may occasion natural perils, as the difficulty of the voyage, the kind of seasons, the probability of lightning, hurricanes, earthquakes, etc. He is bound to know every cause which may occasion political perils, from the ruptures of states, from war, and the various operations of it. He is bound to know the probability of safety from the continuance or return of peace; from the imbecility of the enemy through the weakness of their counsels, or their want of strength, etc.

If an underwriter insures private ships of war by sea and on shore, from ports to ports. and places to places. anywhere, he needs not be told the secret enterprises they are destined upon, because he knows some expedition must be in view; and, from the nature of his contract,

without being told, he waives the information. If he insures for three years, he needs not be told any circumstance to show it may be over in two; or if he insures a voyage, with liberty of deviation, he needs not be told what tends to show there will be no deviation.

Men argue differently from natural phenomena and political appearances; they have different capacities, different degrees of knowledge, and different intelligence. But the means of information and judging are open to both: each professes to act from his own skill and sagacity, and therefore neither needs to communicate to the other.

The reason of the rule which obliges parties to disclose is to prevent fraud and to encourage good faith. It is adapted to such facts as vary the nature of the contract, which one privately knows, and the other is ignorant of and has no reason to suspect.

The question, therefore, must always be "Whether there was, under all the circumstances at the time the policy was underwritten, a fair representation or a concealment, — fraudulent, if designed, or, though not designed, varying materially the object of the policy, and changing the risk understood to be run."

This brings me, in the second place, to state the case now under consideration.

The policy is against the loss of Fort Marlborough from being destroyed by, taken by, or surrendered unto, any European enemy between the 1st of October, 1759, and 1st of October, 1760. It was underwritten on the 9th of May, 1760.

The underwriter knew at the time that the policy was to indemnify to that amount Roger Carter, the governor of Fort Marlborough, in case the event insured against should happen. The governor's instructions for the insurance, bearing date at Fort Marlborough, the 22d of September, 1759, were laid before the underwriter. Two actions upon this policy were tried before me in the year 1762. The defendants then knew of a letter written to the East India Company, which the company offered to put into my hands, but would not deliver to the parties, because it contained some matters which they did not think proper to be made public.

An objection occurred to me at the trial, "Whether a policy against the loss of Fort Marlborough, for the benefit of the governor, was good," upon the principle which does not allow a sailor to insure his wages.

But considering that this place, though called a fort, was really but a factory or settlement for trade, and that he, though called a governor, was really but a merchant, — considering, too, that the law allows the captain of a ship to insure goods which he has on board, or his share in the ship, if he be a part owner; and the captain of a privateer, if he be a part owner, to insure his share, — considering, too, that the objection did not lie upon any ground of justice in the mouth of the underwriter, who knew him to be the governor at the time he took the premium. And as, with regard to principles of public convenience,

the case so seldom happens (I never saw one before), any danger from the example is little to be apprehended, — I did not think myself warranted upon that point to nonsuit the plaintiff, especially, too, as the objection did not come from the bar.

Though this point was mentioned, it was not insisted upon at the last trial; nor has it been seriously argued, upon this motion, as sufficient alone to vacate the policy; and if it had, we are all of opinion “That we are not warranted to say it is void upon this account.”

Upon the plaintiff’s obtaining these two verdicts, the underwriters went into a court of equity, where they have had an opportunity to sift everything to the bottom, to get every discovery from the governor and his brother, and to examine any witnesses who were upon the spot. At last, after the fullest investigation of every kind, the present action came on to be tried at the sittings after last term.

The plaintiff proved, without contradiction, that the place called Bencoolen, or Fort Marlborough, is a factory or settlement, but no military fort or fortress; that it was not established for a place of arms or defence against the attacks of an European enemy, but merely for the purpose of trade and of defence against the natives; that the fort was only intended and built with an intent to keep off the country blacks; that the only security against European ships of war consisted in the difficulty of the entrance and navigation of the river for want of proper pilots; that the general state and condition of the said fort, and of the strength thereof, was in general well known by most persons conversant or acquainted with Indian affairs, or the state of the company’s factories or settlements, and could not be kept secret or concealed from persons who should endeavor by proper inquiry to inform themselves; that there were no apprehensions or intelligence of any attack by the French until they attacked Nattal in February, 1760; that on the 8th of February, 1760, there was no suspicion of any design by the French; that the governor then bought from the witness goods to the value of £4,000, and had goods to the value of above £20,000, and then dealt for £50,000 and upwards; that on the 1st of April, 1760, the fort was attacked by a French man-of-war of sixty-four guns, and a frigate of twenty guns, under the Count D’Estaigne, brought in by Dutch pilots, unavoidably taken, and afterwards delivered to the Dutch, and the prisoners sent to Batavia.

On the part of the defendant. — After all the opportunities of inquiry, no evidence was offered that the French ever had any design upon Fort Marlborough before the end of March, 1760, or that there was the least intelligence or alarm “That they might make the attempt,” till the taking of Nattal in the year 1760.

They did not offer to disprove the evidence that the governor had acted as in full security long after the month of September, 1759, and had turned his money into goods so late as the 8th of February, 1760. There was no attempt to show that he had not lost by the capture very considerably beyond the value of the insurance.

But the defendant relied upon a letter, written to the East India Company, bearing date the 16th of September, 1759, which was sent to England by the "Pitt," Captain Wilson, who arrived in May, 1760, together with the instructions for insuring; and also a letter bearing date the 22d of September, 1759, sent to the plaintiff by the same conveyance and at the same time (which letters his lordship repeated¹).

They relied, too, upon the cross-examination of the broker who negotiated the policy, "That, in his opinion, these letters ought to have been shown, or the contents disclosed; and if they had, the policy would not have been underwritten."

The defendant's counsel contended at the trial, as they have done upon this motion, "That the policy was void."

1. Because the state and condition of the fort, mentioned in the governor's letter to the East India Company, was not disclosed.

2. Because he did not disclose that the French, not being in a condition to relieve their friends upon the coast, were more likely to make an attack upon this settlement rather than remain idle.

3. That he had not disclosed his having received a letter of the 4th of February, 1759, from which it seemed that the French had a design to take this settlement by surprise the year before.

They also contended that the opinion of the broker was almost decisive.

The whole was laid before the jury, who found for the plaintiff.

Thirdly, it remains to consider these objections, and to examine "Whether this verdict is well founded."

To this purpose, it is necessary to consider the nature of the contract at the time it was entered into.

The policy was signed in May, 1760. The contingency was, "Whether Fort Marlborough was or would be taken by an European enemy between October, 1759, and October, 1760."

The computation of the risk depended upon the chance, "Whether any European power would attack the place by sea." If they did, it was incapable of resistance.

The underwriter at London in May, 1760, could judge much better of the probability of the contingency than Governor Carter could at Fort Marlborough in September, 1759. He knew the success of the operations of the war in Europe. He knew what naval force the Eng-

¹ The former of them notifies to the East India Company, that the French had, the preceding year, a design on foot to attempt taking that settlement by surprise and that it was very probable they might revive that design. It confesses and represents the weakness of the fort; its being badly supplied with stores, arms, and ammunition; and the impracticability of maintaining it (in its then state) against an European enemy.

The latter letter (to his brother) owns that he is "now more afraid than formerly that the French should attack and take the settlement; for, as they cannot muster a force to relieve their friends at the coast, they may, rather than remain idle, pay us a visit. It seems they had such an intention last year." And therefore he desires his brother to get an insurance made upon his stock there. — *REP.*

lish and French had sent to the East Indies. He knew, from a comparison of that force, whether the sea was open to any such attempt by the French. He knew, or might know, everything which was known at Fort Marlborough in September, 1759, of the general state of affairs in the East Indies, or the particular condition of Fort Marlborough, by the ship which brought the orders for the insurance. He knew that ship must have brought many letters to the East India Company, and particularly from the governor. He knew what probability there was of the Dutch committing, or having committed, hostilities.

Under these circumstances, and with this knowledge, he insures against the general contingency of the place being attacked by an European power.

If there had been any design on foot, or any enterprise begun, in September, 1759, to the knowledge of the governor, it would have varied the risk understood by the underwriter; because, not being told of a particular design or attack then subsisting, he estimated the risk upon the foot of an uncertain operation which might or might not be attempted.

But the governor had no notice of any design subsisting in September, 1759. There was no such design in fact; the attempt was made without premeditation, from the sudden opportunity of a favorable occasion, by the connivance and assistance of the Dutch, which tempted Count D'Estaigne to break his parole.

These being the circumstances under which the contract was entered into, we shall be better able to judge of the objections upon the foot of concealment.

The first concealment is that he did not disclose the condition of the place.

The underwriter knew the insurance was for the governor. He knew the governor must be acquainted with the state of the place. He knew the governor could not disclose it consistent with his duty. He knew the governor by insuring apprehended at least the possibility of an attack. With this knowledge, without asking a question, he underwrote.

By so doing, he took the knowledge of the state of the place upon himself. It was a matter as to which he might be informed various ways; it was not a matter within the private knowledge of the governor only.

But, not to rely upon that, the utmost which can be contended is, that the underwriter trusted to the fort being in the condition in which it ought to be: in like manner, as it is taken for granted that a ship insured is seaworthy.

What is that condition? All the witnesses agree "That it was only to resist the natives, and not an European force." The policy insures against a total loss, taking for granted "That if the place was attacked it would be lost."

The contingency, therefore, which the underwriter has insured against is, "Whether the place would be attacked by an European force," and

not, "Whether it would be able to resist such an attack if the ships could get up the river."

It was particularly left to the jury to consider "Whether this was the contingency in the contemplation of the parties;" they have found that it was.

And we are all of opinion "That, in this respect, their conclusion is agreeable to the evidence."

In this view, the state and condition of the place was material only in case of a land attack by the natives.

The second concealment is his not having disclosed that, from the French not being able to relieve their friends upon the coast, they might make them a visit.

This is no part of the fact of the case; it is mere speculation of the governor's from the general state of the war. The conjecture was dictated to him from his fears. It is a bold attempt for the conquered to attack the conqueror in his own dominions. The practicability of it in this case depended upon the English naval force in those seas, which the underwriter could better judge of at London in May, 1760, than the governor could at Fort Marlborough in September, 1759.

The third concealment is that he did not disclose the letter from Mr. Winch, of the 4th of February, 1759, mentioning the design of the French the year before.

What the letter was, how he mentioned the design, or upon what authority he mentioned it, or by whom the design was supposed to be imagined, does not appear. The defendant has had every opportunity of discovery, and nothing has come out upon it, as to this letter, which he thinks makes for his purpose.

The plaintiff offered to read the account Winch wrote to the East India Company, which was objected to, and therefore not read. The nature of that intelligence therefore is very doubtful. But, taking it in the strongest light, it is a report of a design to surprise the year before, but then dropped.

This is a topic of mere general speculation, which made no part of the fact of the case upon which the insurance was to be made.

It was said if a man insured a ship, knowing that two privateers were lying in her way, without mentioning that circumstance, it would be a fraud; I agree it. But if he knew that two privateers had been there the year before, it would be no fraud not to mention that circumstance, because it does not follow that they will cruise this year at the same time in the same place, or that they are in a condition to do it. If the circumstance of "this design laid aside" had been mentioned, it would have tended rather to lessen the risk than increase it; for the design of a surprise which has transpired, and been laid aside, is less likely to be taken up again, especially by a vanquished enemy.

The jury considered the nature of the governor's silence as to these particulars; they thought it innocent, and that omission to mention them did not vary the contract. And we are all of opinion "That, in this respect, they judged extremely right."

There is a silence, not objected to at the trial nor upon this motion, which might with as much reason have been objected to as the two last omissions, rather more.

It appears, by the governor's letter to the plaintiff, "That he was principally apprehensive of a Dutch war." He certainly had what he thought good grounds for this apprehension. Count D'Estaing being piloted by the Dutch, delivering the fort to the Dutch, and sending the prisoners to Batavia, is a confirmation of those grounds. And probably the loss of the place was owing to the Dutch. The French could not have got up the river without Dutch pilots, and it is plain the whole was concerted with them. And yet, at the time of underwriting the policy, there was no intimation about the Dutch.

The reason why the counsel have not objected to his not disclosing the grounds of this apprehension is, because it must have arisen from political speculation and general intelligence; therefore they agree it is not necessary to communicate such things to an underwriter.

Lastly, great stress was laid upon the opinion of the broker.

But we all think the jury ought not to pay the least regard to it. It is mere opinion, which is not evidence. It is opinion after an event. It is opinion without the least foundation from any previous precedent or usage. It is an opinion which, if rightly formed, could only be drawn from the same premises from which the court and jury were to determine the cause, and therefore it is improper and irrelevant in the mouth of a witness.

There is no imputation upon the governor as to any intention of fraud. By the same conveyance which brought his orders to insure, he wrote to the company everything which he knew or suspected; he desired nothing to be kept a secret which he wrote either to them or his brother. His subsequent conduct, down to the 8th of February, 1760, showed that he thought the danger very improbable.

The reason of the rule against concealments is to prevent fraud and encourage good faith.

If the defendant's objections were to prevail in the present case, the rule would be turned into an instrument of fraud.

The underwriter here, knowing the governor to be acquainted with the state of the place, knowing that he apprehended danger, and must have some ground for his apprehension, being told nothing of either, signed this policy without asking a question.

If the objection "That he was not told" is sufficient to vacate it, he took the premium, knowing the policy to be void, in order to gain, if the alternative turned out one way, and to make no satisfaction if it turned out the other; he drew the governor into a false confidence, "That, if the worst should happen, he had provided against total ruin," knowing at the same time "That the indemnity to which the governor trusted was void."

There was not a word said to him of the affairs of India, or the state of the war there, or the condition of Fort Marlborough. If he thought

that omission an objection at the time, he ought not to have signed the policy with a secret reserve in his own mind to make it void: if he dispensed with the information, and did not think this silence an objection then, he cannot take it up now after the event.

What has often been said of the statute of frauds may, with more propriety, be applied to every rule of law, drawn from principles of natural equity, to prevent fraud, "That it should never be so turned, construed, or used, as to protect, or be a means of, fraud."

After the fullest deliberation, we are all clear that the verdict is well founded, and there ought not to be a new trial; consequently, that the rule for that purpose ought to be discharged.

Rule discharged.

PART II.

THE APPLICATION OF THE THEORY.

SECTION I.

Marine Insurance.

DE COSTA v. SCANDRET.

CHANCERY, LORD MACCLESFIELD, C., 1723. 2 P. Wms. 170.

ONE having a doubtful account of his ship that was at sea, viz. that a ship described like his was taken, insured her without giving any information to the insurers of what he had heard, either as to the hazard, or circumstances which might induce him to believe that his ship was in great danger, if not actually lost.

The insurers bring a bill for an injunction, and to be relieved against the insurance as fraudulent.

LORD CHANCELLOR. The insured has not dealt fairly with the insurers in this case; he ought to have disclosed to them what intelligence he had of the ship's being in danger, and which might induce him, at least, to fear that it was lost, though he had no certain account of it; for if this had been discovered, it is impossible to think that the insurers would have insured the ship at so small a premium as they have done, but either would not have insured at all, or would have insisted on a larger premium, so that the concealing of this intelligence is a fraud.

Wherefore decree the policy to be delivered up with costs, but the premium to be paid back, and allowed out of the costs.

SEAMAN v. FONEREAU.

NISI PRIUS, KING'S BENCH, 1743. 2 Str. 1183.

ON 25th August, 1740, the defendant underwrote a policy from Carolina to Holland. It appeared the agent for the plaintiff had on 23d August received a letter from Cowes dated 21st August, wherein it is said, "The 12th of this month I was in company with the ship 'Davy' (the ship in question), at twelve in the night lost sight of her all at once; the captain spoke to me the day before that he was leaky, and

the next day we had a hard gale." The ship, however, continued her voyage till 19th August, when she was taken by the Spaniards; and there was no pretence of any knowledge of the actual loss at the time of the insurance, but it was made in consequence of a letter received that day from the plaintiff abroad, dated 27th June before.

Several brokers were examined, and proved that the agent ought to have disclosed the letter; for either the defendant would not have underwrote, or insisted on a higher premium. And the Chief Justice¹ was of that opinion, and declared that as these are contracts upon chance, each party ought to know all the circumstances. And he thought it not material that the loss was not such an one as the letter imported; for those things are to be considered in the situation of them at the time of the contract, and not to be judged of by subsequent events;² he therefore thought it a strong case for the defendant, and the jury found accordingly.

LOCKE v. THE NORTH AMERICAN INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1816. 13 Mass. 61.

THIS was assumpsit on a policy of insurance, dated the 19th of February, 1813, by which the defendants cause the said "Joseph Locke, by John Barnard, to be assured \$2,300 on property on the sloop 'General Greene,' at and from Boston to Albany." A total loss is averred by capture by the public enemy on the 8th of March, 1813.

The cause was tried upon the general issue, November term, 1814, before JACKSON, J., when it appeared that the plaintiff, in February, 1813, was about purchasing a quantity of fish to be sent to Albany for sale, and applied to the said John Barnard for a loan of money, to enable him to make the said purchase. It was thereupon agreed between the plaintiff and the said Barnard that the latter should advance about \$2,300 for that purpose; that the plaintiff should purchase, in Boston, fish to that value, to be sent to Albany, and that the property should be assigned to Barnard, and shipped in his name as security for said loan. This sum, with interest, and the amount of the premium upon this policy, and Barnard's commission, were to be repaid him by the consignees at Albany; and, in case of a loss, he was to receive the sum insured towards the same object.

The assignment and insurance were to be merely a pledge or security for his debt; and if he did not realize the whole amount from those

¹ Sir WILLIAM LEE. — ED.

² *Acc.*: Lynch v. Hamilton, 3 Taunt. 37 (1810); s. c. on error, *sub nom.* Lynch v. Dunsford, 14 East, 494 (1811). In that case the rumor proved to be untrue. — ED.

sources, the plaintiff was to pay him the balance; if the goods should produce at Albany more than sufficient for that purpose, the plaintiff was to receive the residue for his own use.

In pursuance of this agreement, the plaintiff purchased fish to the amount of \$2,315, and received that sum from Barnard to pay for it. He then shipped it on board the said vessel, and took from the master a bill of lading of the fish, as shipped by Barnard. This bill of lading was dated the 22d of February, 1813. The invoice, also, which accompanied the goods, purported that they were shipped on the account and risk of Barnard. The plaintiff also made a bill of parcels of the fish, purporting to be an absolute sale thereof to Barnard, for the price above mentioned, with a receipt therefor.¹ . . .

A verdict was taken by consent for the plaintiff for \$2,566.88, subject to the opinion of the court, on the facts appearing at the trial. . . .

J. T. Austin, for the defendants.

Prescott, for the plaintiff.

PARKER, C. J. . . . On the next question, which respects the insurable interest in the plaintiff, we think there can be no doubt. The property was really his, although the legal control of it was in Barnard; it was shipped on his account and risk; and he merely owed a debt to Barnard, which this property was pledged to secure. His interest is the same as it would have been had the purchase been made in his own name, and the bill of lading in his favor, and he had then indorsed the bill of lading, and signed other papers necessary to transfer the property as a pledge to Barnard.

It is not now to be disputed that several persons, having several interests in property, may insure to the full value of that interest. There are numerous cases settling this point. But the great question is, whether one having an equitable interest in property, the legal title of which is in another, may make insurance upon the property generally, without representing the interest he has, so that the underwriters may know the exact state of the subject-matter of their contract; and whether, if such representation is not made, there is not a concealment of material facts, which will avoid the policy.

It seems to us that, upon general principles, it would be right that such should be the law; but we are to inquire what has been settled and practised upon, according to usages and judicial decisions, in order to ascertain the law of mercantile contracts.

As the contingency of damage to property insured, which may justify an abandonment and a claim for a total loss, although the subject-matter of the contract remains entire, is too frequent not to enter into the contemplation of the contracting parties, it would seem that, when a man causes insurance upon property in which he has an interest, but not such a title as will authorize him to transfer it by abandonment, this fact ought to be made known, that the underwriter may determine

¹ In the statement and the opinion passages foreign to concealment have been omitted. — Ed.

whether he will take the risk under such circumstances or not. Still, we do not find that such representation has been deemed essential in England, in the several cases where insurance upon qualified property has been established, nor in this State, although several cases have occurred which seemed necessarily to present such a question to the court. *Livermore v. Newburyport Insurance Company*, 1 Mass. 264; *Holbrook, Adm. v. Brown*, 2 Mass. 288; *Toppan v. Atkinson*, id. 365; *Oliver v. Green*, 3 Mass. 133; *Wolff et al. v. Horncastle*, 1 B. & P. 316; *Hill et al. v. Secretan*, id. 315; *Crawford et al. v. Hunter*, 8 D. & E. 13; *Boehm et al. v. Bell*, id. 154; *Hibbert et al. v. Carter*, 1 D. & E. 745; *Thompson v. Taylor*, 6 D. & E. 478; *Grant v. Parkinson*, Park, 267.

Under these circumstances, we do not feel ourselves authorized to introduce what may be deemed a new principle, however useful it might have been, if early introduced into the law of insurance. We are satisfied, as the law stands, that a *bona fide* equitable interest in property, of which the legal title is in another, may be insured under the general name of property, or by a description of the thing insured; unless there should be a false affirmation or representation, or a concealment, after inquiry, of the true state of the property.

We are the less disposed to depart from what appears to have been generally understood and received as the law and practice upon this subject, from a persuasion that underwriters can, in no event, be injured thereby. For the assured, when he cannot, by abandoning, transfer the legal title to the underwriters, will be confined to an actual indemnity. Thus, if there should be salvage, which the person having the legal title to the property, or those who may have insured it for him, shall claim as belonging to them, the underwriter for him, who has the equitable interest, will be holden to pay only what is actually lost; the assured being in that case indemnified for the residue by the salvage, which is in fact received to his use, by the party to whom he is indebted. . . .

We have before observed, that an actual, designed concealment of the nature of the interest insured would avoid the policy. But we think that this cannot be considered as proved, with respect to this particular subject of insurance, without a direct false affirmation as to the nature of the property, or a refusal to answer truly upon inquiry. In most cases it is entirely immaterial to the underwriter; and if it is important to him to know, he may always insist upon a satisfactory exhibition of title, or refuse to enter into the contract.

Upon these grounds we are of opinion that the verdict is right; and judgment must accordingly be entered upon it.¹

¹ *Acc.*: *Bartlet v. Walter*, 13 Mass. 267 (1816); *Wells v. Philadelphia Ins. Co.*, 9 S. & R. 103 (1822); *Crowley v. Cohen*, 3 B. & Ad. 478 (1832); *Mackenzie v. Whitworth*, 1 Ex. D. 35 (C. A. 1875).

And see *Buck v. Chesapeake Ins. Co.*, 1 Pet. 151 (1828). — ED.

GENERAL INTEREST INS. CO., PLAINTIFFS IN ERROR, *v.*
RUGGLES, DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES, 1827. 12 Wheat. 408.

THIS cause was argued by Mr. *D. B. Ogden* and Mr. *Wheaton*, for the plaintiffs in error, and by Mr. *Webster* and Mr. *Bliss*, for the defendant in error.

Mr. Justice THOMPSON delivered the opinion of the court.

This is an action on a policy of insurance, bearing date the 9th of February, 1824, for \$3,000, on the sloop "Harriet," lost or not lost, at and from Newport, Rhode Island, to, at, and from all ports and places to which she may proceed in the United States, during the term of six months, beginning on the 12th of January, 1824. And also \$600 property on board said sloop, at and from Newport to Charleston or Savannah, or both. The sloop, whilst proceeding on her voyage, and within the term of six months, to wit, on the 19th of January, was wrecked on Cape Hatteras, and both vessel and cargo wholly lost. An abandonment was in due time made, and a total loss claimed.

The case comes before this court upon a bill of exceptions taken to the directions given by the Circuit Court for the District of Massachusetts to the jury upon the law of the case.¹

¹ In the Circuit Court, where the case is reported *sub nom.* *Ruggles v. General Interest Ins. Co.*, 4 Mason, 74 (1825), STORY, J., said:—

"It is argued . . . that, after the loss, the master wilfully omitted to communicate intelligence of it to the owner, with the fraudulent design to enable him to make insurance, which conduct, although the owner be entirely innocent and unknowing of the act or intent of the master, and of the loss, avoided the policy *bonâ fide* made by the owner after the loss.

"In support of this doctrine various cases are cited. . . . [Here were stated and distinguished these cases: *Fitzherbert v. Mather*, *post*, p. 221 (1785); *Gladstone v. King*, 1 M. & S. 35 (1813); *Andrews v. Marine Ins. Co.*, 9 Johns. 32 (1812); *Stewart v. Dunlop*, 4 Bro. P. C. (Toml. ed.) 483 (1785).]

"The principle contended for is new. If well founded, it must have often occurred. The general silence, therefore, is against it, but not decisive of its merits. Upon what grounds does it stand? Not upon the ground of agency, for the master was not the agent as to the insurance. Not upon the ground of imputed knowledge or fraudulent concealment, for that is excluded by the argument. It must then be upon the ground that the act of the master binds the owner; and that an omission of duty to his owner, by which third persons are prejudiced, destroys the rights of his owner, however innocent he may be. There is certainly no public policy or convenience in such a principle. The owner does not guaranty the fidelity of the master to all the world, or to the insurer in particular. On the contrary, the insurer sometimes insures against the misconduct of the master. In England it is generally so as to barratry, and in some cases as to negligence. For what reason should the law interfere between two innocent persons to change a loss, which, by contract, one has engaged to bear?

"It is said that he who reposes the confidence in such a one should bear the loss. But underwriters, equally with owners, repose confidence in the masters. The master is the agent for all concerned. In case of loss, he acts for all concerned. In the case

The loss, it will be seen, happened on the 19th of January, and the policy was not effected until the 9th of February. And the question upon the trial turned upon the legal effect and operation of the misconduct of the master after the loss occurred. It was proved that the master, immediately after the loss, for the purpose and with the design that the owner, not hearing of the loss of the vessel, might effect insurance thereon, did express his intention not to write to the owner, and took measures to prevent the fact of the loss being known; and that, by the conduct of the master in this particular, and in consequence of the measures adopted by him to suppress intelligence of the loss, knowledge thereof had not reached the parties at the time the policy was underwritten.

Upon these facts the court instructed the jury that, although it was the duty of the master to give information of the loss to his owner as soon as he reasonably could, yet that, in the present case, when there had been an abandonment in due time for a loss really total, if the owner at the time of procuring the insurance had no knowledge of the loss, but acted with entire good faith, he was not precluded from a recovery. Nor was the policy void by the omission of the master to communicate the information; or by his acts in suppressing intelligence of the loss, although such omission and acts were wilful, and resulted from the fraudulent design to enable the owner to make in-

of an abandonment, he is retroactively the agent of the underwriter, from the time of the loss on which the abandonment is founded. What reason is there why owners, acting innocently, may not insure against *bonâ fide* losses of which the master withholds the knowledge?

"It is said it may encourage fraud. But this argument supposes too much. Most losses in this age must be public. The first port of arrival brings all out. The crew and officers, and other persons, are not bound to silence. In fact, but few cases of this defence have yet occurred. But suppose it to be so. If there may be frauds, may there not be also ruinous losses to innocent owners? Is it a good public policy to endanger the interests of commerce by new implied warranties? The underwriter can require a warranty, or except the master's acts, or require his negligence to be fatal. This very case shows how difficult it is to conceal the facts even in an obscure place. They were universally known in twenty days, and reported in a loose rumor in twelve days.

"The court is called upon to lay down a new principle, to extend the present boundaries. But I see no analogies to lead me farther, and no public policy indispensably requiring a stricter rule. If a fraudulent omission avoids the insurance, so would negligence (1 Maule & Selw.). I am ready to declare my opinion against the general principle, as argued by the defendant. But as the plaintiff has in his argument restricted it to the facts of the present case, I do not wish to go beyond them. My opinion is, that in the present case, where there has been an abandonment in due time for a loss really total, if the owner, at the time of procuring the insurance, had no knowledge of the loss, but acted with entire good faith in procuring the insurance, he is not precluded from a recovery, nor is the policy void by the omission of the master to communicate intelligence of the loss, although such omission was wilful and with the fraudulent design to enable the owner to make insurance after the total loss, the owner not being consulant of any such act or design at the time of such insurance. My opinion also is, that it was the duty of the master to give information of the loss to his owner as soon as he reasonably could, and that his omission was a plain departure from his duty." — ED.

surance after the loss, — the owner himself not being conscious of such acts and design at the time of procuring the insurance.

And under this direction a verdict was found for the plaintiff for a total loss.

The statement of the case admits fraudulent misconduct on the part of the master, by reason whereof the policy was effected before any knowledge of the loss reached the assured or the underwriters; but that the assured was entirely ignorant of this misconduct in the master, and that on his part there was the most perfect good faith in procuring the policy. Here, then, is a loss thrown upon one of two innocent parties, and the question is by which is it to be borne. The determination of this question must depend in a great measure, if not entirely, upon the relation in which the master stood to the respective parties when this misconduct occurred. If the loss of the vessel had been occasioned by any misconduct of the master short of barratry whilst in the prosecution of the voyage, and before the loss happened, or if at the time this misconduct is alleged against him he was the exclusive agent of the owner for any purposes connected with procuring the insurance, the owner must bear the loss. But if after the loss the agency of the master ceased, and was at an end, or if he in judgment of law became the agent of the underwriters, his misconduct cannot be chargeable to the assured.

The researches of counsel have not furnished the court with any adjudged cases, either in the English or American courts, which seem to have decided this question. Some have been referred to which have been urged as having a strong bearing upon the point, but which, on examination, will be found distinguishable in some material facts and circumstances.

The precise point, therefore, now before the court may be considered new, but we apprehend is to be governed by the application of principles understood to be well settled in the law of insurance.

It is important to understand with precision and accuracy the relation in which the master stood to the owner of the vessel at the time when he was guilty of the fraud and misconduct imputed to him. It was after the loss occurred, and at a time when there had been a total destruction of the subject insured, over which the master's agency had extended.

The case has been argued on the part of the underwriters as if the agency growing out of the relation of master and owner of the vessel existed at this time; and that the assured was responsible for all consequences arising from the misconduct of the master; and that the law would presume that whatever was known to the master must be considered as impliedly known to the owner. These propositions may be true when applied to a state of facts properly admitting of such application, but cannot be true to the extent to which they have been urged in the present case. If the owner is presumed to know whatever is known to the master, there could be no valid policy effected upon a

vessel after she was, in point of fact, lost. Such loss must be known to the master; and if it follows, as a legal conclusion, that it is known to the owner, the policy would be void. Nor upon this doctrine could there ever be any insurance against barratry, or any other misconduct of the master; for his own acts must necessarily be known to himself. And, indeed, the principle pressed thus far would render it impracticable ever to have any guaranty whatever against the fraud or misconduct of an agent any more than against that of the principal himself. The knowledge of the agent, therefore, with respect to the fact of loss, cannot affect the insurance; nor could the knowledge of the owner himself, with respect to such loss, affect the insurance in all cases. Suppose the owner should himself be the master, or be on board, having left orders with an agent to procure insurance in a given time, unless he should hear from him, or have information of the arrival of the vessel at her port of destination, and the vessel should be lost the day before the policy was underwritten, and at a distance that rendered it impossible that information thereof could reach the agent, would such a policy be void? No one could certainly maintain such a proposition. And it is by no means an unfrequent practice to obtain insurance in this way. It is not therefore true, as a universal rule, that either the fact of loss, or the knowledge of such fact by the agent or the principal at the time the policy is procured, will vacate it. But such knowledge must be brought home to some of the parties or agents connected with the business of procuring the insurance; and then the rule properly applies which puts the principal in place of the agent, and makes him responsible for his acts. There is, then, the relation of principal and agent in the subject-matter of the contract. But the master, in his character as master, has no authority to procure insurance, nor is he in any sense an agent for such purpose, or in any way connected with it. There may, undoubtedly, be superadded to his powers and duties as master an agency in other matters, to effect insurance, or any other lawful business; but in his appropriate character of master, the law considers him an agent only for the navigation of the vessel, and in such matters as are connected with and incident to such employment. And when the books speak of the master's being agent of the owner, they are to be understood in this sense. He is not to be considered as the general agent of the owner for all purposes whatsoever that may have connection with the voyage. He is a special agent for navigating the vessel, and can neither bind nor prejudice his principal by any act not coming properly within the scope and object of such employment. Unless the powers of agents are thus limited, no man could be safe in the transaction of any business through the agency of another. The master, in his character as such, had certainly no authority to procure insurance. He could not bind the owner by such a contract; and if he could not, why should his acts, totally unconnected with the business of procuring the insurance, render void a contract entered into in good faith in all parties having any concern in the transaction? It is a general rule,

applicable to agencies of every description, that the agent cannot bind his principal, except in matters coming within the scope of his authority; and this rule applies particularly to a master and owner of a vessel, and is construed with considerable strictness.¹ . . .

It is a little difficult to perceive how, in any legal sense, the relation of principal and agent could exist at the time when the misconduct of the master is alleged to have taken place. So far as he was agent for navigating the vessel, it had terminated by the absolute destruction of the subject. The agency would seem to have ceased from necessity. There was nothing upon which it could act. Had there not been a total loss of the vessel, there would have remained a duty and legal obligation on the part of the master to use his best exertions to save what he could from the wreck. But when the subject-matter of the agency becomes extinct, it is not easy to understand how in any just sense the agency can be said to survive. There might be a moral duty resting on the master to communicate information of the loss to his owner. But how could there have been any legal obligation binding upon him to do it? The information could neither benefit nor prejudice the owner. It is a general rule of law that, if an injury arises to a principal in consequence of the misconduct of his agent, an action may be sustained against him for the damage. Could an action in this case be sustained by the owner against the master for not giving him information of the loss? And if not, it would seem to follow as a necessary consequence that the owner could not be prejudiced by his acts.

But suppose the agency of the master not to have terminated, but that in judgment of law he was the agent of some one. The question recurs, whose agent was he? The answer cannot admit of a doubt. If agent at all, he was by operation of law the agent of the underwriters.

The policy, taking the risk on the vessel and cargo, lost or not lost, although effected after the loss happened, related back; and by the abandonment the underwriters were substituted in the place of the assured, and the master, although the agent of the owner until the loss occurred, became, upon the abandonment, the agent of the underwriters. The law upon this subject is well settled, where there is only a technical total loss, and any part of the subject insured remains. The interest in the salvage, whatever it may be, becomes transferred to the underwriters, and the agency is, of course, transferred with the subject, and the agent thereafter becomes responsible to the underwriters for the faithful discharge of his trust. No action could be sustained against him by the assured for the proceeds, or any misconduct in the management thereof. This is not only the settled rule of law, but a contrary doctrine would involve the greatest absurdity. It would be placing the absolute interest in the property in one party, and making the agent accountable for its management to another. No action could be sustained by the assured, for the plain reason that he would have no interest in the subject of the agency.

¹ Here was stated *Boucher v. Lawson*, Cas. temp. Hardwicke, 85 (1734). — ED.

And if such would be the effect of an abandonment in case of a technical total loss, there can be no good reason assigned why the rule should not be applied to a loss really total, so far as to transfer whatever agency could remain. So that whether the agency terminated by the total destruction of the subject, or was transferred by the abandonment to the underwriters, the misconduct of the master could not prejudice the rights of the owner. The connection of principal and agent was dissolved, and they stood towards each other as mere strangers, so far as any legal responsibility could be involved in the conduct of the master. Such we apprehend to be the result of the application of well-settled principles of law to the facts and circumstances presented by the bill of exceptions, in the absence of any authority to govern the case.¹ . . .

It is no doubt true, with respect to policies of insurance, as well as to all other contracts, that the principal is responsible for the acts of his agent; and that any misrepresentation, or material concealment by the agent, is equally fatal to the contract as if it had been the act of the principal himself. But such responsibility must of necessity be limited to cases where the agent acts within the scope of his authority. In the present case, the master was clothed with no authority or agency in any manner connected with procuring insurance. The misconduct charged against him occurred, not whilst he was acting as master, but at a time when the relation of master and owner may well be considered as dissolved from necessity, by reason of a total destruction of the whole subject-matter of the agency; and if not, the master, by the legal operation of the abandonment, became the agent of the underwriters, and was their agent at the time of his alleged misconduct.

It is said that if this is a new question, the court should adopt such rule as is best calculated to preserve good faith in effecting policies of insurance. But it is by no means clear that this end would be best promoted by adopting the rule contended for on the part of the underwriters. Cases may very easily be supposed where negligence or misconduct in agents of underwriters, as to matters not immediately connected with effecting a policy, will still have a remote influence, which may have a tendency to prejudice the interest of the assured. Such cases, however, as well as those of the description now under consideration, will most likely be of rare occurrence, and nice and minute distinctions practically operate unfavorably on the business of insurance.

If underwriters feel themselves exposed to fraudulent practices in such cases, the protection is in their own hands by not assuming any losses that may have happened prior to the date of the policy. It is considered a hazardous undertaking to insure, lost or not lost, and a proportionate premium is demanded, according to the circumstances

¹ Here these cases were stated and distinguished: *Fitzherbert v. Mather*, 1 T. R. 12 (1785); *Stewart v. Dunlop*, 4 Bro. P. C. (Toml. ed.) 483 (1785); *Andrews v. Marine Ins. Co.*, 9 Johns. 32 (1812); and *Gladstone v. King*, 1 M. & S. 35 (1813). — Ed.

stated, to show the probability or improbability of the safety of the subject insured.

Although no adjudged cases directly applicable to the one before us have been found, we do not consider this decision as establishing any new principle in the law of insurance, but as grounded on the application of principles already settled, to a new combination of circumstances.

*Judgment affirmed.*¹

NEPTUNE INS. CO. v. ROBINSON.

COURT OF APPEALS OF MARYLAND, 1840. 11 G. & J. 256.

APPEAL from Baltimore County Court.²

This was an action of assumpsit, brought by the appellee against the appellant, on its policies of insurance, by which it undertook to assure the appellee, lost or not lost, at and from Richmond, Va., to Portland, Me., \$3,000 on the good schooner "Wildee," and \$350 on her freight.

The plaintiff declared for a total loss, and the defendant pleaded non assumpsit.

The case was submitted to the county court on a statement of facts, in which the material points were these: —

Benjamin Robinson, the plaintiff, owner of the schooner "Wildee," effected the insurance with the defendant company on April 20, 1837. The schooner left Richmond on April 16. On April 17 the winds and currents drove her on Goods Rocks, whereby by the perils of the sea she was totally lost, notwithstanding all due efforts of the captain and crew to save her. On April 17 the captain addressed to the plaintiff a letter, which stated that the vessel had run on Goods Rocks and did not appear to be damaged, although the cargo no doubt was. This letter was delivered at the post-office in Richmond in the afternoon of April 17. It arrived at the post-office in Baltimore on April 20, between three and four o'clock in the morning, and could have been had at the post-office, if applied for, at seven o'clock. The plaintiff was a resident of Baltimore. He was not a merchant, and he had no place of business other than his private dwelling. His letters were not taken to him by a letter-carrier, but were called for by him at the post-office or sent for thence by him. He did not call at the post-office until April 24, and then he received the letter of April 17. On April 19 he had called at the post-

¹ See *Patton v. Janney*, 2 Cranch C. C. 71 (1813); *Clement v. Phenix Ins. Co.*, 6 Blatch. 481 (1869); *Folsom v. Mercantile Mut. Ins. Co.*, 8 Blatch. 170 (1871).

See also 1 Phillips on Ins. (5th ed.), §§ 549, 564; 2 Duer on Mar. Ins., 418-421, 788-796; 1 Parsons on Mar. Ins., 455-458. — ED.

² The statement has been rewritten. — ED.

office, and had received a letter dated April 14, wherein the captain stated that the "Wildee" would probably sail on April 16 or 17. On April 20 the plaintiff applied for the insurance. The defendant company's answer, stating terms, was given at two o'clock that afternoon; and the terms were accepted before five o'clock. The information in the letter of April 17, if known to plaintiff, would have been material to the risk. If the court shall, on these stated facts, be of opinion that the plaintiff had notice, either actual or constructive, of the loss of the schooner "Wildee," or of the contents of said letter of April 17, prior to the making of said insurance, or shall be of opinion that the plaintiff was guilty of such laches in not calling regularly for his letters at the post-office and receiving the intelligence of the loss communicated by said letter, as will vitiate said insurance, then, and in either case, their judgment must be for the defendant; otherwise for the plaintiff, for the sum of \$2,851.64, with interest from Aug. 14, 1837, and costs.

The county court rendered judgment for the plaintiff, and the insurance company appealed to this court.

Mayer, for the appellant.

McMahon, for the appellee.

CHAMBERS, J. The claim of the appellee upon this policy of insurance has been resisted, on the ground that under the circumstances of this case he is to be charged with notice of the loss prior to the insurance, or at least with such neglect as will vitiate the policy. That the contents or existence of the letter of 17th April were known to him in fact is not alleged in the statement of facts, nor could it by any just inference be deduced therefrom, if indeed the court could make inferences of fact, which is certainly not the case. The statement in reference to this matter is, that the appellee on the 19th of April applied at the post-office (where his letters remained till he called for them) and received the letter of 14th of April, and on the following day, the 20th, effected the insurance; and that he did not call again at the post-office until 24th April, when he received the letter of 17th, informing him of the loss. It being, then, conceded that the facts stated do not prove actual knowledge of the letter of 17th of April, and consequently of the loss of the schooner, we are to decide whether they make a case from which the law will impute the consequences of knowledge, and imply concealment, suppression, or negligence on the part of the assured, to vitiate the policy.

The principles advanced on the part of the appellant, on the authorities cited, may all be admitted, and yet we do not think they will furnish an affirmative answer to this question. That the assured acted with entire good faith, and without any design to impose upon himself a condition of ignorance, the facts afford sufficient evidence to prove. It is very true that in many instances negligence will be visited with the same penalty as wilful desire to do wrong. Thus, if a party, with knowledge that his agent is in treaty for insurance, obtains information of a material fact, he is bound promptly to use the means of communicating it.

The impossibility of fixing a definite limit between prompt attention and unreasonable delay, and the difficulty of certainly ascertaining the motives and excuses for all intervening grades of despatch in performing an admitted duty, make such a rule imperatively necessary. When the principles of fair dealing, as well as the rules of law, require a fact to be communicated, if known, and time enough had elapsed within which to communicate it, and a means of conveying it had presented, it would be fatal to the rights of the party to require him to prove bad motives for the delay. Justice requires the same standard in this respect for the man of active industry as for the habitually indolent, and wisely says, what a man is thus obliged to do he must do promptly and diligently, or bear the consequences of his neglect.

But we do not think the case before us is one where the party has neglected a duty.

He was under no obligation to go to the post-office, nor had he, as far as the facts are disclosed, any cause to expect information. In point of fact, it was solely in consequence of the loss of the schooner that the captain did write.

The principle relied on by the appellant is, that the assured is bound to use all accessible means of information, at the very last instant of time, to ascertain the condition of the property insured.

We do not think this principle recognized by any adjudged case, and if carried out to its legitimate, indeed, necessary results, would embarrass the whole doctrine of insurance with complicated and endless difficulties.

We approve the opinion expressed by the county court of Baltimore, and affirm the judgment.

Judgment affirmed.

BATES v. HEWITT.

QUEEN'S BENCH, 1867. L. R. 2 Q. B. 595.

DECLARATION on a policy of marine insurance, for six calendar months, on the screw steamer, "Georgia," subscribed by the defendant for £100, claiming a total loss.

Plea, that the defendant was induced to effect the insurance, and to subscribe the policy, by the wrongful and improper concealment, by the plaintiff and his agents, from the defendant of certain material information, then known to the plaintiff and his agents, and unknown to the defendant, and which ought to have been communicated to the defendant.

Issue joined.

At the trial before COCKBURN, C. J., at the sittings in London, after Michaelmas Term, 1866, the following facts were proved: The plaintiff is a shipowner at Liverpool, and the defendant is an underwriter at

Lloyd's. A vessel called the "Japan" was built at Dumbarton in 1863. Shortly afterwards she was fitted out as a vessel of war, on behalf of the government of the Confederate States of America, and her name was changed to the "Georgia." For about a year she was employed as a cruiser, and became very notorious in this service; but on the 2d of May, 1864, she put into Liverpool, and was there dismantled; this was a fact of general notoriety at the time. She was put up to sale by public auction, and purchased by the plaintiff for £15,000. The plaintiff fitted her out as a merchant vessel, at an expense of £4,000 or £5,000; and chartered her on the 28th of July, 1864, to the agent of the Portuguese government for a period of four months, to trade from Liverpool to Lisbon, and from thence to the Cape de Verde Islands and the Western Coast of Africa.

On the 27th of July, 1864, the plaintiff wrote from Liverpool to Bradford & Co., insurance brokers, in London:—

"At what rate can you do me the hull of the S.S. 'Georgia' for four months, chartered to proceed on the following voyages:—From Liverpool to Lisbon, and from thence to Cape de Verde, Principe, St. Thome, Benguela, Loando, Massamade, Ambriz, and return to Lisbon, calling at all ports as ordered."

To which Bradford & Co. replied:—

"We presume the 'Georgia' is the Confederate boat and the voyage the Portuguese mail service; if so, we should think the four months would be from three to four guineas per cent, but it is rather a guess on our part. The company's steamers doing that work were insured at seven guineas the year, but there was a batch of them, whereas this is a single matter. We should be glad to secure you the best possible terms, and, if you send an order, please say all you can of the vessel's condition, and any particulars that may assist us."

On the 1st of August, 1864, the plaintiff wrote to Bradford & Co.: "Annexed I beg to hand you particulars of the voyage of the 'Georgia'; if you can insure her at $3\frac{1}{2}$ guineas per cent, for six months, please do so to the extent of £23,000. Captain Wittycombe, who is to command, has been master at times of nearly all my ships, and is at present overlooking her.

"'Georgia,' S.S. Built by Denny & Co., at Dumbarton, in 1863, 427 tons register, 200-horse power, Captain Wittycombe, — for and during the space of six calendar months, commencing on the 7th of August, 1864, at all times and in all places, and on all lawful service, Liverpool to Lisbon, there and thence to Cape de Verde, Principe, St. Thome, Benguela, Loando, Massamade, Ambriz, and back to Lisbon ^{and} Liverpool, calling at above-named places on the return voyage — ship valued at £23,000.

"I think the underwriters know W. F. Wittycombe very well. He has been master in my ships for sixteen years, built many of them, and up to this moment has never cost underwriters on his ship a shilling. If not done, telegraph to me."

Bradford & Co. telegraphed to the plaintiff that they could not insure the "Georgia" at his limit, but could do so at four guineas. Eventually they effected (amongst other policies) an insurance at Lloyd's, on the 6th of August, for £6,000, on the "Georgia" steamer, for six months from her sailing, at four guineas per cent., of which the defendant underwrote £100. It is customary for time policies effected at Lloyd's to contain a memorandum that the insurance is free of capture and seizure, but this clause was omitted in the present policy. The letters of the 27th of July, and of the 1st of August, with the particulars, were shown to the defendant and the other underwriters at the time they underwrote the policy.

The defendant stated, at the trial, that he knew that a vessel called the "Georgia" had been in the Confederate service as a war steamer, and that she had been sold at Liverpool; but that these facts were not present to his mind at the time he underwrote the policy, and that he did not know that he was asked to insure and was insuring the Confederate "Georgia;" and had he known that the vessel in question was the "Georgia" which had been in the Confederate service, he would not have insured her. He also admitted that he did not observe that the policy was not free of capture and seizure; and he stated that Bradford & Co. were the brokers for a company who had steamers running to the Mediterranean, and being under the impression that he was insuring one of these steamers, he did not give much attention to the plaintiff's letters and particulars.

The vessel sailed from Liverpool, upon her voyage, on the 8th of August, and was captured on the 15th by a frigate of the United States of America.

The following is the statement furnished to the parties by the Chief Justice, of his direction, and the questions he left to the jury and their finding:—

"I direct the jury:

"1. That the fact of the 'Georgia' having been a Confederate war steamer was a material fact.

"2. That that fact not having been communicated to the insurer, the verdict must be for the defendant, unless defendant knew the fact, or had the means of knowledge of which he ought to have availed himself (this point, however, being subject to the leave reserved).

"3. That it is immaterial that the defendant may have previously been aware that the Confederate steamer 'Georgia' was at Liverpool, so that if he had remembered it he would have known the vessel proposed to be insured was the same, if he had forgotten his former knowledge: as the knowledge must be not a past but a present one.

"I leave to the jury:

"1. Whether the defendant had a present knowledge of the identity of the vessel.

"2. If not, whether taking the previous knowledge of defendant as to the Confederate 'Georgia' being at Liverpool, and the particulars

disclosed by the slip and memorandum accompanying it, defendant by the exercise of ordinary intelligence and knowledge of his business, might have known that this was the Confederate 'Georgia.'"

"Verdict: The jury are not satisfied that defendant was aware of the fact that the 'Georgia' proposed for insurance was the former Confederate cruiser; but their verdict is, that he had abundant means of identifying the ship at the time of underwriting the ship.

"In answer to a question from me, the jury added that the means of knowledge referred to were to be found in the slip itself. On this finding I directed the verdict to be entered for defendant, subject to leave reserved."

A rule was accordingly obtained to enter a verdict for the plaintiff, on the ground that on the finding of the jury the plaintiff was entitled to have the verdict entered for him.

A cross rule was obtained on behalf of the defendant for a new trial (in the event of this court, or a court of appeal, holding that the finding of the jury amounted to a verdict for the plaintiff), on the ground that the verdict was against the evidence.

James, Q. C., *T. Jones*, Q. C., and *Sir G. Honyman*, Q. C., for the defendant, showed cause against the rule to enter the verdict for the plaintiff.

Milward, Q. C., and *Potter*, in support of the rule.

COCKBURN, C. J.¹ . . . I think what passed between the jury and myself must be taken to amount to a finding by the jury in the affirmative of the question I put to them, whether, taking the previous knowledge of the defendant as to the Confederate steamer "Georgia" being at Liverpool, and the particulars disclosed by the slip and memorandum, the defendant, by the exercise of ordinary intelligence and knowledge of his business, might have known that this vessel was the Confederate steamer "Georgia." The jury did not, in fact, directly find the affirmative or the negative of the question, but they found that the defendant had abundant means of identifying the ship at the time of his underwriting the policy; and, inasmuch as the abundant means might have been something extrinsic to the particulars communicated by the plaintiff to the defendant, I asked the jury whether they meant by their answer to say that, taking the previous knowledge and the particulars afforded by the plaintiff, the defendant had the means of knowledge, or whether they meant to say that, looking at the particulars, if he had made further inquiry he must have acquired a knowledge extrinsically; and their answer amounts to this, coupling what was contained in the particulars supplied by the plaintiff with the defendant's previous knowledge, he had abundant means of identifying the vessel as the Confederate steamer.

Now the question is whether the finding of the jury entitles the plaintiff to the verdict; and I am of opinion that it does not.

¹ After stating the case.—Ed.

No proposition of insurance law can be better established than this, viz., that the party proposing the insurance is bound to communicate to the insurer all matters which will enable him to determine the extent of the risk against which he undertakes to guarantee the assured. It is true, if matters are common to the knowledge of both parties, such matters need not be communicated. It is also true that when a fact is one of public notoriety, as of war, or where it is one which is matter of inference, and the materials for informing the judgment of the underwriter are common to both, the party proposing the insurance is not bound to communicate what he is fully warranted in assuming the underwriter already knows. Short of these things, the party proposing the insurance is bound to make known to the insurer whatever is necessary and essential to enable him to determine what is the extent of the risk against which he undertakes to insure; and I apprehend that, as to the matters which the party proposing the insurance is bound to communicate to the insurer, there is no answer to be made, except that the insurer had, at the time of entering upon the contract, knowledge of the particular fact. I do not mean to say that, if the insurer choose to neglect the information which he receives, he can take advantage of his wilful blindness or negligence; if he shuts his eyes to the light, it is his own fault, — provided sufficient information, as far as the assured is concerned, has been placed at his disposal. If, indeed, the insurer knows the fact, the omission on the part of the assured to communicate it will not avail as a defence in an action for a loss; not because the assured will have complied with the obligations which rested on him to communicate that which was material, but because it will not lie in the mouth of the underwriter to say that a material fact was not communicated to him which he had present to his mind at the time he accepted the insurance; the law will not lend itself to a defence based upon fraud; it will not allow the underwriter to say, "I have taken the premium with the knowledge of the particular fact, but because the assured has not communicated it to me I will not make good the loss." Therefore, if the fact be known to the underwriter, he cannot avail himself of the circumstance that it was not communicated by the assured; but putting that aside, it is the duty of the assured to make known to the insurer whatever is material with regard to the extent of the risk.

It is admitted that a fact was not communicated to the underwriter in such a shape, or in such an abstract form, as that, independently of something extrinsic to the communication itself, it would afford him the necessary information. But it is said: "The underwriter had previous knowledge of the fact of the Confederate steamer 'Georgia' being at Liverpool; he also knew she was there for the purpose of being dismantled and sold." We must, however, take it on the oath of the defendant, and the finding of the jury, that those facts were not present to the defendant's mind at the time he underwrote the policy. The case may be put in two ways: either, that if the previous knowl-

edge which the defendant had with reference to the vessel had been present to his mind, that with the particulars before him would have brought to his mind the fact that he was asked to insure the Confederate steamer "Georgia;" or that if he had carefully studied the particulars stated in the memorandum, those particulars would have brought back to his mind the knowledge which had been previously present to it, which for the moment had been forgotten, and the combination of the knowledge thus resuscitated and revived with the particulars contained in the memorandum would have led him to the conclusion that the vessel offered for insurance was the Confederate steamer. But the facts are to the contrary; the previous knowledge that the defendant may have had was not present to his mind; and what the defendant swore was that the particulars did not bring that knowledge back to his mind. The result was, as the jury have found, that at the time he underwrote the policy of insurance, the defendant did not know that the vessel was the Confederate steamer.

I think that we should be sanctioning an encroachment on a most important principle, and one that is vital in keeping up the full and perfect faith which there ought to be in contracts of marine insurance, if we were to hold that a party — who is under an obligation to communicate the material conditions and facts which constitute the basis of the contract into which he invites another to enter — may speculate as to what may or may not be in the mind of the underwriter, or as to what may or may not be brought to his mind by the particulars disclosed to him by the assured, if those particulars fall short of the fact which the assured is bound to communicate. If we were to sanction such a course, especially in these days, when parties frequently forget the old rules of mercantile faith and honor which used to distinguish this country from any other, we should be lending ourselves to innovations of a dangerous and monstrous character, which I think we ought not to do.

The rule we find established is this: that the person who proposes an insurance should communicate every fact which he is not entitled to assume to be in the knowledge of the other party; and the assured is bound to communicate every fact to enable the insurer to ascertain the extent of the risk against which he undertakes to protect the assured. True, if it can be established that the insurer did know the fact, it will not lie in his mouth to say, the fact of which he had previous knowledge was not communicated; if it can be established that the underwriter had knowledge of the fact, the assured would be protected against the fraud of the underwriter in seeking, under such circumstances, to avoid the insurance. And it is also well-established law, that it is immaterial whether the omission to communicate a material fact arises from intention, or indifference, or a mistake, or from it not being present to the mind of the assured that the fact was one which it was material to make known. I think that there is every reason to believe that both parties imagined that the fact that the vessel had

been a Confederate war steamer was not a material circumstance, and the plaintiff must be exonerated from any imputation of having wilfully and intentionally kept back that material fact; because he had only a short time before bought the vessel for £15,000, and laid out £4,000 or £5,000 on her, and it is extremely improbable that he would have expended this large sum of money on her if he had supposed she was a vessel liable to seizure by the United States Government. He probably thought that when she was bought by a British subject, and had a British flag flying aboard, she was safe from capture. That turned out to be a mistake; and it is now admitted that the fact of her being thus exposed to the danger of seizure, was a material fact to be communicated, though the non-communication of it may have arisen from perfect innocence on the part of the plaintiff, and from his thinking that it was not a material fact. It is clear that there was an obligation on the part of the plaintiff to communicate this fact; it is clear that he did not communicate it; that he had disclosed partial information, which, by possibility, if it had brought back to the defendant's mind what had previously been known to him, would have led him to the knowledge that this was the Confederate steamer "Georgia;" or if, on the other hand, he had the knowledge present in his mind, he might have read the particulars communicated to him in a different light from that in which he read them. It is laid down as a general proposition, that the party proposing the insurance, if he has omitted a material fact, can only enforce the insurance which, from the omission to communicate the fact, would otherwise be avoided, in the event of the jury finding by their verdict that by means of what he did communicate coupled with any other fact that then might be present to the mind of the insurer, the latter knew at the time he granted the insurance the fact which it was the duty of the assured to communicate.

Taking, therefore, the finding of the jury in the most favorable sense for the plaintiff, we think that the verdict entered for the defendant is right, and should not be disturbed, and that this rule should be discharged.

MELLOR, J. I am of the same opinion. I think the verdict entered for the defendant must stand. It is of the greatest importance to abide by the cardinal rules which have prevailed on this subject since the judgment delivered by Lord Mansfield in the case of *Carter v. Boehm*, 3 Burr. 1905; and it would be most dangerous, as it appears to me, to allow those well-established rules to be frittered away by the introduction of doubtful equivalents. I cannot help thinking that to enable a person proposing an insurance to speculate upon the maximum or minimum of information he is bound to communicate, would be introducing a most dangerous principle into the law of insurance.¹ . . .

So far as I know, the judgment of Lord Mansfield has never been

¹ Here followed a statement of the principal case, and then quotations from *Carter v. Boehm*, *ante*, p. 125 (1766). — ED.

qualified or questioned. The only part of it upon which any doubt has been raised is, as to the admissibility in evidence of the opinions of brokers, who are in the habit of negotiating policies of insurance, as to the materiality of facts not communicated.¹ That judgment rests on a sound principle and has always been considered as laying down the true rules which govern the law of insurance.

SHEE, J. I am of the same opinion. The principle on which the law of concealment, as it relates to marine insurance, rests, is, that in bargaining for an insurance, the person proposing the insurance should take care that the underwriter is as well informed as he himself is of all those circumstances which would increase the risk which he offers to the underwriter. He is not bound to communicate things which are well known to both. He is not bound to communicate facts or circumstances which are within the ordinary professional knowledge of an underwriter. He is not bound to communicate facts relating to the general course of a particular trade; because all these things are supposed to be within the knowledge of the person carrying on the business of insurance, and which, therefore, it is not necessary for him to be specially informed of. But the person proposing the insurance is bound to communicate to the person whom he asks to undertake the insurance everything within his knowledge, which is of a nature to increase the risk which the underwriter is asked to undertake.

In this case, there was a fact especially within the knowledge of plaintiff; viz., that this vessel had been a Confederate cruiser. The plaintiff did not know that that fact was of a nature to increase the risk: it was, however, of a nature to increase the risk, because the vessel was, from having been a Confederate cruiser, liable to seizure by the government of the United States; that was a fact material to the risk, which the person proposing the insurance knew, and which the person to whom the insurance was proposed did not know. The parties, therefore, while they were considering what one would be willing to give for the protection which he desired, and what the other would be willing to take for giving him that protection, were not upon equal terms; they had not an equal amount of knowledge; and the reason that they had not an equal amount of knowledge was, that the plaintiff kept back a material fact which he well knew.

It was argued by the plaintiff's counsel, that it is enough if the person to whom the insurance was proposed had the means of knowing the material fact. No authority was cited for that proposition. No doubt there are cases in which it has been held, where the underwriter has the means, by merely looking at lists which are hung up in the room where the insurance is effected, of ascertaining a particular fact, it is not necessary that it should be communicated. In *Friere v. Woodhouse*, Holt, N. P. 572, it was ruled that information contained in Lloyd's lists need not be communicated to the underwriter, as by fair

¹ See the notes to *Carter v. Boehm*, 1 Sm. L. C. 4th ed. 422. — REP.

inquiry and due diligence in his business he could have ascertained the facts they contained. But the facts of the present case are very different. The underwriter had no means of presently knowing the fact not communicated to him; he might by possibility, if he had instituted inquiries, have found it out: but that he is not obliged to do. The person who proposed the insurance knew the fact, and it was a fact material to the estimate of the risk, and he ought to have communicated it. For these reasons, it appears to me that the plaintiff was guilty of concealment, and the verdict ought not to be disturbed.

Rule discharged.

PROUDFOOT v. MONTEFIORE.

QUEEN'S BENCH, 1867. L. R. 2 Q. B. 511.

DECLARATION against the defendant as chairman of the Alliance Marine Assurance Company, claiming damages from the company in respect of the company not having delivered to the plaintiff a policy of insurance on certain goods shipped on board a ship called the "Anne Duncan," pursuant to an agreement alleged by the plaintiff to have been entered into between the plaintiff and the company, and in respect of the company not having paid the sum of money which the plaintiff alleged would have become due on such policy if the same had been so delivered.

The third plea stated, in substance, that the alleged agreement was obtained from the company by the wrongful and improper concealment by the plaintiff from the company of certain facts and information which the plaintiff knew as to the ship having run ashore on or about the 23d of January, 1861, which matters so concealed were unknown to the company; that the matters which were so wrongfully and improperly concealed were at the time of the making of the promise material to be known to the company, and material to the risks against which the company made the promise to indemnify the plaintiff.

The cause was tried at the Liverpool summer assizes, 1861, before CROMPTON, J., when a verdict was found for the plaintiff. On the 27th of June, 1862, a rule for a new trial, obtained at the instance of the defendant, was made absolute. The cause was tried a second time at the Liverpool summer assizes, 1863, before MELLOR, J. At the second trial it was agreed that the case should be left to the jury on the question, whether or not the plaintiff, before the instructions were given for the insurance and before it was effected, had actual knowledge of the ship or cargo having been lost, or of any misfortune having happened to, or of anything being amiss with, the ship or cargo, or of the ship or cargo having sustained any injury. The jury found for the plaintiff. A judge's order was made, before the jury returned their

verdict, that, in the event of the jury finding for the plaintiff, the verdict should be entered for the sum of £1,200, plus interest to the day of signing judgment, less the amount of the premium and salvage, and subject to a special case to be stated from the notes taken by CROMPTON, J., with the addition of the evidence of Rees taken by MELLOR, J., and the letters therein referred to. The court were to draw any inferences of fact they thought proper.

The facts, so far as they are material, sufficiently appear from the judgment of the court.

Jones, Q. C. (Temple, Q. C., with him), for the plaintiff.

Cohen, for the defendant.

Cur. adv. vult.

COCKBURN, C. J.¹ . . . The agreement was for insurance on a cargo of madder, lost or not lost, shipped at Smyrna, on a voyage from Smyrna to Liverpool, on board the ship "Anne Duncan," for and on account of the plaintiff, and consigned to him by one T. B. Rees, of Smyrna.

The plaintiff, a merchant at Manchester and Liverpool, dealt largely in madders in the Smyrna market, and Rees, being resident at Smyrna, was employed by him at a salary of £800 a year to make purchases of madder on his account, and to ship and consign the cargoes to him. The cargo in question was purchased and shipped by Rees in the course of his employment as such agent. The ship, with the cargo on board, sailed from Smyrna on the 21st of January, 1861, but again brought up in the Gulf of Smyrna on the same day. She set sail again on the 23d, but was stranded in the course of that day, and became a wreck. The cargo became a total loss. Intelligence of the stranding of the ship was communicated to Rees on the morning of the 24th. On the 26th, which was the first post day, he communicated by letter to the plaintiff the loss of the vessel; and the fact that though the cargo had been got out, yet, as the vessel had had twelve feet of water in the hold, the greater part of the cargo would be seriously damaged. Having communicated this information, the letter proceeds thus: "I hope to goodness you are fully insured. On the 12th instant I forwarded you invoice and weights of the shipment by her, which gave you plenty of time to effect insurance. Lloyd's agents have telegraphed the disaster, which will reach London before my letter of the 19th instant, enclosing bill of lading.² I did not dare telegraph to you, for when once you had the intelligence in hand you were prevented from insuring." On the 31st of January the plaintiff, after receipt of the letters from Rees of the 12th and 19th of January, but prior to the receipt of that of the 26th, gave instructions to effect the policy, and the slip was signed on the same day by the company's agent at Manchester.

There was, therefore, no fraud or undue concealment by the plaintiff

¹ After describing the nature of the action. — ED.

² The telegram was received, and the loss published in Lloyd's list of the 29th of January; but neither the plaintiff nor the company's agent was aware of it. — REF.

of a material fact within his personal knowledge. On the other hand, it is clear that the fact of the loss of the vessel and damage to the cargo might have been communicated to him by Rees by means of the telegraph, but was purposely kept back by the agent for the fraudulent purpose of enabling the plaintiff to insure. We think it clear, looking to the position of Rees as agent to purchase and ship the cargo for the plaintiff, that it was his duty to communicate to his principal the disaster which had happened to the cargo; and, looking to the now general use of the electric telegraph, in matters of mercantile interest, between agents and their employers, we think it was the duty of the agent to communicate with his employers by this speedier means of communication. From the letter of the agent it appears that, but for the fraudulent motive for his silence, he would, in the ordinary course of his duty, have conveyed the intelligence of the loss to his employer, and would have availed himself of the telegraph for that purpose.

Upon the above facts, the question arises whether the plaintiff, the assured, is so far affected by the knowledge of his agent of the loss of the vessel and damage to the cargo as that the fraud thus committed on the underwriter, through the intentional concealment of the agent, though innocently committed so far as the plaintiff is concerned, will afford a defence to the underwriter on a claim to enforce the policy.

Two cases decided in this court, one in the time of Lord Mansfield, the other in that of Lord Ellenborough, establish the affirmative of this proposition. In the case of *Fitzherbert v. Mather*, 1 T. R. 12, 16, where an agent of the assured was employed to ship a cargo of oats, and to communicate the shipment to another agent who was employed to effect an assurance, an omission on the part of the former, who had written to announce the sailing of the ship, on the ship having afterwards got on shore, to communicate that fact, which he might have done by the same post, was held fatal to the insurance. Ashurst, J., observes: "On general principles of policy, the act of the agent ought to bind the principal; because it must be taken for granted that the principal knows whatever the agent knows. And there is no hardship on the plaintiff; for if the fact had been known, the policy could not have been effected." Buller, J., says: "Though the plaintiff be innocent, yet if he build his information on that of his agent, and his agent be guilty of a misrepresentation, the principal must suffer. It is the common question every day at Guildhall, when one of two innocent persons must suffer by the fraud or negligence of a third, which of the two gave credit. Here it appears that the plaintiff trusted Thomas (the agent), and he must therefore take the consequences."

In the case of *Gladstone v. King*, 1 M. & S. 35, 38, which was an action on a policy on a ship, "lost or not lost," the master had omitted to communicate, when writing to his owners, the fact of the ship having been driven on a rock, — a fact as to which, on arriving at the port of discharge, he made a protest, detailing the accident, and stating that the ship's bottom must have been chafed; and the owners, in ignorance

of the accident, had effected an insurance. On these facts it was held that the captain was bound to communicate the fact, and, for want of such communication, the antecedent damage was an implied exception from the insurance, and the plaintiffs could not recover the loss arising from the repairs rendered necessary by the accident. "If," says Lord Ellenborough, "the captain might be permitted to wink at these circumstances without hazard to the owners, the latter would in all such cases instruct their captain to remain silent; by which means the underwriter at the time of subscribing the policy would incur a certainty of being liable for an antecedent average loss. To prevent such a consequence, and considering that what is known to the agent is impliedly known to the principal, and that the captain knew, and might have actually communicated to the plaintiffs the cause of damage, so as to have apprised them of it before the time of effecting the policy, I think that no mischief will ensue from holding in this case that the antecedent damage was an implied exception out of the policy. If the principle be new, it is consistent with justice and convenience; and there being no fraud imputed to the captain in the concealment will not alter the case."

An eminent authority, the late Mr. Justice Story, has, however, declined to be bound by these decisions. In a case (*Ruggles v. General Interest Insurance Company*, 4 Mason's Rep. 74) tried before him on a policy of insurance effected after a total loss, where the master had omitted to give intelligence of the loss to his owner, with the fraudulent design, of enabling him to make an insurance, and the insurance had been effected by the owner in ignorance of the loss, that learned judge held that, as the owner at the time of procuring the insurance had no knowledge of the loss, but acted with an entire good faith, he was not precluded from recovering, and that the policy was not rendered void by the omission of the master to communicate intelligence of the loss, although such omission was wilful and fraudulent. The case being taken to a court of error (12 Wheaton, 408), the latter upheld the decision; not, indeed, on the grounds taken by Mr. Justice Story, but on the very unsatisfactory, and, as we think, untenable ground, that by the total loss of the vessel the master had wholly ceased to be the agent of the owner, and had become the agent of the underwriters. From the language of the judgment, it may be inferred that if the court had considered that the relation of the master to his owners had not been interrupted by the loss of the vessel, they would not have upheld the decision appealed from. The ruling of Mr. Justice Story has been discussed by Mr. Duer in his admirable work on insurance, vol. ii. p. 418, and we think the reasoning of the learned writer fully establishes his conclusion as to the ruling having been erroneous. Notwithstanding the dissent of so eminent a jurist as Mr. Justice Story, we are of opinion that the cases of *Fitzherbert v. Mather* and *Gladstone v. King* were well decided; and that if an agent, whose duty it is in the ordinary course of business to communicate information to his principal as to the state of a ship

and cargo, omits to discharge such duty, and the owner, in the absence of information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void, on the ground of concealment or misrepresentation. The insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or in the ordinary course of business ought to have, knowledge; and that the latter will take the necessary measures, by the employment of competent and honest agents, to obtain, through the ordinary channels of intelligence in use in the mercantile world, all due information as to the subject-matter of the insurance. This condition is not complied with where, by the fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact which ought to have been made known to the underwriter, and through such ignorance fails to disclose it.

It has been said, indeed, that a party desiring to insure is entitled, on paying a corresponding premium, to insure on the terms of receiving compensation in the event of the subject-matter of the insurance being lost at the time of the insurance, and that he ought not to be deprived of the advantage, which he has paid to secure, by the misconduct of his agent. But to this there are two answers: First, that as we have already pointed out, the implied condition on which the underwriter undertakes to insure — not only that every material fact which is, but also that every fact which ought to be, in the knowledge of the assured shall be made known to him — is not fulfilled; secondly, as was said by the court in *Fitzherbert v. Mather*, where a loss must fall on one of two innocent parties through the fraud or negligence of a third, it ought to be borne by the party by whom the person guilty of the fraud or negligence has been trusted or employed.

By thus holding, we shall prevent the tendency to fraudulent concealment on the part of masters of vessels and agents at a distance, in matters on which they ought to communicate information to their principals, as also any tendency on the part of principals to encourage their servants and agents so to act. For these reasons our judgment must be for the defendant.

*Judgment for the defendant.*¹

¹ Compare *Stribley v. Imperial Marine Ins. Co.*, 1 Q. B. D. 507 (1876). — ED.

BLACKBURN, LOW, & CO., APPELLANTS, v. VIGORS, RESPONDENT.

HOUSE OF LORDS, 1887. 12 App. Cas. 531.

APPEAL from the Court of Appeal.

The facts are stated in the judgments of Lord ESHER, M. R., and LINDLEY, L. J., 17 Q. B. D. 553.¹ The following outline will suffice for this report.

The appellants having brought an action against the respondent upon a policy of re-insurance subscribed by him for £50, claiming for a total loss by perils of the sea, the substantial defence was that the defendant was induced to subscribe the policy by the wrongful concealment by the plaintiffs and their agents of certain material facts known to the plaintiffs or their agents and unknown to the defendant.

At the trial before DAY, J., and a special jury, in July, 1885, the following facts were proved or admitted.

The plaintiffs, underwriters and insurance brokers at Glasgow, had underwritten the steamship "State of Florida" for £1,500, the policy having been effected by the usual brokers for the ship, Rose, Murison, & Thomson, who were underwriters and insurance brokers in Glasgow. The ship had left New York on the 11th of April, 1884, bound for Glasgow, where she was due about the 24th or 25th. On the 30th the plaintiffs tried to re-insure through their London brokers, Roxburgh, Currie, and Co., but the terms asked were higher than the plaintiffs would give. On the next day, May 1st, the plaintiffs asked Rose, Murison, & Thomson to effect a re-insurance for £1,500 at fifteen guineas through Rose, Thomson, Young, & Co., the London agents of Rose, Murison, & Thomson. The latter telegraphed accordingly to Rose, Thomson, Young, & Co. After the telegram, and before any answer came, Murison, a member of the firm of Rose, Murison, & Thomson, became aware of certain facts concerning the ship which were material to the risk, but these facts were never communicated to the plaintiffs or to Roxburgh, Currie, & Co. After learning these facts, Rose, Murison, & Thomson received the following answer to their telegram: "Twenty guineas paying freely, and market very stiff; likely to advance before day is out." This answer they showed to the plaintiffs, and then sent in the plaintiffs' names the following telegram to Rose, Thomson, Young, & Co.: "Pay 20 guineas." The answer to this was sent direct to the plaintiffs, who ultimately re-

¹ It there appears that the policy of re-insurance was on the ship, "lost or not lost," that all parties knew the ship was overdue, that "a Mr. Murray gave Murison important information brought to Glasgow by another ship, . . . calculated to excite suspicion of the loss of the 'Florida' some days previously," and that the ship was in fact already lost. — ED.

insured for £800 at 25 guineas through Rose, Thomson, Young, & Co. This was not the policy sued on.

On the 2d of May the plaintiffs, through Roxburgh, Currie, & Co., effected a policy of re-insurance for £700 at 30 guineas, lost or not lost. This was the policy sued on. The ship had in fact been lost some days before the plaintiffs tried to re-insure. It was admitted that the plaintiffs and Roxburgh, Currie, & Co. acted in good faith throughout.

The jury having been discharged by consent, DAY, J., gave judgment for the plaintiffs for the amount claimed.

The Court of Appeal (LINDLEY and LOPES, L. JJ., Lord ESHER, M. R., dissenting) reversed this decision, and gave judgment for the defendant.

Against this judgment the plaintiffs appealed.

Sir *C. Russell*, Q. C., and *Hollams*, for the appellants.

Sir *R. Webster*, A. G., and *J. Gorell Barnes*, for the respondent.

The House took time for consideration.

LORD HALSBURY, L. C. My Lords, in this case the plaintiffs sue upon a policy of marine insurance, and the only question arises upon the statement of defence that the defendant was induced to enter into the contract by concealment of material facts by the plaintiffs and their agents.

The facts are not in dispute. Neither the plaintiffs nor the agent through whom the policy was effected had any knowledge of the material fact the concealment or non-disclosure of which is relied on as vitiating the policy; but an agent, who did not effect the policy, at an earlier period received information admitted to be material, while he was acting as agent to effect an insurance for the plaintiffs, which he did not communicate.

DAY, J., before whom the case was decided without a jury, held that this did not affect the validity of the policy. A majority of the Court of Appeal reversed DAY, J.'s judgment, and held that the non-disclosure was fatal to the plaintiffs' claim.

So far as I can understand the judgment of the Court of Appeal, it is intended to lay down a principle that would not, I think, be contested; but it applies that principle to a state of facts to which I think it is inapplicable. LINDLEY, L. J., says, I think correctly: "It is a condition of the contract that there is no misrepresentation or concealment, either by the assured or by any one who ought, as a matter of business and fair dealing, to have stated or disclosed the facts to him or to the underwriter for him." 17 Q. B. D. 578. And LOPES, L. J., after stating the principle upon which the knowledge of the agent is the knowledge of the principal, explains it to mean that the principal is to be as responsible for any knowledge of a material fact acquired by his agent employed to obtain the insurance as if he had acquired it himself. 17 Q. B. D. 579. To the propositions thus stated I think no objection could be made; but it is obvious that the words in the one judgment,

“agent employed to obtain the insurance,” or in the other judgment, the words, “*the* underwriter,” import that the particular contract obtained was, in the language of the statement of defence, a policy which the defendant was induced to subscribe by the wrongful concealment by the plaintiffs and their agents of certain facts then known to the plaintiffs or their agents, and unknown to the defendant, and which were material to the risk.

I doubt very much whether the solution of the controversy as to what is the true principle upon which the contract of insurance is avoided by concealment or misrepresentation, whether by considering it fraudulent or as an implied term of the contract, helps one very much in deciding the present case. If one were to adopt in terms the language of Lord Ellenborough in *Gladstone v. King*, 1 M. & S. 35, I do not think it could justify the judgment of the majority of the Court of Appeal. In that case a policy lost or not lost was effected on the 25th of October. On the previous 25th of July the ship had run upon a rock. On the 5th of August the captain wrote to his owners, the plaintiffs; they received his letter on the 5th of October. Whatever may be said of the logic of that case, which acquitted the captain of all ill intention, but decided upon the ground that otherwise owners might direct their captains to remain silent, and which upon a policy lost or not lost assumes any antecedent damage to have been an implied exception out of the policy, it does not proceed upon any such ground as the Court of Appeal appear to rely on here. Lord Ellenborough says: “No mischief will ensue” (a somewhat strange mode of enunciating a proposition of law) “from holding in this case that the antecedent damage was an implied exception out of the policy. If the principle be new, it is consistent with justice and convenience.” Unfortunately, his Lordship does not state what is the principle which he apparently admits to be new. I can quite understand that when a man comes for an insurance upon his ship he may be expected to know both the then condition and the history of the ship he seeks to insure. If he takes means not to know, so as to be able to make contracts of insurance without the responsibility of knowledge, this is fraud. But even without fraud, such as I think this would be, the owner of the ship cannot escape the necessity of being acquainted with his ship and its history because he has committed to others — his captain, or his general agent for the management of his shipping business — the knowledge which the underwriter has a right to assume the owner possesses when he comes to insure his ship.

With respect to agency so limited, I am not disposed to differ with the proposition laid down by Cockburn, C. J., in *Proudfoot v. Montefiore*, Law Rep. 2 Q. B. 511, 521. A part of the proposition is “that the insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or in the ordinary course of business ought to have, knowledge.” I think these last are the cardinal words, and contemplate such an agency as I have described above. I am un-

able, however, to see that the present case is governed by any such principle.

A broker is employed to effect a particular insurance. While so employed he receives material information; he does not effect the insurance, and he does not communicate the information. How is it possible to suggest that the insurer could rely upon the communication to the principal of every piece of information acquired by any agent through whom the assured has unsuccessfully endeavored to procure an insurance? I am unable to accept the criticism by the Master of the Rolls upon the proposition that the knowledge of the agent is the knowledge of the principal. When a person is the agent to know, his knowledge does bind the principal. But in this case I think the agency of the broker had ceased before the policy sued upon was effected. The principal himself and the broker through whom the policy sued on was effected were both admitted to be unacquainted with any material fact which was not disclosed. I cannot but think that the somewhat vague use of the word "agent" leads to confusion. Some agents so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts, intentions, and knowledge of the principal. Other agents may have so limited and narrow an authority, both in fact and in the common understanding of their form of employment, that it would be quite inaccurate to say that such an agent's knowledge or intentions are the knowledge or intentions of his principal; and whether his acts are the acts of his principal depends upon the specific authority he has received.

In *Fitzherbert v. Mather*, 1 T. R. 12, the consignor and shipper of the goods insured was the agent whose knowledge was in question. In *Gladstone v. King*, 1 M. & S. 35, the master of the ship was the agent; and in *Proudfoot v. Montefiore*, Law Rep. 2 Q. B. 511, the agent was the accepted representative of the principal, in effect trading and acting for him in Smyrna, the owner himself carrying on business in Manchester. And though the decision in *Ruggles v. General Insurance Co.*, 12 Wheaton, 408, before the Supreme Court of the United States, may not be very satisfactory in what they held under the circumstances of that case to be the relation between the captain of the ship and his owners, the principle upon which that case was decided was the supposed termination of the agency between them.

Where the employment of the agent is such that in respect of the particular matter in question he really does represent the principal, the formula that the knowledge of the agent is his knowledge is, I think, correct; but it is obvious that that formula can only be applied when the words "agent" and "principal" are limited in their application.

To lay down as an abstract proposition of law that every agent, no matter how limited the scope of his agency, would bind every principal even by his acts, is obviously and upon the face of it absurd; and yet it is by the fallacious use of the word "agent" that plausibility is given to reasoning which requires the assumption of some such proposition.

What, then, is the position of the broker in this case, whose knowledge, though not communicated, is held to be that of the principal?

He certainly is not employed to acquire such knowledge, nor can any insurer suppose that he has knowledge in the ordinary course of employment, like the captain of a ship, or the owner himself, as to the condition or history of the ship. In this particular case the knowledge was acquired, not because he was the agent of the assured, but from the accident that he was general agent for another person. The reason why, if he had effected the insurance, his knowledge, unless he communicated it, would have been fatal to the policy, is because his agency was to effect an insurance, and the authority to make the contract drew with it all the necessary powers and responsibilities which are involved in such an employment; but he had no general agency, — he had no other authority than the authority to make the particular contract, and his authority ended before the contract sued on was made. When it was made, no relation between him and the shipowner existed which made or continued him an agent for whose knowledge his former principal was responsible. There was no material fact known to any agent which was not disclosed at the point of time at which the contract was made; there was no one possessed of knowledge whose duty it was to communicate such knowledge.

For these reasons, I am of opinion that the judgment of the Court of Appeal should be reversed, and the judgment of Day, J., restored; and I move your Lordships accordingly.

LORD WATSON. My Lords, this is a case of considerable nicety; but I have ultimately come to the conclusion, for the reasons already stated by the Lord Chancellor, that the appeal ought to be allowed.

It is, in my opinion, a condition precedent of every contract of marine insurance that the insured shall make a full disclosure of all facts materially affecting the risk which are within his personal knowledge at the time when the contract is made. Where an insurance is effected through the medium of an agent, the ordinary rule of law applies, and non-disclosure of material facts, known to the agent only, will affect his principal and give the insurer good ground for avoiding the contract.

In the case of insurance by a shipowner, it has been decided that he is affected by the knowledge of a class of agents other than those whom he employs to insure. In the ordinary course of business, the owner of a trading vessel employs a master and ship agents, whose special function it is to keep their employer duly informed of all casualties encountered by his ship, which would materially influence the judgment of an insurer. On that ground it has been ruled that the insurer must be held to have transacted in reliance upon the well-known usage of the shipping trade, and that he is consequently entitled to assume that every circumstance material to the risk insured has been communicated to him, which ought in due course to have been made known to the shipowner before the insurance was effected. Accordingly, if a master or ship agent, whether wilfully or unintentionally, fail in their duty to

their employer, their suppression of a material fact will, notwithstanding his ignorance of the fact, vitiate his contract.

I do not think it necessary to notice in detail the authorities which bear on this point. I desire to say, however, that I have difficulty in comprehending the principle upon which the court, in *Gladstone v. King*, 1 M. & S. 35, and *Stribley v. Imperial Marine Insurance Company*, 1 Q. B. D. 507, held that the innocent non-communication of a material fact by an agent who was the *alter ego* of the shipowner merely created an exception from the policy. In both these cases the court appears to me to have undertaken the somewhat perilous task of settling the terms of the contract which the insurer would have made for himself if the fact had been communicated to him.

In the present case it is sought to extend the imputed knowledge of the insured to all facts which during the period of his employment became known to any agent, other than the agent effecting the policy in question, who was employed at any time, successfully or unsuccessfully, to insure the whole or part of the same risk with that covered by the policy. This is a case of re-insurance; but it is obvious that the principle, if admitted, would be equally applicable to the original contract.

I am of opinion, with your Lordships, that the responsibility of an innocent insured for the non-communication of facts which happen to be within the private knowledge of persons whom he merely employs to obtain an insurance upon a particular risk, ought not to be carried beyond the person who actually makes the contract on his behalf. There is no authority whatever for enlarging his responsibility beyond that limit, unless it is to be found in the decisions which relate to captains and ship agents; and these do not appear to me to have any analogy to the case of agents employed to effect a policy. There is a material difference in the relations of these two classes of agents to their employer. The one class is specially employed for the purpose of communicating to him the very facts which the law requires him to divulge to his insurer; the other is employed, not to procure or furnish information concerning the ship, but to effect an insurance. There is also, as the Master of the Rolls pointed out, an important difference in the positions of those two classes with respect to the insurer. He is entitled to contract, and does contract, on the basis that all material facts connected with the vessel insured, known to the agent employed for that purpose, have been by him communicated in due course to his principal. So, also, when an agent to insure is brought into contract with an insurer, the latter transacts on the footing that the agent has disclosed every material circumstance within his personal knowledge, whether it be known to his principal or not; but it cannot be reasonably suggested that the insurer relies to any extent upon the private information possessed by persons of whose existence he presumably knows nothing.

In the circumstances of this case, I have come to the conclusion that whilst it might be the moral duty of Mr. Murison to communicate to the appellants the information which he received on the forenoon of

the 1st of May, 1884, he was under no legal obligation to do so. There may be circumstances which impose upon agents in the position of Mr. Murison an express or implied duty to communicate their own information to their principal; but nothing of that sort occurs here. I must, in fairness to Mr. Murison, say that I can find no warrant for the inference of fact drawn by Lindley, L. J., that he purposely omitted to impart his knowledge to the appellants, in order that they might re-insure on more favorable terms. No such imputation was made at the trial; and if it had been made, it ought to have been submitted to the jury, and their verdict taken upon it.

I concur, therefore, in the judgment which has been moved.¹

*Order appealed from reversed;*² *judgment of DAY, J., restored; cause remitted to the Queen's Bench Division.*

¹ Concurring opinions by Lord FITZGERALD and Lord MACNAGHTEN have been omitted. — ED.

² Compare *Blackburn v. Haslam*, 21 Q. B. D. 144 (1888).

In *Moens v. Heyworth*, 10 M. & W. 147, 157-158 (1842), an action for deceit in representing falsely the quality of goods sold, PARKE, B., said: "To give a right of action for that representation, it was, I think, essential to prove that . . . it was made *falsely*, and for the improper purpose of inducing the plaintiffs to purchase the goods. . . . I think it essential that there should be moral fraud, and, indeed, all the cases show that it is, though the word *legal* fraud is used. . . . The case of a policy of insurance does not appear to me to be analogous to the present; those instruments are made upon an implied contract between the parties, that everything material known to the assured should be disclosed by them. That is the basis on which the contract proceeds; and it is material to see that it is not obtained by means of untrue representation or concealment in any respect."

In *North British Ins. Co. v. Lloyd*, 10 Ex. 523, 531 (1854), an action on a guaranty, where the defendant relied upon non-disclosure, PARKE, B., in the course of the argument, said: "This subject has been very ably treated by an American writer, in which he states that the necessity of the disclosure of all material circumstances in cases of insurance is founded upon mercantile usage, and not upon fraud." The reporters suggest that the allusion was to Duer on Marine Insurance. And at p. 533, POLLOCK, C. B., for the court, said: "It seems to us an incorrect proposition that the same rule prevails in the case of guarantees as in assurances upon ships or lives, in which it is a settled rule that all material circumstances known to the assured are to be disclosed, though there be no fraud in the concealment. This is peculiar to the nature of such contracts, in which in general the assured knows, and the underwriter does not know, the circumstances of the voyage or the state of health."

In *Ionides v. Pender*, L. R. 9 Q. B. 531, 539 (1874), BLACKBURN, J., for the court, said: "It is perfectly well established that the law as to a contract of insurance differs from that as to other contracts; and that a concealment of a material fact, though made without any fraudulent intention, vitiates the policy. In Duer on Insurance, vol. ii. p. 388, it is said: 'The terms in which the general rule is usually stated are that it is the duty of the assured to communicate all facts that are material to the risks, and which are not known or presumed to be known to the underwriter; but these terms are ambiguous, and the first and necessary inquiry is, by what criterion the materiality of the facts alleged to have been concealed is proper to be determined. Is the obligation of a disclosure limited to the facts that are material to the risks considered in their own nature? Or does it extend to all that may be deemed material by the insurer and would probably influence his ultimate decision?' He admits that a knowingly false representation of a matter which, though extraneous to the risks, may affect the judgment of the underwriter, will vitiate, and that the case of *Sibbald v. Hill*, 2 Dow, 263, is an express decision of the House of Lords to that effect. But

he lays it down as being 'the most reasonable opinion . . . that those facts only are necessary to be disclosed which, as material to the risks considered in their own nature, a prudent and experienced underwriter would deem it proper to consider.' The cases and proofs in support of his position are collected by Duer, at p. 518. . . . It would be too much to put on the assured the duty of disclosing everything which might influence the mind of an underwriter. Business could hardly be carried on if this was required. But the rule laid down in *Parsons on Insurance*, vol. i. p. 495, that all should be disclosed which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters do in practice act, seems to us a sound one."

In *Brownlie v. Campbell*, 5 App. Cas. 925, 954 (1880), a Scotch conveyancing case, Lord BLACKBURN said: "In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is *uberrima fides*, that if you know any circumstance at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, or what premium he will charge if he does take it, you will state what you know. There is an obligation there to disclose what you know; and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy. But in other contracts it is not so."

In *Rivaz v. Gerussi*, 6 Q. B. D. 222, 229 (C. A., 1880), BRETT, L. J., said: "The true proposition, I think, is laid down in *Phillips on Insurance*, sec. 531, when explained by *Parsons*. . . . The concealment which is to vitiate a policy is a concealment at the time of the negotiation of the policy of a material fact, which, if communicated, would affect the judgment of a rational underwriter in considering whether he would enter into the contract at all, or enter into it at one rate of premium or at another."

In *Asfar v. Blundell*, '96, 1 Q. B. 123, 129-130 (C. A., 1895), Lord ESHER said: "The assured is bound to disclose every material fact which is within his knowledge, and which is not to be taken as being within the knowledge of the underwriters. If he fails to do so, he is guilty of what is called in insurance law concealment, which may in fact be either innocent or fraudulent. But it is not necessary to disclose minutely every material fact; assuming that there is a material fact which he is bound to disclose, the rule is satisfied if he discloses sufficient to call the attention of the underwriters in such a manner that they can see that if they require further information they ought to ask for it. In this case the plaintiffs disclosed that there was a charter party in existence, for one of the parts of the subject-matter of insurance was chartered freight; and, further, that the subject-matter which the underwriters were asked to insure was the difference between the chartered freight payable by the assured to the shipowner, and the bill of lading freights which they were to obtain from the consignees of the goods. But having given this information, they did not tell the underwriters whether the chartered freight was a lump sum, or whether it was a tonnage freight depending upon the delivery of the goods to the consignees. But that the freight must be a lump sum was almost certain; and if the underwriters wanted to be sure on the point, they could have immediately acquired the knowledge by asking the question; the question ought to have been present to their minds. I think, therefore, that sufficient was disclosed by the plaintiffs to satisfy the rule that the assured must make a disclosure of the material facts."

Interesting applications of the doctrine of concealment in marine insurance are found in the following cases:—

- Harrower v. Hutchinson*, L. R. 5 Q. B. 584 (Ex. Ch. 1870);
- Merchants' Ins. Co. v. Paige*, 60 Ill. 448 (1871);
- Cory v. Patton*, L. R. 7 Q. B. 304 (1872);
- Morrison v. Universal Marine Ins. Co.*, L. R. 8 Ex. 197 (Ex. Ch. 1873);
- Ionides v. Pender*, *supra*;
- Stribley v. Imperial Marine Ins. Co.*, 1 Q. B. D. 507 (1876);
- Rivaz v. Gerussi*, *supra*;
- Tate v. Hyslop*, 15 Q. B. D. 368 (C. A., 1885);
- Herring v. Janson*, 1 Commercial Cas. 177 (1895).—ED.

SECTION II.

*Fire Insurance.*BUFE *v.* TURNER AND OTHERS.COMMON PLEAS, 1815. 2 Marsh. 46.¹

THIS action was brought by a merchant, native of, and resident at, Heligoland, against the defendants, as directors of the Phoenix fire office, on a policy of insurance effected on the 25th of July, 1814, "on a warehouse situate in the lower town of Heligoland, for three months, as by the plaintiff's letter of the 11th of July, 1814." The defendants pleaded that, at the time when the letter ordering the insurance was written, the premises were in imminent danger of being burned, which the plaintiff knew, but concealed; in consequence of which fraudulent concealment, the policy became void. Issue was joined on that plea, and on the trial of the cause, at the sittings after last Trinity term, before Lord C. J. GIBBS, the jury found a verdict for the defendants.

Mr. Serjt. *Lens* having now moved to set this verdict aside, on the ground that there was not sufficient evidence to support it, the Chief Justice stated the facts of the case, which were shortly these: The plaintiff was in possession of two warehouses in Heligoland; that which was insured was separated only by one other building from the warehouse of another person, which was on fire on the night of Saturday, the 11th of July. The fire was supposed to have been extinguished by eight o'clock in the evening, but it was considered necessary to watch the premises all night; and on the Monday morning following it broke out again, consumed the warehouse in which it originally commenced, and communicating, through the intervening building, with the warehouse which was the subject of this insurance, consumed that also. On the night of the 11th, after the bag of letters had been made up for England, the plaintiff wrote to his agent here, dryly desiring that the warehouse in question might be insured, and taking no notice of the other warehouse which he had in the town; which letter was not sent in the regular way, but was given to the master of the boat, which

¹ s. c. 6 Taunt. 338, where these additional facts are stated: "That fire . . . was apparently extinguished in half an hour, and four persons were employed by the plaintiff, who was a magistrate there, to watch during the night lest the fire should again break out. The plaintiff on the same evening wrote the letter. . . . The mail for England was to sail that day, and was then closed; but the plaintiff procured the master of the packet-boat to take the letter with him, and put it into the post-office at Cuxhaven, so that the letter left Heligoland at a late hour on the same night, and it reached England by the same packet on the 24th, and the plaintiff's agent on the following day effected the policy."—ED.

carried the letter bag. The jury thought that a fact which bore so hard upon the safety of the premises insured as the fire of the 11th, ought to have been communicated; and though they acquitted the plaintiff of any fraudulent intention in the concealment, they still thought that the defendants were not on equal terms with the insured. His Lordship added that, under the circumstances of the case, he could not but think that the jury were warranted in the verdict they had given; and the rest of the court concurring, the rule was

*Refused.*¹

FLETCHER v. THE COMMONWEALTH INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1836. 18 Pick. 419.

ASSUMPSIT on a policy of insurance effected by the plaintiff for \$800, viz. \$150 on his one-story framed store, situate on the Bucknam road in Medford, and occupied by him, and \$650 on his stock in trade contained in the store. The store and stock in trade were consumed by fire on the 23d of February, 1835.

At the trial, before SHAW, C. J., it appeared that the plaintiff applied at the defendants' office to procure insurance, and requested them to insure the above sums on his store and stock. No written application or representation was made or required; and no other particulars in relation to the property were communicated to the defendants; nor were any further inquiries made.

One Bucknam owned the land on which the store had been placed, and he had agreed that the plaintiff might move the store on to the land and keep it there, paying an annual rent, for five years, unless Bucknam should request him to remove it, in which case he should have six months' notice. There was no writing between Bucknam and the plaintiff in relation to the store or the land.

Upon this evidence it was contended, that facts material to the risk had been suppressed or not disclosed, which it was the duty of the assured to have disclosed, and that thereby the policy was rendered void. But the Chief Justice instructed the jury that it was not the plaintiff's duty to give a more particular representation of the nature of his interest, without inquiry being made of him; that if the defendants wished for a more particular description in this respect, it was their duty to inquire, in which case it would have been the duty of the plaintiff to state truly the nature of his interest; but that under the circumstances above mentioned, there was no such misrepresentation as would avoid the policy.

¹ See *Curry v. Commonwealth Ins. Co.*, 10 Pick. 535 (1830); *Walden v. Louisiana Ins. Co.*, 12 La. 134 (1838). — ED.

A verdict was returned for the plaintiff, which the defendants moved to set aside on the ground that the instruction to the jury was erroneous.

Farley, for the defendants.

Aylwin and *H. H. Fuller*, for the plaintiff.

PUTNAM, J. If the concealment was material, it will avoid the policy notwithstanding the assured did not intend to commit any fraud. And it is true that the materiality of the fact concealed is a question for the jury. These general principles are well established. But the assured may well be silent as to various matters connected with or having some relation to the property insured, without any prejudice to his insurance, provided that such silence was not intended to deceive or to defraud the underwriter. *Aliud est celare, aliud tacere*. In the case at bar the defendants say, that the plaintiff withheld information which was material to the risk, and which, therefore, ought to have been communicated. And the fact so withheld is stated to be, that the plaintiff did not inform the defendants who owned the land on which the building stood. Now it seems to us very clear, that it was not necessary that he should. He stated his property in the building, goods, etc., etc. He stated in what town and street it stood. He stated everything truly. And it seems to us that if the defendants wanted any further information, they should have requested it. Now it is contended the land belonged to another, that there was a right reserved for the owner to cause the plaintiff to remove his store in a certain time, and as his tenure was such, he would be less careful of the property, and so the risk would be greater than it would be if the plaintiff owned the land as well as the building. We think this is more ingenious than substantial. If in truth the plaintiff owned the land upon which his building stood, it might be that he wished to have a new framed store instead of the old one, and it would be within the region of possibility that he would not be so likely to take as good care of the old one as he would if it were a new one; and he might honestly omit to state his desire to substitute a new store for the old. But such a suggestion of such an omission, although quite as likely to affect the risk, could not be a foundation sufficient to support a verdict avoiding the policy for concealment. It would, we think, be sufficient for the plaintiff to describe the property to be insured, as it then existed; and if the defendants wished for more particular information, touching the risk to be assumed, and the motives, more or less strong, which would operate with the plaintiff in regard to the care he would take of the property assured, they should inquire.

This is the more equitable, because the law would require the plaintiff to take reasonable care of the property insured. He could not recover if it were proved that the fire was caused by his own fraud or neglect.

If the Chief Justice had left the cause to the jury with instructions to find for the defendants, if they should think there was a conceal-

ment material to the risk, and they had returned a verdict for the defendants upon that ground, we all think the verdict could not have been supported upon the evidence produced. The fact is to be settled by the jury, but it must be upon legal and sufficient evidence; and where the evidence is agreed, it is a question of law whether it be sufficient or not to establish the fact. Now the evidence is, that the plaintiff did not say whether he owned the land or not; and it is not in our power to see how that varied the risk which the defendants assured against fire. It would have been just as material to have stated on which side, east or west, of the street the house stood; whether it were painted or not. In the latter case it probably could be said with truth, that if painted it would be more combustible than if it were not. But such objections would be vain; and it seems to the court that those which are now made to the instruction of the Chief Justice, cannot be maintained. Enough was truly represented to put the defendants upon their inquiries for more. The case of *Curry v. Commonwealth Ins. Co.*, 10 Pick. 535, and cases to which we have been referred, seem to us clearly to show that the proceeding at the trial was correct, and that the judgment should be entered for the plaintiff according to the verdict.¹

THE NEW YORK BOWERY FIRE INS. CO. *v.* THE NEW
YORK FIRE INS. CO.

SUPREME COURT OF NEW YORK, 1837. 17 Wend. 359.

ERROR from the New York Common Pleas. This was an action against the Bowery Insurance Company, on a policy of re-insurance. On the third day of February, 1834, the New York Fire Insurance Company of the city of New York entered into a policy to insure for one year one Joseph Mortimer, against loss or damage by fire upon his stock of dry goods and ready-made clothing, in a store occupied by him, to the amount of \$3,000, and upon his household furniture to the amount of \$500. On the eleventh day of February, 1834, the assurers applied to the Bowery company for re-insurance on the dry goods and clothing, and two days after such application the Bowery company entered into a policy whereby they agreed to re-insure the other company against loss or damage by fire, to the amount of \$3,000 on the stock of dry goods and ready-made clothing, the property of Joseph Mortimer, contained in, etc. (describing the building the same as in the policy exe-

¹ *Acc.*: *Delahay v. Memphis Ins. Co.*, 8 Humph. (Tenn.) 684 (1848); *Hill v. Lafayette Ins. Co.*, 2 Mich. 476 (1853); *Morrison's Administrator v. Tennessee M. & F. Ins. Co.*, 18 Mo. 262 (1853); *West Rockingham Mutual F. Ins. Co. v. Sheets*, 26 Grat. (Va.) 854 (1875); *Castner v. Farmers' Mutual F. Ins. Co.*, 46 Mich. 15 (1881); *Morotock Ins. Co. v. Rodefer*, 92 Va. 747 (1896). — ED.

cuted to Mortimer). The policy was in the usual form of instruments of this kind, except that for the word insure, near the commencement of it, was substituted the word re-insure;¹ . . . the policy to be void in case the assured had already any other insurance against fire on the property not notified. . . . The policy executed by the New York company contained a memorandum in the body thereof, that \$3,000 had been insured by the City Fire Insurance Company, but no reference to such insurance was made in the policy executed by the Bowery company, nor was the fact mentioned previous to or at the time of the execution of the policy, nor did it appear that the first policy was exhibited to the officers of the Bowery company at the execution of their policy. The goods and clothing insured were destroyed by fire on the 14th July, 1834, and the loss of Mortimer amounted to upwards of \$6,000. Mortimer forthwith gave notice and furnished the necessary preliminary proofs to enable him to assert his claim against the New York company, and at the expiration of 60 days commenced his suit, and recovered the whole amount insured. The company paid the recovery and then brought their action against the Bowery company, on the policy of re-insurance. . . . The defendants . . . proved that after the plaintiffs had entered into the policy of insurance with Mortimer, and previous to the application for re-insurance, the secretary of the plaintiffs was informed by the secretary of the Jefferson Insurance Company that the character of Mortimer was bad; that he had been insured and twice burned out; that there had been difficulties in respect to his losses; that he was in bad repute with insurance offices, and that he, the informant, if applied to, would not insure him; and that the information as to the character of Mortimer, thus obtained, was not communicated to the defendants at the time of the application for re-insurance. The recorder charged the jury that the only question for them to pass upon was, whether the information communicated by the secretary of the Jefferson company to the secretary of the plaintiffs, previous to the re-insurance by the defendants, was material to have been communicated to the defendants; that if they should find that the secretary of the plaintiffs had intentionally withheld information which it was material to communicate, then the plaintiffs were not entitled to recover; but if they should find that the information was not so withheld, then the plaintiffs were entitled to recover. The defendants excepted, the jury found a verdict for the plaintiffs, on which judgment was rendered. The defendants sued out a writ of error.

D. Selden, for plaintiffs in error.

J. Anthon, for defendants in error.

BRONSON, J. . . . No doubt seems to have been entertained by the judge that the testimony of Thorne, the secretary of the Jefferson Insurance Company, gave rise to a question of some kind, for the consideration of the jury. The facts stated by him to Merchant, the secretary

¹ From the statement and the opinion several passages not bearing on concealment have been omitted. — *Ed.*

of the plaintiffs, were calculated to make a strong impression on the mind of an underwriter for Mortimer; and if they had been communicated to the defendants at the time of the application for the re-assurance, it can hardly be doubted that they would either have demanded a greater premium, or declined the risk altogether. If neither of these courses had been adopted, they would at least have taken time to make inquiries concerning the character of Mortimer. It is true that Thorne did not, with absolute certainty, identify the Mortimer of whom he spoke with the one insured by the plaintiffs; but there remained little more than a mere possibility that there were two persons of that name, answering to the same description. The witness gave not only his surname, but his occupation, which was not of a kind likely to include a great number of individuals. This was not all. He gave the place of his residence, and the street in which he carried on business. No doubt seems to have been entertained by Merchant, that the person insured by his company was identical with the person of whom Thorne spoke, and none could well have been entertained by any one. But if there was any uncertainty about the person, the value of the evidence was to be estimated by the jury, under proper instructions from the court.

The information which the plaintiffs possessed, and which they withheld from the defendants, was, I think, material to the risk. It seems to have been so regarded by the plaintiffs themselves. The policy to Mortimer was issued by Merchant on the 3d of February, in the absence of the president of his company. When the president returned the next day, he disapproved of what had been done, and ordered a re-insurance. But nothing was done by Merchant, the secretary, because, as he says, he thought it a good risk, and hoped to remove the president's objections. He adds, he thought he had nearly quieted the fears of the president, and persuaded him to keep the risk. That he was right in this supposition is rendered highly probable, from the fact, that although the president expressed his disapprobation and ordered re-assurance on the 4th of February, nothing was done until the 11th, and after the conversation with Thorne. After learning the character of Mortimer, no time was lost in applying for re-assurance. If the concealment of this information had, under proper instructions, been submitted to the jury as a question of actual fraud on the part of the plaintiffs, it is impossible to say that their verdict would not have been in favor of the defendants. But if the facts concerning Mortimer's character were material to the risk, it is enough that they were withheld by the plaintiffs on applying for re-assurance.

The general doctrine on this subject is not denied; but it is said that the character of Mortimer was not a fact material to the risk; that the person applying for insurance is not bound to say anything about his own character. The last branch of the remark is undoubtedly true. Had Mortimer applied to the defendants for insurance, he was not bound, nor could it be expected, that he should speak evil of himself. Good manners on the part of the underwriter, and self-respect on the

part of the applicant, would forbid a conversation on the subject of character. If the underwriter wished information on that point, he would naturally seek it from some other source. But this case presents, I think, a different question. There was no law of social intercourse forbidding the plaintiffs to speak of the character of a third person; especially in a matter of business, where character became an important inquiry. But it is said that Merchant might have subjected himself to an action of slander, if he had repeated the words of Thorne, and it should turn out that they were untrue. I do not so understand the law. When a man, without any intent to defame, repeats, in the legitimate course of business and for an honest purpose, what he has heard of the character of another, I have yet to learn that he is liable to an action if the information prove erroneous. Merchant had no legal excuse for withholding the information derived from Thorne, and I think he was bound to speak. The rule on this subject is very broad. "Every fact and circumstance which can possibly influence the mind of any prudent and intelligent insurer, in determining whether he will underwrite the policy at all, or at what premium he will underwrite it, is material." 1 Marsh. 467. He must even give doubtful news concerning the ship, in cases of marine insurance, however little credit he may give to it himself. 1 Marsh. 471; Phillips, 93, 95.

This question was not properly submitted to the jury. They were instructed, in effect, that although they should think the information material, they must still find for the plaintiffs unless it was intentionally withheld. There was no ground for submitting such a question to the jury. It was not raised by the evidence. And, besides, if the facts communicated by Thorne were material, it is enough that they were withheld by Merchant on applying for re-assurance. Whether the omission was the result of mistake or design, was not an important inquiry. The assured acts at his peril in withholding information. *Shirley v. Wilkinson*, Doug. 306, note; *Kohne v. Ins. Comp. N. A.*, 1 Marsh. Ins. 473, note; *Carter v. Boehm*, 3 Burr. 1909; *Thompson v. Buchanan*, 4 Bro. Parl. Cases, 482. Phil. on Ins. 80.

I think the policy was void, on the ground that no notice was given to the defendants of the insurance of Mortimer on the same goods by the City Ins. Company. But as it is not now necessary to decide this point, and my brethren are not prepared to pass upon it, I shall not assign the reasons for my own opinion. The judgment is reversed, on the ground that the charge was erroneous, and a *venire de novo* is ordered in the court below.

Judgment reversed.

LYON AND ANOTHER v. THE COMMERCIAL INS. CO.

SUPREME COURT OF LOUISIANA, 1842. 2 Rob. 266.

APPEAL from the Commercial Court of New Orleans.

The plaintiffs seek to recover \$15,000, on a policy of insurance against fire on their stock in trade, consisting of clothing, hats, etc., in a store, No. 11, Front Levée Street. The insurance was effected for one year from the 9th of December, 1839, and the goods insured were destroyed by fire on the morning of the 27th of March, 1840. The defence set up to this claim is in substance that before, at the time of, and after the execution of the policy, the plaintiffs withheld from the company important information material to the risk. The facts alleged to have been concealed were the names and occupations of the tenants on the premises; and it is averred that the risks of the defendants were greatly increased by such concealment, because the pursuits and occupations of the tenants were of a nature to endanger the safety of the premises. This case was tried by a jury, who rendered their verdict in favor of the plaintiffs. The company appealed, after an ineffectual attempt to obtain a new trial.

Durant and Grymes, for the plaintiffs.

Lucius C. Duncan and Isaac T. Preston, for the appellants.

MORPHY, J.¹ . . . On the merits, there is no dispute as to the value of the goods destroyed, and no charge of fraud is set up against the plaintiffs. The only defence is, that the assured, who rented the second story of the building they occupied to one Cornell, and knew that he kept in it a gambling establishment, did not communicate the fact to the defendants; and that such concealment was material, as the fact concealed greatly increased the risk, and would have prevented them from insuring had it been made known. The evidence shows that the building in which the goods insured were stored was four stories high, and belonged to one Kohn, and that the plaintiffs had a lease of it for a term of years; that they never occupied the whole of the premises themselves, but sub-leased from time to time the second and fourth stories; that the fourth story, which had been let to a militia company some time before, was unoccupied at the time of the fire, but that the second story was then occupied by one Cornell. The testimony leaves little doubt in our minds that this tenant kept a gambling house in the rooms he rented from the plaintiffs, and, moreover, renders it probable that the plaintiffs knew the fact. Armstrong, the secretary of the company, testifies that when application was made for insurance, he went with the plaintiffs to take a general view of the premises; that in a conversation he then had with Lyons, in relation to the gambling establishments in the neighborhood, he stated the objection he

¹ Passages foreign to insurance have been omitted. — Ed.

should have to taking risks near these establishments. This witness thinks that Lyons replied, that he did not know there were any such there, and that if there were, it would most likely be in the corner store; and that he then remarked to Lyons that there was an intervening store, that he knew the stores to be well built, and that he would, therefore, take the risk; that plaintiff at the time gave no intimation that he had under-leased any part of the premises, or that he had the intention to do so; that had he (the witness) been informed at the time that there were sub-tenants on the premises, he would, before taking the risk, have made inquiry to ascertain the occupations and business of the sub-tenants, etc. On the trial of the case the counsel for the underwriters requested the court to charge the jury that, if they believed that the plaintiffs were tenants by the year of the store in which the property insured was, they (the plaintiffs) were bound to inform the company if there were any sub-tenants in the premises, and who they were. The court refused so to charge the jury, but on the contrary instructed them that the plaintiffs were not bound to inform the defendants if there were any sub-tenants, nor what their occupations were, the more especially as the insurance was not on the store, but on a stock of goods in it; and that if the jury believed that, pending the negotiation for the policy, the defendants, through their agents, had objected or expressed an unwillingness to insure property in the neighborhood of gambling establishments, and that the plaintiffs at the time knew that there was one within the premises in which was the property insured, the court would leave it to them to say whether this was a fact, the concealment or misrepresentation of which was so material to the risk as to vitiate the policy, and that it was of no consequence whether it was material in the opinion of the defendants or their agent, but that it must be considered material to the risk by the jury themselves. The judge further instructed the jury that, where a house was insured, the owner of the house had a right to have it occupied by any person he pleased, provided the occupations of the persons, or the property in it, were not of such a nature as to vitiate the policy under the conditions relative to what was considered hazardous or extra-hazardous risks; that where a stock of goods which were in a part of a house or store were insured, the manner in which the rest of the house was occupied did not affect the policy, unless the insured had made some warranty in relation thereto, or unless there had been a concealment or misrepresentation of facts deemed by the jury material to the risk. To this charge of the judge, and to his refusal to instruct the jury as prayed for, the defendants took a bill of exceptions.

The charge of the judge appears to us substantially correct. No case, it is believed, can be referred to, in which it has been held that the owner of a house, or a tenant on a lease for years, is bound to disclose or communicate to his underwriters the names and pursuits of the tenants, or sub-tenants, living on the premises. If the insurers wish to guard themselves against the risk or dangers supposed to result from

certain pursuits or occupations of the tenants, or sub-tenants, of houses on which they make insurance, whether it be on the property itself, or on goods in it, they have it in their power to insert in the policy a warranty to that effect. Being considered as a condition precedent, a warranty, whether material or immaterial to the risk, must be complied with before the assured can maintain an action on the policy; but where a fact, not provided for by the warranty appearing on the face of a policy, is concealed, it cannot affect the assured's right to recover, unless it be material to the risk, for then it avoids the policy on the ground of fraud, or because the underwriters have been misled. But in all cases of this kind we take the rule to be well settled that the materiality of the fact concealed or misrepresented is to be left to the jury. They are the proper judges of the fact whether the risk of fire has been thereby increased. 10 Pickering, 535; 2 Peters, 56; 7 Wen. 77; 6 Ib. 627; 1 Hall. 234, and note. In the present case the jury were called upon to decide whether the plaintiffs, at the time when the insurance was effected, knew that their tenant kept a gambling house in the premises, and whether the danger of fire was thereby greatly enhanced. After hearing all the evidence, they decided these questions of fact in the negative; and we cannot say that they erred.

Judgment affirmed.

BURRITT v. SARATOGA COUNTY MUTUAL FIRE INS. CO.

SUPREME COURT OF NEW YORK, 1843. 5 Hill, 188.

ASSUMPSIT on a policy of insurance, tried before MONELL, C. Judge, at the Tompkins circuit, in September, 1842. On the 19th of December, 1837, the defendants insured the plaintiff, Joseph Burritt, against loss or damage by fire "on his store situate in the village of Ithaca, \$1,600, reference being had to the application of said Joseph Burritt for a more particular description, and as forming a part of this policy, during the term of five years." Annexed to the policy were "Conditions of insurance" as follows, viz.: 1. "All applications for insurance must be made in writing, according to the printed forms prepared by the company. Such application shall contain the place where the property is situated [and, among other things], its relative situation as to other buildings; distance from each, if less than ten rods; for what purpose occupied," etc.; 2. "Such application may be made either by the applicant or by a surveyor, and in all cases the insured will be bound by the application, for the purpose of taking which, such surveyor will be deemed the agent of the applicant;" 6. "If any person insuring any property in this company shall make any misrepresentation or concealment in the application, etc., such insurance

shall be void and of no effect." The printed forms of applications prepared by the company contained a marginal note as follows: "Relative situation as to other buildings — distance from each, if less than ten rods;" at the right hand of which note was a blank to be filled up by the applicant. This blank the plaintiff filled in his application with the description of five buildings as standing within ten rods from the building insured. Several other buildings, and among the number a cabinet-maker's shop, all standing within the ten rods, were not mentioned in the application. The plaintiff's store was an ordinary hazard, and the rate of premium was 15 per cent. The rate for a cabinet-maker's shop was from 25 to 30 per cent. On the 28th of May, 1840, a fire commenced in the cabinet-maker's shop, which communicated to the plaintiff's store and damaged it to the amount of \$850; and for that loss this action was brought. The judge charged the jury in relation to the survey or application, that "it did not amount to a *warranty*: that there must be evidence to the jury (which is disclaimed in this cause) of *fraudulent* misrepresentation, or *fraudulent* concealment of facts. That an accidental omission to insert in the application (without fraud) a building within the ten rods did not make void the policy; and therefore that the mere omission to insert the cabinet shop, under the facts of this case, where fraud is disclaimed, did not avoid the policy." The jury found a verdict for the plaintiff, and the defendants now moved for a new trial on a bill of exceptions.

D. Wright and J. A. Spencer, for the defendants.

B. Johnson, for the plaintiff.

BRONSON, J.¹ . . . I am strongly inclined to the opinion that there was a warranty; but there is another feature in the case which renders it unnecessary to settle that question.

In marine insurance the misrepresentation or concealment by the assured of a fact material to the risk will avoid the policy, although no fraud was intended. It is no answer for the assured to say that the error or suppression was the result of mistake, accident, forgetfulness, or inadvertence. It is enough that the insurer has been misled, and has thus been induced to enter into a contract which, upon correct and full information, he would either have declined, or would have made upon different terms. Although no fraud was intended by the assured, it is nevertheless a fraud upon the underwriter, and avoids the policy. *Bridges v. Hunter*, 1 Maule & Selw. 15; *Macdowall v. Fraser*, Doug. 260; *Fitzherbert v. Mather*, 1 T. R. 12; *Carter v. Boehm*, 3 Burr. 1905; *Bufe v. Turner*, 6 Taunt. 338; *Curry v. Commonwealth Ins. Co.*, 10 Pick. 535; *N. Y. Bowery Ins. Co. v. N. Y. Fire Ins. Co.*, 17 Wend. 359; 1 Marsh. Ins. (Cond'y) 451-453, 465; 1 Phil. Ins. 214, 303. The assured is bound, although no inquiry be made, to disclose every fact within his knowledge which is material to the risk. But this doctrine cannot be applicable, at least not in its full extent, to policies against fire. If a man is content to insure my house without taking the trouble

¹ A passage on warranty has been omitted. — Ed.

to inquire of what materials it is constructed, how it is situated in reference to other buildings, or to what uses it is applied, he has no ground for complaint that the hazard proves to be greater than he had anticipated, unless I am chargeable with some misrepresentation concerning the nature or extent of the risk. It is therefore the practice of companies which insure against fire to make inquiries of the assured in some form, concerning all such matters as are deemed material to the risk, or which may affect the amount of premium to be paid. This is sometimes done by the conditions of insurance annexed to the policy, and sometimes by requiring the applicant to state particular facts in a written application for insurance. When thus called upon to speak, he is bound to make a true and full representation concerning all the matters brought to his notice, and any concealment will have the like effect as in the case of a marine risk. See 1 Phil. Ins. 284, 285, ed. of 1840. It is not necessary for the purpose of avoiding the policy to show that any fraud was intended. It is enough that information material to the risk was required and withheld.

This doctrine is fatal to the present action. The plaintiff was plainly and directly called upon to state the relative situation of the store as to all other buildings within the distance of ten rods; and he omitted to mention several buildings which stood within that distance, and among the number was one which was far more hazardous than that to which the policy applied. If there could be any doubt that the facts concealed were material to the risk, the question should have been left to the jury.

But there is a further view of the case which is still more decisive against the action; and it is one in which the materiality of the concealment is not open for discussion. The plaintiff was required by the conditions annexed to the policy, and by the printed form of application which he used, to give the information which he withheld. And it was one of the "conditions of insurance" that if he should "make any misrepresentation or concealment in the application" the policy should be "void, and of no effect." Nothing is said about fraud; but any concealment in the application avoids the policy. And yet the jury was instructed that there must be a *fraudulent* concealment of facts. That position cannot be maintained without making a new contract for the parties.

A warranty by the assured in relation to the existence of a particular fact must be strictly true, or the policy will not take effect; and this is so whether the thing warranted be material to the risk or not. It would, perhaps, be more proper to say, that the parties have agreed on the materiality of the thing warranted, and that the agreement precludes all inquiry on the subject. See the cases already cited, and *Fowler v. Aetna Ins. Co.*, 6 Cowen, 673, and 7 Wend. 270, S. C.; 1 Phil. Ins. 351, 354. Here the parties have by their contract placed a misrepresentation or concealment in relation to particular facts upon the same footing as a warranty. They have agreed that the misrepre-

sensation or concealment shall avoid the policy, and we have nothing to do with the inquiry whether the fact misrepresented or concealed was material to the risk. The jury should have been instructed to find a verdict for the defendants.

The CHIEF JUSTICE, and COWEN, J., being members of the company, gave no opinion. *New trial granted.*¹

CLARK AND OTHERS, PLAINTIFFS IN ERROR, v. THE MANUFACTURERS' INSURANCE CO., DEFENDANTS IN ERROR.

SUPREME COURT OF THE UNITED STATES, 1850. 8 How. 235.²

ERROR to the Circuit Court of the United States for the District of Massachusetts,³ in an action on a policy of insurance against fire.

It appeared at the trial that the property insured was a cotton mill, at Malone, in the State of New York, the defendant's place of business being Boston, in the State of Massachusetts. In 1834, Jonathan Stearns, being the owner of the mill, applied for insurance, and in answer to printed questions proposed to him by the defendants, represented, among other things, "no lamps used in the picking-room." Upon these representations, a policy was issued to Stearns, and was from time to time renewed, until, in 1842, the plaintiffs having purchased the mill, a policy was issued to them, in which it was declared: "This policy is issued agreeably to the representation formerly made by Jonathan Stearns, the former owner, which representation is binding on the assured." When this policy expired, the same amount of premium was sent, with a request for a renewal, and another policy sent, not, however, containing the special clause as to Stearns's representation, but a general clause, that the policy was issued on the representation of the assured. Like policies continued to be issued from time to time till 1846, when the mill was destroyed by fire, occasioned by a lamp in the picking-room.

The defendants contended that the jury would be warranted in finding that the representation of Stearns bound the plaintiffs, and its falsity avoided the policy; and if not, that it was the duty of the insured to make known a fact so material to the risk, known to him, if unknown to the assured, and that therefore the policy was void.⁴

¹ Compare *Gates v. Madison County Mutual Ins. Co.*, 5 N. Y. 469 (1851); *Armenia Ins. Co. v. Paul*, 91 Pa. 520 (1879). — ED.

² Instead of the original statement, the one in 17 Curt. Dec. 569 has been used. — ED.

³ In that court the case is reported in 2 Wood. & M. 472 (1847). — ED.

⁴ In 8 How. 235, it appears that it was agreed at the trial "that such a use of lamps in the picker-room as appeared in this case enhanced the danger of fire, and was material to the risk;" and that, according to the bill of exceptions, the jury were in-

The opinion of the court states the points taken and ruled upon these questions.

Gillet, for the plaintiffs.

Curtis and Hall, *contra*.

WOODBURY, J.¹ . . . It is necessary for us to examine with care whether an instruction like that presented here could legally be given.

First, then, what is the substance of that supposed instruction?

It is, that if no representations were made or adopted by the plaintiffs, they would not be entitled to recover, if lamps were in truth used in the picking-room, which were conceded to be material to the risk; and this use was known to the plaintiffs and not to the defendants, and this use was meant to be continued, and was continued, and caused the present loss. In the next place, what must be considered the law in relation to this subject? Little doubt exists, that, when representations are made or adopted, the denial in them of a material fact, such as here, that any lamp was used in the picking-room, where one or more was in truth used, makes the policy void, not only for misrepresentation, but misdescription and concealment. 1 Marshall on Ins., 481; Ellis on Fire and Life Ins., 58; Dobsen v. Sotheby, 1 Moody & Malk. 90; 6 Cowen, 673; 4 Mass. 337.

A false representation avoids the policy, because it either misleads or defrauds. *Livingston et al. v. Mar. Ins. Co.*, 7 Cranch, 332.

In such a state of things, also, the insured — knowing that he is asked for representations to enable the underwriter to decide properly whether he will insure at all, and if so, at what premium — must suppress nothing material to the risk, or the underwriter will not stand on equal grounds with himself, and will be forced to act in the dark more than himself, and probably to misjudge. 1 Marshall on Ins., 473, 474, note; Lynch v. Dunsford, 14 East, 494; Maryland Ins. Co. v. Ruden's Ad., 6 Cranch, 338, and Livingston v. Mar. Ins. Co., id. 279; Columbian Ins. Co. v. Lawrence, 10 Peters, 516; McLanahan v. Universal Ins. Co., 1 Peters, 185; 2 Peters, 59; 2 Duer, 388, 379, 411; 2 Caines, 57; 1 Wash. C. C. 162.

Concealment thus would operate in some cases as a fraud, and in all will make the risk very different from what the insurer knew and agreed to. 3 Burr. 1905; Ellis on Fire and Life Ins., 38.

structured "that if they found the policy declared on did not refer to the said representations of Stearns, and that no representation was in fact made or adopted by the plaintiffs respecting the use of lamps in the picker-room, they would then take the law to be, that, as it was agreed by the parties that the use of lamps in the picker-room in the manner found was material to the risk, it was the duty of the plaintiffs to disclose the fact of such use to the defendants, or their agent, when the policy was applied for, provided such use then existed, and was known to the plaintiffs and unknown to the defendants, and was then intended by the plaintiffs to be, and in fact was, continued after the policy was issued, and occasioned the loss in question; and that each failure of the plaintiffs, even without any fraudulent intent on their part, to make this fact known to the defendants, would avoid the policy." — Ed.

¹ The omitted passages did not deal with concealment. — Ed.

But the hypothetical position presented by this record is that the law would be the same, provided no representations whatever were made, and in this form it does not, in the state of facts exhibited in the record, meet with the sanction of this court. The chief controversy appears to have been concerning the first point; and when this last question was made a part of the case by agreement of counsel, it was not known whether this court would consider the original representations by Stearns as adopted, and thus binding on those subsequently insured. Independent of those, none appear to have been made or asked.

Representations, however, in insurances, it is well known, almost invariably exist, either written or parol. *Columbian Ins. Co. v. Lawrence*, 2 Peters, 49; s. c. 10 Peters, 515. But they are not usually named or incorporated in the policy, except on the continent of Europe. 3 Kent, 237; 9 Barn. & Cress. 693.

It is fair to presume that they took place in all the reported cases on insurance, though often not named, unless the contrary is expressly stated, as they are in general "the principal inducements to contract, and furnish the best grounds upon which the premium can be calculated." (1 Marsh. on Ins., 450.)

But the relation of the parties seems entirely changed, if the insurer asks no information and the insured makes no representations. That is the chief novelty in this question, as hypothetically stated in the bill of exceptions. We think that the governing test on it must be this, — it must be presumed that the insurer has in person or by agent in such a case obtained all the information desired as to the premises insured, or ventures to take the risk without it, and that the insured, being asked nothing, has a right to presume that nothing on the risk is desired from him.

This rule must not be misapprehended and supposed to rest on a principle different and somewhat ordinary, that insurers are always to be expected to possess some general knowledge of such matters as they deal with, independent of inquiries to the assured. 8 Peters, 582.

Nor on the position well settled, that the insurer must be presumed to know what is material in the course of any particular trade, — its usages at home and abroad, and those transactions which are public, and equally open to the knowledge of both parties. *Hazard's Ad. v. New England Mar. Ins. Co.*, 8 Peters, 557; 2 Duer on Ins., 379, 478; 3 Kent's Com. 285, 286; *Green v. Merchants' Ins. Co.*, 10 Pick. 402; 4 Mason, C. C. 439; *Buck et al. v. Chesapeake Ins. Co.*, 1 Peters, 160. Nor on any special usage proved, as in *Long v. Duff*, 2 Bos. & Pul. 210, that it was, in a case like this, the duty of "the underwriter to obtain this information for himself."

But when representations are not asked or given, and with only this general knowledge the insurer chooses to assume the risk, he must in point of law be deemed to do it at his peril. It has been justly remarked, in a case somewhat like this in principle, — "With this

knowledge, and without asking a question, the defendant underwrote; and by so doing he took the knowledge of the state of the place upon himself," etc. 1 Marshall on Ins., 481, 482; Carter v. Boehm, 3 Burr. 1905.

In cases of fire insurance, also, the underwriters may be considered as more likely to do this than in marine insurance; because the subject insured is usually situated on land and nearer, so as to be examined easier by them or their agents; and the circumstances connected with it are more uniform and better known to all. 1 Har. & Gill, 295; Burritt v. Saratoga M. F. Ins. Co., 5 Hill, 192.

It is true that, from what is reasonable and just, some exceptions must exist to this general rule, though none of them are believed to cover the present case. Thus the insurer must be supposed, if no special information has been asked or obtained, to take the risk, on the hypothesis that nothing unusual exists enhancing the risk; and hence, as in this case, if lamps are used in the picking-room, which do enhance it, he must show that their use in the manner practised was unusual or not customary, and then, though no representations had been asked or made, he would make out a case, where it was the duty of the insured to inform him of the fact, and where *suppressio veri* would be as improper and injurious as *suggestio falsi*. Livingston v. Mar. Ins. Co., 6 Cranch, 281.

So if any extrinsic peril existed, outside and near a building insured, and which increased the risk, the insured should communicate that, though not requested. Bufo v. Turner, 6 Taunt. 338; Walden v. Lou. Ins. Co., 12 Louis. 134. But as to the ordinary risks connected with the property insured, if no representations whatever are asked or given, the insurer must, as before remarked, be supposed to assume them; and, if he acts without inquiry anywhere concerning them, seems quite as negligent as the insured, who is silent when not requested to speak. The conclusions on the whole case then are, that the defendants are entitled to be discharged on the first ground upon the merits: because the plaintiffs were interrogated in writing on this very fact and risk, or others were, whose answers they adopted; and the truth was not disclosed in their representations in reply, when it is conceded to have been material to the risk; and therefore, by the express stipulations of this policy, as well as by the general principles of the law of insurance, the plaintiffs should not recover. But our judgment cannot be rendered on this conclusion, standing alone, because the second point is connected with it in the form before explained. Again, the defendants would be entitled to be discharged under the second point on the ground, which accords with the truth here, that representations were really made on this subject; but not, if none whatever were made, according to what is hypothetically suggested in the record. The judgment below must, therefore, be reversed, for the purpose of correcting what is defective in the manner of stating how the verdict was taken and how the last question stood by itself on the

facts proved; and the case must be remanded to the court below, with instructions to take all proper steps to carry into effect the views presented in this opinion.¹

WALES v. NEW YORK BOWERY FIRE INSURANCE CO.

SUPREME COURT OF MINNESOTA, 1887. 37 Minn. 106.

APPEAL by defendant from an order of the District Court for Hennepin County, LOCHREN, J., presiding, refusing a new trial after a verdict for plaintiff.

Torrance & Fletcher, for appellant.

Lusk & Bunn, for respondent.

¹ *Acc.*: *Gates v. Madison County Mut. Ins. Co.*, 5 N. Y. 469 (1851); *Boggs v. America Ins. Co.*, 30 Mo. 63 (1860).

In *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 472 (1853), RANNEY, J., for the court, though the point was unnecessary, said: "It is not now true, whatever may be thought of the older authorities, that there is no difference in this respect between marine and fire insurance; nor that a failure to disclose every fact material to the risk, upon which information is not asked for, or suppressed with a fraudulent intent, will avoid a policy of the latter description. The reason of the rule, and the policy in which it was founded, in its application to marine risks, entirely failed when applied to fire policies. In the former, the subject of insurance is generally beyond the reach, and not open to the inspection of the underwriter, often in distant ports or upon the high seas, and the peculiar perils to which it may be exposed, too numerous to be anticipated or inquired about, known only to the owners and those in their employ; while in the latter, it is, or may be, seen and inspected before the risk is assumed, and its construction, situation, and ordinary hazards, as well appreciated by the underwriter as the owner. In marine insurance, the underwriter, from the very necessities of his undertaking, is obliged to rely upon the assured, and has therefore the right to exact a full disclosure of all the facts *known* to him, which may in any way affect the risk to be assumed. But in fire assurance, no such necessity for reliance exists, and if the underwriter assumes the risk without taking the trouble to either examine or inquire, he cannot very well, in the absence of all fraud, complain that it turns out to be greater than he anticipated."

In *Campbell v. American F. Ins. Co.*, 73 Wis. 100, 109 (1888), TAYLOR, J., for the court, said: "The offer of the company to show . . . that the plaintiff did not disclose the fact that the barn contained some other property than the hay insured, was properly rejected upon two grounds: *first*, it is not alleged in the answer that there was a fraudulent concealment of the facts sought to be proved; and, *second*, the fact that these things were in the barn would not avoid the contract to insure, as no inquiry was made by the agent in regard to them at the time of making the contract, although he did question the plaintiff in regard to the situation of the barn. Not having questioned the plaintiff as to what the barn contained, he cannot now claim that it contained other property which increased the hazard of insurance, unless he can show that the plaintiff concealed the facts fraudulently."

And see *Satterthwaite v. Mutual Beneficial Ins. Assn.*, 14 Pa. 393 (1850); *Girard F. & M. Ins. Co. v. Stephenson*, 37 Pa. 293 (1860); *Keith v. Globe Ins. Co.*, 52 Ill. 518, 529-531 (1870); *Hey v. Guarantors' Liability Indemnity Co.*, 181 Pa. 220 (1897), a case of insurance against accidental losses other than those caused by fire or lightning. — ED.

MITCHELL, J. This action was brought upon a policy of insurance to recover the value of wood destroyed by fire between the hours of 10 A. M. and 1 P. M. of May 15, 1885. The policy bore date May 13, 1885, and purported to insure plaintiff's wood on the north side of the Manitoba railway, at Armstrong's station, for one year from noon of that date. The defence was that the agreement to insure was not entered into until May 18th, three days after the property was destroyed, of which fact plaintiff had knowledge at the time, but withheld the information from the defendant, who made the contract and executed the policy in ignorance of the loss of the property. It appears from the evidence than an application for insurance was made by plaintiff, on either the 14th or 15th of May, to Milligan & Ermentraut, insurance agents in Minneapolis, in the form of a written memorandum left at their office with their clerk, calling for \$1,000 insurance on wood, "on north and south sides" of the Manitoba railway at Armstrong's station. It is customary for insurance agents, when they have no company in which to carry a risk, to place it with some other agency, in which case the agency which takes the risk, after writing up the policy, intrusts it to the other agency to deliver, and to collect the premium, and then the two divide the commissions between them.

In the present instance, Milligan & Ermentraut, having no company in which they could carry the risk, on May 15th, took plaintiff's memorandum to the office of Cheney, the agent of defendant, and, not finding him at home, left it with his clerk, with the request to have it written up. The clerk promised that the matter would be attended to, but in fact she had no authority to accept applications, or bind the defendant company. The application was called to Cheney's attention about 4 o'clock in the afternoon of the same day, but, it being in the "blanket" form, he could not accept the risk, and took no action in the matter. He supposed that Milligan & Ermentraut would call to see about it, but, not having done so, Cheney went to plaintiff's office on May 18th, and "got authority" from him to write up two policies for \$1,000 each, one on wood on the north side, and the other on wood on the south side, of the railway track. It was not until this date that Cheney assumed the risk for the defendant, or entered it in his register. The policies were dated back to May 13th, the date of the expiration of a policy in a Cleveland company which plaintiff had the year before obtained through Milligan & Ermentraut, who had, however, placed the risk with Cheney, who was at the time agent of that company. The object of this was "to make the insurance continuous." After they were written up, the policies were delivered to Milligan & Ermentraut, who delivered them to plaintiff. Plaintiff learned of the loss of the wood on the afternoon of May 15th, but not until after his application had been left at the office of Milligan & Ermentraut. Neither Cheney nor Milligan & Ermentraut had any knowledge of the loss until after the policies had been executed and delivered to plaintiff. Upon learning the facts as to the loss, defendant cancelled the policies,

May 30th. The premium was paid by plaintiff to Milligan & Ermentraut June 9th. They say they tendered it to Cheney, but that he refused to accept it, and they, on ascertaining that the policies had been cancelled, tendered it back to plaintiff, but he refused to receive it.

Upon this state of facts we do not see how plaintiff can recover. As in the case of any other contract, to constitute a contract of insurance, the minds of the parties must meet and concur as to terms. Now, prior to May 18th, Cheney had never had any communication with any one regarding this insurance. He was ignorant even of what had passed between plaintiff and Milligan & Ermentraut. He knew nothing about the matter except what was disclosed by the memorandum of application left at his office May 15th. Had he accepted the risk on the terms of this application, and written up the policy accordingly, a different question would have been presented. But this he declined to do, because the risk in the form stated in the application was not one which he could take. The terms of the contract were never agreed on until Cheney went to plaintiff's office on the 18th, and these terms were entirely different, both as to the amount and nature of the risk assumed, from those contained in plaintiff's original memorandum. Hence, even under the rule invoked by plaintiff, that, when an application for insurance is accepted, the risk attaches at the date of the application, the risk could not in this case attach, by relation, before the 18th, for that was the time when the terms were agreed on, and must therefore be taken as the date when the application was made, and the contract entered into.

If at that time both parties had been ignorant of the loss, it would have been competent for them, by antedating the policy, to have made it retroactive. But in fact the plaintiff then knew that the property had been destroyed, but did not communicate that fact to defendant's agent, who, in ignorance of the loss, accepted the risk, and issued the policy. Under these circumstances, the policy is void, and does not cover the loss.

*Order reversed.*¹

¹ Compare *Home Ins. & Banking Co. v. Myer*, 93 Ill. 271 (1879).

And see *Insurance Co. v. Lyman*, 15 Wall. 664 (1872), a marine insurance case. — ED.

PELZER MANUFACTURING CO. v. ST. PAUL F. & M.
INS. CO.PELZER MANUFACTURING CO. v. SAVANNAH F. & M.
INS. CO.

CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF SOUTH CAROLINA, 1890. 41 Fed. R. 271.

AT law.

Smythe & Lee and *Wells & Orr*, for plaintiff.*N. I. Hammond* and *I. H. Haywood*, for defendants.

SIMONTON, J. (charging jury). Cely & Bro., warehousemen, insured certain bales of cotton, stored with them by plaintiff in their warehouse in Greenville, near the track of the Greenville & Columbia Railroad. The cotton was insured in their own name, on a form of policy intended for warehouses, containing the special clause, "cotton in bales, their own, or held by them in trust, or on commission, or on joint account with others, or sold but not delivered, contained in" their warehouse. The cotton was burned. Proof of loss was made. Cely & Bro. assigned their policies to the plaintiff. Among these policies were one of the St. Paul Fire & Marine Insurance Company, for \$5,000, and one of the Savannah Fire & Marine Insurance Company, for \$2,500. These two companies having refused to pay the loss, these suits were brought. They are separate and distinct suits; but, as they depend upon the same facts, they are tried together. The defence is: (1) That Cely & Bro. had no insurable interest in the cotton burned. (2) That they insured the cotton in their own name, and did not disclose the fact that the Pelzer Manufacturing Company owned it. With respect to these, I instruct you that Cely & Bro., being warehousemen, had the right to insure cotton in their warehouse in their own name, under the forms of policy in evidence, and when the loss occurred they had the right to sue for the entire loss in their own name; and, having such right, they could lawfully assign the policy to plaintiff, the owner of the cotton, who could lawfully sue as such assignee. In these suits, plaintiff, being assignee of Cely & Bro., is bound by everything which would have bound Cely & Bro. before notice of the assignment. Treat the case as if brought by Cely & Bro. (3) The last ground of defence is this: It seems that Cely & Bro. had erected their warehouse on the right of way of the Greenville & Columbia Railroad; that they had leased the land on which it was built, and, under the terms of the lease, Cely & Bro. had released the railroad company from liability for any damage occasioned by a fire from its locomotives; that this was a material fact, as it deprived the insurers of the right of subrogation, and was not known or disclosed to the insurance company when the insurance was effected, and for this reason

the policy is not binding on the insurance company. There can be no doubt that when an insurance company has paid a loss like this it is entitled to be put in the place — would stand in the shoes — of the person insured, and is entitled to any claim for damages which the person insured had against the person causing the loss. This is called the “right of subrogation.” It is given by the law, and need not be given by contract. I have also no doubt that in the present cases the covenant in the lease of Cely & Bro. would prevent them from proceeding against the railroad company; and, as Cely & Bro. could not do this, the insurance company, being subrogated only to their rights, could not.

The questions in the case are: Is this covenant in this lease a material fact? Was its existence concealed by Cely & Bro. when they effected insurance, or did they omit to state it? Did this concealment or omission invalidate the policy? Was it a material fact? Not, was it deemed by the insurance company a material fact? But was it known, or should it have been known, to Cely & Bro. to be a material fact entering into the contract of insurance? These are questions for you. In coming to your conclusion upon them, you should inquire, in what way did the insurance companies make known their estimate of this as a material fact? Did they communicate this to Cely & Bro.? If not, did they make any difference in rates between property insured with right of subrogation, and such property insured without this right? Was there any usage or custom among insurance companies in this territory making a discrimination in this respect, showing their estimate of the materiality of the right of subrogation? Did they refuse risks in which subrogation was released? In order to make this a material fact entering into this contract, both parties must have known, or should have known, that is, must be presumed to know, that it was so considered. If it be a material fact, and if Cely & Bro. did not intentionally conceal it, or if they omitted to state it because they did not know, and had no reason to know, and were not put on the inquiry so as to know, that it was deemed to be a material fact by the company issuing the policy, then their silence with regard to it does not make the policy invalid, especially if the jury believe from the evidence that the policy was issued on a verbal application.

ON MOTION FOR NEW TRIAL.

(March 7, 1890.)

Before BOND and SIMONTON, JJ.

PER CURIAM. The jury having found a verdict for the plaintiff in each of these cases, the defendants now move for a new trial in each case, on exceptions to the charge of the presiding judge to the jury. The circuit judge, at the request of the trial judge, sat at the hearing, and unites in the decision upon these motions.¹ . . .

¹ Passages not dealing with concealment have been omitted.—ED.

The most serious exception is to so much of the charge as related to the silence of Cely & Bro. respecting the covenant in their lease with the Greenville & Columbia Railroad Company, releasing that company from any liability for fire caused by their locomotives on their right of way. Whether the fact that Cely & Bro. had released the railroad company from all claim for damages caused by its engines was a material fact, or not, was submitted to the jury in the instructions of the court which are excepted to, and the method by which the jury could ascertain such materiality was pointed out to it. The jury was told that if the insurance companies in this territory made no difference in rate, with right of subrogation or without it, or if they found from the evidence there was neither usage nor custom showing the materiality of the right of subrogation among insurance companies in their acceptance or refusal of risks, then they might find that the non-mention of such a fact, where the insurance was on verbal application, was not a concealment or omission of a material fact, which would invalidate the policy. If the fact had been as stated, the jury found it would have made no difference in the risk; that neither party, insured or insurers, had ever treated in this section of the country such matter as material. This being the case, it did not enter or become a part of the contract of insurance. The presiding judge was not in error. *Tate v. Hyslop*, 15 Q. B. Div. 377; *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 313, 6 Sup. Ct. Rep. 750, 1176. The motions are dismissed.

SECTION III.

Life Insurance.

HUGUENIN v. RAYLEY.

COMMON PLEAS, 1815. 6 Taunt. 186.

THIS was an action upon a policy of insurance subscribed by the Albion Insurance Company upon the life of Elizabeth Swayne. Upon the trial of the cause at the Sarum spring assizes, 1815, before DAMPIER, J., one defence was, that there had been a fraud in effecting the policy by the suppression of a fact which the contract required the assured to disclose. It appeared that E. Swayne, who had been many years resident in a house of her own in the parish of Fisherton Anger, but was in December, 1813, a prisoner for debt in the county jail in Fishertown Anger, then employed Mather to effect an insurance on her life with the defendants; one condition of the insurance was, that a declaration should be made of the state of the health of the life insured, and Mather, reciting that he had proposed on the behalf of Elizabeth Swayne of Fisherton Anger an insurance on her life, which had been accepted on the declaration then following, declared that E. Swayne did not exceed the age of sixty-six years, and that she was then resident as above; it was stipulated that the policy should be valid only if the statement were free from all misrepresentation or reservation. For the purpose of ascertaining the state of her health, Mather, by the direction of the defendants, called in a physician, who found the subject in the jail, which is in a situation perfectly healthy, confined in a large, airy room, well calculated to preserve the health of its inhabitants. She was apparently about sixty years of age, a fresh-looking, healthy, hale woman, making allowances for her confinement; for confinement makes some difference in the state of health. He certified that she was in good health, and he would have noticed on his certificate the fact of her being in jail, had he not been led by the circumstance of Mather's speaking of the defendants by the term "our office," to suppose he was an agent of the defendants, and that all which he knew would be communicated, for the witness thought it a fact material to the terms of the contract to be communicated. Upon this evidence, DAMPIER, J., thought, that Mather had by contrivance prevented the physician from stating a fact to the defendants, which he thought material to the contract, and he therefore stopped the plaintiff's case, and without hearing the defendant's case directed a nonsuit.

Best, Serjt., in this term obtained a rule *nisi* to set aside the nonsuit and have a new trial; he urged that the contract did not require any

statement respecting the state of the party's liberty, or confinement; the defendants required precise and particular information respecting certain facts; and the least misstatement on those facts would, he admitted, be fatal; but the assured was not bound to disclose facts which were not inquired of, and it would be a dangerous doctrine to encourage; it would render necessary that an assured should furnish the insurers with a minute history of his whole life; there was a manifest distinction between misrepresentation and silence. Some insurance offices required by their contract that everything should be certified that was material to the risk; but that was not the case here; and therefore, although imprisonment might, as the physician stated, in a slight degree increase the risk, that could not invalidate the contract between the parties; at all events, if the holding back a material fact would avoid the policy, it was a question that ought to have been left to the jury, whether the imprisonment were a material fact, and the defendant ought to have had the opportunity of bringing evidence before the jury to show that it was immaterial. The court granted a rule *nisi*.

Lens, Serjt., now showed cause against this rule. From whatever cause the concealment originated, if there was a concealment of that which it was important should be known, it avoids the policy. The terms of the declaration induce a belief, that the residence in Fisher-ton Anger was a residence at large there, the physician's evidence is, not only that he thought it important in the construction of the contract, but that, for physical reasons, it was material whether the subject was in prison, and debarred from air and exercise, or not; insomuch, that he saw reason for going beyond the matters expressly required by the proposal, so far as to insert the mention of this fact in his certificate, if he had not been misled by the idea that Mather was the agent of the defendants. By the terms "without reservation," the assured was bound to state everything which from its nature could possibly bear on the subject. If this fact had been disclosed, the defendants could have taken medical advice whether the imprisonment would increase the risk. Unless, therefore, the plaintiff could prove that this fact could by no possibility increase the risk (and the nature of things shows the contrary), it ought to have been communicated, and the defendants had a right to have it laid before them that they might form their own judgment thereon.

Adjournatur.

On this day the court relieved Best from supporting his rule. They observed that they had examined the documents, and there was nothing express in the terms of the policy which required the imprisonment to be stated, nor was there an omission of the statement of any matter which the office called for; nevertheless, if the imprisonment were a material fact, the keeping it back would be fatal; but it ought to have been submitted to the jury, whether the omission of the fact relied on was or was not a material omission, therefore there must be a new trial.

Rule absolute.

LINDENAU v. DESBOROUGH.

KING'S BENCH, 1828. 8 B. & C. 586.¹

ASSUMPSIT against the secretary of the Atlas Insurance Company on a policy of insurance on the life of the Duke of Saxe Gotha. Plea, the general issue. At the trial before Lord TENTERDEN, C. J., it appeared that in 1824 an insurance was effected on the life of the duke with the Union Assurance Company. That company had an agent in Germany, who, on behalf of his principals, submitted certain questions to the physicians of the duke, many of them as to specific diseases, and his habits of life; and the last was, "Is there any other circumstance within your knowledge which the directors ought to be acquainted with?" and this was answered in the negative. There was also a private certificate sent by the agent to the directors in answer to their inquiries as to certain points. In this also there was a general question. "Do you know any other circumstance which ought to be communicated to the directors?" which was answered as follows: "Agreeably to our informations, the duke has led a dissolute life in former days, by which he has lost the use of his speech, and, according to some informations, also that of his mental faculties, which, however, is contradicted by the medical men; and as little as we believe that this has any influence on his natural life, we find it our duty to mention it." The physicians in one of their answers said the duke was *hindered* in his speech, but did not mention the state of his mental faculties. An application was made to the Union to insure a further sum on the duke's life; but that being contrary to their general rules, their agent handed over the proposal to the Atlas, and at the same time gave the latter company the private answers received from their agent in Germany. The plaintiff signed the usual declaration, and declarations by the duke's physicians were made to the Atlas similar to those made to the Union. Upon receiving these documents the Atlas entered into the policy. In 1825 the duke died, and it was then discovered that there had existed in his head for many years a large tumor pressing on the brain, to which the loss of speech and mental faculties might be attributed; but all the medical testimony went to establish that the symptoms during the duke's life were not such as were likely to excite the suspicion that such a tumor existed, or that he was afflicted with any particular disorder tending to shorten life. One foreign physician, however, said, that had he been consulted he should have thought it right to state that he attributed the loss of speech to a paralysis of the organs of speech. And an English surgeon, called for the plaintiff, on cross-examination said he should, in answer to the general question, "Whether he knew any other circumstances that ought to be communi-

¹ S. C. 3 M. & Ry. 45. — ED.

cated to the directors?" have thought it right to mention the state of the duke's mental faculties. Upon hearing this evidence Lord TENTERDEN told the plaintiff's counsel he thought it made an end of his case; and he should leave it to the jury to say whether there were any facts material to be known which were not mentioned to the assurers, and that if there were, the policy was void. The plaintiff's counsel thereupon elected to be nonsuited, leave being given to him to move for a new trial, on the ground of misdirection.

Brougham now moved accordingly.

Lord TENTERDEN, C. J. At the trial before me, amongst other depositions that of a foreign physician named Stark was read, wherein he stated that he would have certified that the duke was in bodily health, but that he would not have failed to observe that he labored under an inability to speak, which he attributed to a paralytic state of the nerves of the organs of speech. In addition to this, Mr. Green, a surgeon, stated, that if consulted he should have thought it right to mention the state of the duke's mental faculties; whereupon I expressed an opinion that the cause was at an end, and said that I should direct the jury to find for the defendant if they thought the plaintiff had failed to communicate to the insurers any material circumstance within his knowledge.¹ The only question now is, whether that direction would have been correct or not? At the time of the trial I had in my recollection, although not very accurately, the case of *Morrison v. Muspratt*, 4 Bing. 60.² . . . In the present case, the insurance was upon the life of a foreigner. It appeared that a previous insurance had been effected with an office that had an agent abroad. That office was requested to make a further insurance, and, being unwilling to do so, the secretary handed over to the defendant the certificate received from their foreign agent. If that had distinctly disclosed the fact now in question, I am not prepared to say that the defendant would have had any ground of complaint; but the state of the duke's faculties is not distinctly stated in that certificate. Then it is said that the party is not bound to do more than answer the questions proposed, unless he can be charged with some fraudulent concealment.³ Admitting this not to fall within any of the specific questions, which is not by any means clear, still the general question put by the office requires information of every fact which any reasonable man would think material. It certainly seems to me that the circumstances proved as to the state of the Duke of Saxe

¹ In 3 M. & Ry. 45, 50, the latter part of this sentence is in this form: "I should tell the jury 'that if any fact in their opinion material to the information of the office respecting the health of the party, known to the party certifying, had not been communicated, the policy was void.'" Such also is the form of the minute preserved in 3 M. & Ry. 47. — Ed.

² The statement of that case has been omitted. — Ed.

³ In 3 M. & Ry. 45, 52, at this point in the opinion occurs this passage: "This cannot be considered as a fraudulent concealment, at least my direction to the jury did not put it upon the ground of a fraudulent concealment, but merely upon the omission to mention." — Ed.

Gotha's mental faculties were material; and, upon the authority of the cases of *Morrison v. Muspratt* and *Bufe v. Turner*, I think I should not have done wrong in leaving the case to the jury in the manner proposed at the trial.

BAYLEY, J.¹ I think that in all cases of insurance, whether on ships, houses, or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured; and that the proper question is, Whether any particular circumstance was in fact material? and not whether the party believed it to be so. The contrary doctrine would lead to frequent suppression of information, and it would often be extremely difficult to show that the party neglecting to give the information thought it material. But if it be held that all material facts must be disclosed, it will be the interest of the assured to make a full and fair disclosure of all the information within their reach. Besides the cases already mentioned, there are others establishing that the concealment of a material fact, although not fraudulent, is sufficient to vitiate a policy on a ship. On these grounds and authorities, I am of opinion that the proper question for the jury was not whether the party believed the information withheld to be material, but whether it was in fact material.

LITLEDALE, J. I am of the same opinion. It is the duty of the assured in all cases to disclose all material facts within their knowledge. In cases of life insurance certain specific questions are proposed as to points affecting in general all mankind. But there may be also circumstances affecting particular individuals which are not likely to be known to the assurers, and which had they been known would no doubt have been made the subject of specific inquiries. The general question appears to have been proposed in order to meet such cases, and I think the question on such a policy is not whether a certain individual thought a particular fact material, but whether it was in truth material, and of that the jury are by law constituted the judges. I therefore think the proposed direction would have been right, and that the nonsuit ought not to be disturbed.

Rule refused.

¹ In 3 M. & Ry. 45, 54, this opinion begins thus: "Whether the policy be upon ship, or upon life, or against fire, I think the underwriter has a right to expect that everything material, known to the party making the application, shall be communicated to him; and that it is at the peril of the assured, if that communication is not made."—ED.

RAWLINS (ONE OF THE DIRECTORS OF THE EAGLE INSURANCE CO.)
v. DESBOROUGH (SECRETARY OF THE ATLAS ASSURANCE CO.).

NISI PRIUS, QUEEN'S BENCH, 1840. 2 Moo. & R. 328.

ASSUMPSIT on a policy of insurance, dated 24th September, 1834, on the life of John Cochrane, for the term of four years. There were also the usual money counts, and a count upon an *insimul computassent*.

The first and second pleas to the first count alleged that a certain declaration made by one Bumstead, who proposed the insurance, on behalf of the Eagle Company, as to the health of Mr. Cochrane, and that he was then in good health, etc., was false. The third and fourth pleas alleged, in substance, that the Eagle Insurance Company, in answer to the usual questions¹ put when the insurance was proposed, referred the Atlas Company to Mr. Bennett and Mr. Neale, respecting the then present and general state of health of Mr. Cochrane; that those referees gave certain answers, set out in the pleas, alleging, amongst other things, that the habits of Mr. Cochrane were, as far as the referees knew, temperate; that those answers were false, and that the referees knew them to be so.

5thly, That the Eagle Company did not communicate to the Atlas Company a certain fact, within their knowledge, material to be communicated, and which they ought to have communicated; viz. a certificate given by the medical officer of the Economic Insurance Company, touching the health and apparent habits of Mr. Cochrane, on the occasion of the Eagle Company having proposed the insurance to the Economic Insurance Company.

6thly. That the Eagle Company did not communicate to the Atlas Company a certain fact within their knowledge, material to be communicated, and which ought to have been communicated; viz. that Mr. Cochrane was addicted to habits of intemperance in liquor.

Lastly, to the money counts, and the count on the *insimul computassent*, *Non-assumpsit*.

The replication traversed the special pleas, and joined issue on the *non-assumpsit*.² . . .

There was a great body of evidence as to the intemperate habits of Mr. Cochrane, and as to the probability that the two referees knew that he was addicted to the immoderate use of spirits. As to the fifth plea, it appeared that the Eagle Company, having agreed to advance a large sum of money to Mr. Cochrane on the security of some property in which he had a life interest, in order to diminish their own risk proposed to various offices to effect insurances on his life in various sums. Amongst other offices, they proposed an insurance to the Economic

¹ See the form set out in *Everett v. Desborough*, 5 Bing. 503. — REP.

² Passages foreign to insurance have been omitted. — ED.

Insurance Company. The secretary of that company called at the office of the Eagle Company, declining the insurance, and showing (as a reason) a communication which their medical adviser, Mr. Travers, had made to the resident director on the subject of Cochrane's insurance. It was in the form of a note to the resident director of the Economic Company, stating that he (Mr. Travers) had just visited Mr. Cochrane, and describing his person; that his appearance was that of a person who had been drinking; that his habits were those of a low *roué*; that he (Mr. Travers) believed his organs were sound, and he should think that drinking was at present an unconfirmed habit; and concluding thus: "The sum is large, but the term is short (four years). He is in more danger from his moral than his physical state at present; but I cannot view them in connection without apprehension. The other offices have not hesitated; you must decide." It was admitted by the plaintiff that this fact was not communicated to the Atlas Company; but there was conflicting testimony as to whether it had been communicated to the Eagle Company themselves before the present policy was effected; and the plaintiff insisted that even if it had been, it was not a fact which they were called upon to communicate. Mr. Travers's note did not contain the statement of any fact, but merely the hasty expression (confidentially imparted) of the writer's opinion, and that obviously formed on mere hearsay. It was further contended by the defendants that they were at all events entitled to a verdict on the sixth plea, the evidence of Cochrane's habitual intemperance being (as the defendants' counsel insisted) irresistible; and that even if Bennett and Neale could be supposed ignorant of such a fact, Cochrane himself must have known it, and was bound to communicate it to the defendants when he appeared before the directors; that he was the general agent of the assured, and that they were responsible for what he wrongfully did, or wrongfully omitted doing, in relation to the insurance; and for this purpose *Everett v. Desborough*, 5 Bing. 503, and *Maynard v. Rhodes*, 5 D. & R. 266, were cited.

The LORD CHIEF JUSTICE,¹ in summing up the case to the jury, after stating that it was the duty of a party effecting an insurance to communicate to the insurers every material fact within his knowledge tending to increase the hazard, or to affect the question of the life being an eligible or proper object of insurance, left the jury to say, as to the third and fourth pleas, whether the habits of Cochrane were intemperate, and whether the referees knew them to be so, as alleged in the pleas. As to the fifth plea, his Lordship left it to the jury to say whether Mr. Travers's letter had been communicated to the Eagle Company before the present policy was effected; and whether, if so, it was a circumstance, which, in the judgment of the jury, was material to be communicated, and which ought to have been communicated by them to the Atlas Company, with reference to the insurance. In regard to the issue on

¹ Lord DENMAN. — ED.

the sixth plea, his Lordship told the jury that, in his opinion, the doctrine contended for by the defendants' counsel, that the party whose life was insured was the general agent of the assured, and that the latter was responsible for all the acts of such party connected with the insurance, had been greatly overstrained. He is to answer all questions put to him; and if he answers them falsely, that will vitiate the policy. Or even if, without being distinctly interrogated as to his habits, the jury thought that he was aware of them, and, knowing their importance, studiously concealed them from the insurers; in that case, his Lordship advised them to find the issue on the sixth plea for the defendant. But the mere non-communication of his habits of life by the party whose life was insured, would not in itself vitiate the insurance, even though those habits were in the opinion of the jury such as tended to shorten life.

The jury found a verdict for the plaintiff on all the points left to them.

Sir *J. Campbell*, A. G., Sir *F. Pollock*, and *Robinson*, for the plaintiff.
Kelly, *R. V. Richards*, and *W. H. Watson*, for the defendants.

RAWLS v. AMERICAN MUTUAL LIFE INSURANCE CO.

COURT OF APPEALS OF NEW YORK, 1863. 27 N. Y. 282.¹

APPEAL from the Supreme Court. Action on a policy of insurance issued by the defendant, dated 28th July, 1853, for \$5,000, on the life of John L. Fish, payable to the plaintiff.

The answer, among other defences, alleged that, before and at the time of the issuing of the policy, Fish was a man of licentious, intemperate, and disorderly habits and passions, and frequently or habitually indulged in habits and practices which had impaired, or would impair, his health and constitution, and shorten his life; all which the plaintiff, Fish, Shipman (Fish's family physician, who, after making a medical examination, had made a written statement, in the form of questions and answers), and Marsh (to whom Fish had referred, and by whom a statement as to health and habits had been signed) well knew, or had good reason to believe, at the time the representations were made, and before the issuing of the policy; and, although the defendant was ignorant thereof, they gave it no notice, but concealed the same, and the policy was, therefore, void.

On the trial, before SMITH, J., at the Monroe Circuit, the jury found a verdict for the plaintiff.

¹ The statement has been rewritten. The case raised numerous questions. In the statement and the opinions, matters foreign to concealment have been omitted. Part of the opinion of WRIGHT, J., has been printed *ante*, p. 115, n. 1. — ED.

The defendant had taken numerous exceptions, among others an exception to the judge's charge as to concealment.

On appeal, the judgment was affirmed at a general term, in the seventh district, and the defendant appealed to this court.

Benedict & Boardman, for the appellant.

Lucian Birdseye, for the respondents.

WRIGHT, J. . . . The third and only remaining branch of the charge singled out for exception was the instruction, "that if Fish answered frankly and truly all the questions put to him, then there was no concealment. The mere omission to state matter not called for by any specific or general question would not be a concealment, and would not affect the validity of the policy." This was not wrong. It may be conceded that if the applicant, when a specific or even general question is put to him which would elicit a fact material to the risk, untruly stated or concealed the fact, it would vitiate the policy; but I know of no case in the law of life or fire insurance in which the insurers, having framed and put to the insured, and having had fully answered by him, a series of questions calling for such information as they desired touching the subject insured, have been discharged from their contract because the insured did not go farther, and state what was not called for in the interrogatories. As was said by the learned judge, in the court below: "The presumption is that the insurers questioned the party upon all subjects which they deemed material, and all which were in the contemplation of the parties at the time, and beyond that, clearly a party is not bound to disclose." . . .

BALCOM, J. . . . There was no error in this. If the defendants desired more information respecting the habits of Fish, they should have asked him more specific questions. He was not bound to inform them whether he ate or drank much or little, or how often he did either, for the reason he was not interrogated as to such habits, and he could not have supposed the defendants desired information respecting the same, and, therefore, was not guilty of a fraudulent concealment in the omission to give it. . . .

All the judges concurred except EMOTT, J., who was for reversal, on the ground of want of insurable interest in the plaintiff, after the statute of limitations had run on his action against Fish; and SELDEN, J., who did not sit in the case.

*Judgment affirmed.*¹

LONDON ASSURANCE v. MANSEL.

CHANCERY DIVISION, 1879. 11 Ch. D. 363.

THIS was an action by the plaintiffs, who were duly incorporated by the name of "The London Assurance," and were empowered to grant

¹ Acc.: *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52 (1871). — ED.

assurances on lives, to set aside an agreement to grant a policy of life assurance to the defendant.

On the 16th of August, 1878, the plaintiffs, on the application of the defendant's solicitor, sent him forms of proposal for life assurance, and on the 20th of August, 1878, the defendant left with the plaintiffs at their office a proposal for assurance on his life for £10,000 filled up on one of the plaintiffs' forms of proposal, and signed by the defendant. The questions and answers contained in this proposal, so far as material, were as follows : —

| Questions. | Answers. |
|--|--|
| "Are you now and have you always been of temperate habits?" | "Yes." |
| "State if there be any other material circumstance affecting your past or present state of health or habits of life to which the foregoing questions do not extend?" | "Not to my knowledge." |
| "Has a proposal ever been made on your life at any other office or offices? If so, where?" | "Insured now in two offices for £16,000 at ordinary rates. Policies effected last year." |
| "Was it accepted at the ordinary premium, or at an increased premium, or declined?" | |

At the foot of the proposal the defendant signed the following declaration : "I declare that the above written particulars are true, and I agree that this proposal and declaration shall be the basis of the contract between me and the London Assurance."

On the same day the defendant had an interview with the medical officer of the plaintiffs, and in reply to his inquiries gave substantially the same answers as those in the proposal before stated.

The plaintiffs being, as they alleged, satisfied with and relying upon the said proposal, and with the report of their medical officer, and with the answers they had received from two friends of the defendant to whom he had referred them, sent to the defendant's solicitor a written acceptance of the proposal for an assurance of £10,000 on the defendant's life, and, on the 23d of August, 1878, received from him a check for the first year's premium, and on the 24th of August, 1878, the plaintiffs sent him the usual certificate as to the assurance being effected.

The plaintiffs alleged that shortly after the last-mentioned date, they discovered that, though the defendant's life had been assured for £10,000 in the Rock Life Assurance Company, and also for £6,000 in the Equity and Law Life Assurance Society, the last-named assurance society had in November, 1877, when the defendant applied for a further assurance of £3,000, decided not to increase the amount at risk on his life; also that the defendant had shortly afterwards made proposals to the Scottish Equitable Society and to the Crown Insurance Society,

who had respectively declined his proposals, to the North British and Mercantile Insurance Society, which proposal was withdrawn, and to the Liverpool, London, and Globe Company, by whom the proposal was not accepted; that in June, 1878, the English and Scottish Law Life Assurance Association, after accepting a proposal for an assurance of £5,000 on the life of the defendant, had refused to proceed with it on learning that the Equity and Law Life Society had declined the further assurance of the defendant's life; also, that in August, 1878, the defendant had applied for assurances on his life to the Clerical, Medical, and General Life Assurance Society, to the Scottish Amicable Assurance Society, and the Law Life Assurance Society, but that each of the said offices had declined his proposals.

The plaintiffs alleged that they thereupon determined not to proceed with the assurance, and that their solicitors wrote to the defendant's solicitor to that effect, and sent a check for the amount of the premium, which was returned by the defendant.

The plaintiffs then brought their action, setting out in their statement of claim the facts before stated, and alleging that it was the duty of the defendant to have informed them that his life had been refused by the said several offices; that such fact was a very material fact in a contract of life assurance, and that the plaintiffs would not have entertained the defendant's proposal for assurance had he informed them that his life had been refused by other offices, which the defendant had concealed.

The plaintiffs claimed a declaration that the acceptance by the plaintiffs of the defendant's proposal for assurance on his life for £10,000, and the contract by the plaintiffs for the assurance on the life of the defendant, were void.

The defendant, by his statement of defence, admitted the plaintiffs' allegations as to the proposal and as to the two policies that had been effected; also that the Equity and Law Life Society had decided not to increase their risk, the reason being that they considered their risk sufficiently large. With regard to the other proposals, the defendant stated as follows:—

“The defendant admits that proposals were made to the Clerical, Medical, and General Life Assurance Society, the Scottish Amicable Life Assurance Society, and the Law Life Assurance Society, for an assurance on his life, and such proposals were declined without any medical examination.”

In paragraph 15 he stated as follows: “The defendant is not and never has been of intemperate habits of life, and although proposals for assurances on the defendant's life had been made to and declined by the several offices in the statement of claim mentioned, the defendant's life was never rejected by an office, but was passed as a first-class life by every medical officer who examined him.” The defendant also stated that the English and Scottish Law Life Assurance Society passed his life as a first-class life, but they reserved the right of

declining to complete the transaction at any time before the receipt of the premium; but that, having learned that the Equity and Law Life Assurance Society had decided not to increase their risk on the defendant's life, and would not take any part of the new risk, exercised their right of declining to complete the transaction.

The defendant submitted that there had been no concealment such as to vitiate the contract.

The case was heard on motion for judgment on admissions in the pleading.

Benjamin, Q. C., *Davey*, Q. C., and *Nalder*, for the plaintiffs.

Chitty, Q. C., and *Levett*, for the defendant.

JESSEL, M. R. The action in this case is to set aside an agreement for assurance for life on the ground of concealment of a material fact in effecting the assurance.

The first question to be decided is, what is the principle on which the court acts in setting aside contracts of assurance? As regards the general principle, I am not prepared to lay down the law as making any difference in substance between one contract of assurance and another. Whether it is life, or fire, or marine assurance, I take it good faith is required in all cases, and though there may be certain circumstances from the peculiar nature of marine insurance which require to be disclosed, and which do not apply to other contracts of insurance, that is rather, in my opinion, an illustration of the application of the principle than a distinction in principle.

But I think the law has been laid down very often, and I am going to refer to two or three statements of it, which at all events are binding on me.

In the case of *Dalglish v. Jarvie*, 2 Mac. & G. 231, 243, a case which had nothing to do with insurance, but which referred to the principles on which a special injunction ought to be granted *ex parte*, Lord Cranworth, then the Lord Commissioner Rolfe, says this: "Upon one point it seems to me proper to add thus much, namely, that the application for a special injunction is very much governed by the same principles which govern insurances, matters which are said to require the utmost degree of good faith, '*uberrima fides*.' In cases of insurance a party is required not only to state all matters within his knowledge, which he believes to be material to the question of the insurance, but all which in point of fact are so. If he conceals anything that he knows to be material, it is a fraud; but besides that, if he conceals anything that may influence the rate of premium which the underwriter may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy."¹ . . .

Now I come to the facts of the case, which certainly appear to me to be very plain and clear indeed. The office of the London Assurance

¹ Here were quoted passages from *Moens v. Heyworth*, *ante*, p. 167, n. 2 (1842), *per* PARKE, B., and *Lindenau v. Desborough*, *ante*, p. 193 (1828) *per* Lord TENTERDEN, C. J., BAYLEY, J., and LITLEDALE, J. — Ed.

asks these questions: "Has a proposal ever been made on your life at any other office or offices; if so, where? Was it accepted at the ordinary premium, or declined?" and there is an agreement at the end, "That this proposal and declaration shall be the basis of the contract between the assured and the company." Here is the answer: "Insured now in two offices for £16,000 at ordinary rates. Policies effected last year." It is to be observed that the man proposing the assurance, who knows the facts, does not answer the question. The question was, "Has a proposal been made at any office or offices; if so, where?" He does not state, "I proposed to half a dozen offices," which was the truth, but simply says, "Insured now in two offices," which of course must have been intended to represent an answer, and therefore would mislead the persons receiving it, who did not look at it with the greatest attention, into the belief that he was insured in two offices, and that they were the only proposals that he had made. "Was it accepted at the ordinary premiums or an increased premium?" His answer is, "At ordinary rates." That is the answer to the second branch of the inquiry, but he has not answered the question, "or declined?" The inference, therefore, which must have been intended to be produced on the mind of the person reading the answer was that it had not been declined. And in my opinion that is the fair meaning of the answer, and the assured is not to be allowed to say, "I did not answer the question." But if it were so, it would make no difference, because if a man purposely avoids answering a question, and thereby does not state a fact which it is his duty to communicate, that is concealment. Concealment properly so called means non-disclosure of a fact which it is a man's duty to disclose, and it was his duty to disclose the fact if it was a material fact.

The question is whether this is a material fact. I should say, no human being acquainted with the practice of companies or of insurance societies or underwriters could doubt for a moment that it is a fact of great materiality, — a fact upon which the offices place great reliance. They always want to know what other offices have done with respect to the lives. But in this case there could be no question as to its materiality. In the first place, we have this in the answer: "The defendant admits that proposals were made to the Clerical, Medical, and General Life Assurance Society, the Scottish Amicable Life Assurance Society, and the Law Life Assurance Society for an assurance on his life, and such proposals were declined." There are three proposals as admitted by the answer declined in the very words of the question; and then he goes on [His Lordship then stated paragraph 15 of the answer, and added]: We have an admission by the defendant that no less than five insurance offices had declined to accept his life.

Now, to suppose that any one who knows anything about life insurance, that any decent special juryman could for a moment hesitate as to the proper answer to be given to the inquiry, when you go to the in-

insurance office and ask for an insurance on your life, ought you to tell them that your proposals had been declined by five other insurance offices? is, I say, quite out of the question. There can be but one answer — that a man is bound to say, “My proposals have been declined by five other offices. I will give you the reasons, and show you that it does not affect my life,” as he admits it to be by this answer; but of that the office could judge. There can be no doubt, as a proposition to be decided by a jury, that such a circumstance is material. But in fact I have elements here admitted on the pleadings for deciding that question quite irrespective of the ordinary knowledge of the practice of mankind in respect to these matters which is to be imputed to a good special jurymen, because I have here two things admitted, first of all, that the proposal which forms the basis of the contract asks a question, Has a proposal been declined?

Now, where it is to form the basis of the contract it is material, because, as was held in a case in the House of Lords of *Anderson v. Fitzgerald*, 4 H. L. C. 484, where it is part of the contract, the other side cannot say it is not material. So here we have the proposal as the basis of the contract. It is impossible for the assured to say that the question asked is not a material question to be answered, and that the fact which the answer would bring out is not a material fact.

Further, we have this, that within the defendant's own knowledge the English and Scottish Law Life Assurance Society having accepted his life, which had been duly passed by their medical officer as a first-class life after examination, and merely reserving a right to decline when they found that one other office, not five, but one, had declined the life, or rather the proposal, at once withdrew from their acceptance and declined his proposal. So that the defendant had the strongest reasons for believing from actual knowledge that the fact of a proposal having been declined was a most material circumstance, and would have the greatest effect on the mind of the proposed assurers.

It seems to me a very plain and clear case, and that the plaintiffs are consequently entitled to judgment.

The order will be — The plaintiffs being willing and hereby offering to return the premium, declare that the acceptance by the plaintiffs of the defendant's life was void and of no effect, that they were not bound to deliver the policy, and that the contract be delivered up to be cancelled.¹

¹ Commenting upon the principal case, in *Phoenix Life Ins. Co. v. Raddin*, 120 U. S. 183, 192 (1887), GRAY, J., for the court, said: “So much of the remarks of Sir George Jessel, M. R., in delivering judgment, as implies that an insurance company is not bound to look with the greatest attention at the answers of an applicant to the great number of questions framed by the company or its agents, and that the intentional omission of the assured to answer a question put to him is a concealment which will avoid a policy issued without further inquiry, can hardly be reconciled with the uniform current of American decisions.” — ED.

PENN MUTUAL LIFE INS. CO. *v.* MECHANICS' SAVINGS BANK AND TRUST CO.UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT, 1896.
37 U. S. App. 692.¹

ERROR to the Circuit Court of the United States for the Middle District of Tennessee.

This action was on a policy of insurance for \$10,000 issued on Dec. 2, 1892, by the Penn Mutual Life Insurance Company to John Schardt on his own life. Schardt died on April 17, 1893, during the currency of the policy. Just before his death he had assigned the policy to the Mechanics' Savings Bank and Trust Company . . . to secure a large debt owed by him to the bank. . . . The trial resulted in a judgment for the full amount of the policy and interest in favor of the plaintiff below, and the insurance company brings the judgment here for review on writ of error.

The defendant filed nineteen pleas to the declaration, averring that both by misrepresentation of facts warranted to be true in the application and policy, and by concealment of a fact material to the risk, the policy was avoided. . . .

The questions and answers in the application which are material to the controversy here are as follows:—

"1. *A.* Give your name in full and post-office address. *A.* John Schardt, Nashville, Tenn.

"*B.* Present and previous occupations? (State the kind of business.) *B.* Present, teller in Mechanics' Bank. Previous, same." . . .

After these answers this statement was signed by the applicant:

"I hereby warrant and agree, that I am temperate in my habits, now in good health, and ordinarily enjoy good health, and that in the statements and answers in this application no circumstance or information has been withheld touching my past and present state of health and habits of life with which the Penn Mutual Life Insurance Company ought to be made acquainted." . . .

Schardt's salary as teller was \$1,500, and he had but a small amount of property. When he died, . . . he had \$80,000 of insurance on his life, nearly all of which had been written within six months. It was conceded that, for more than a year prior to his death, Schardt had been constantly embezzling the funds of his bank, and that his indebtedness to the bank thus criminally incurred amounted, at the time of the application for this policy, to little less than \$100,000, and at his death exceeded that sum. He did not disclose the fact of his crime to the defendant at the time of his application or at any other time. His death . . . was caused by congestion of the brain and other vital

¹ s. c. 72 Fed. R. 413; 19 C. C. A. 286; and 38 L. R. A. 33. A petition for a rehearing was denied, as reported in 43 U. S. App. 75 (1896). — Ed.

organs, caused by the mental strain which a disclosure of the crime brought on. . . .

Upon the question of concealment of the fact, the court charged the jury as follows: "It is again insisted, . . . that, in addition to the answers which it is alleged are false, the insured concealed from the insurance company a fact about which he was not asked in the policy, and that by reason of that concealment the policy is avoided. That fact is that he was at the time a defaulter to the bank of which he was an officer. Now, it is not insisted that this is a false answer to anything asked here, because in the policy and in the application there is no question made upon that point at all, and in the absence of any question at all upon the point, it constitutes no part of the written application or policy. . . . In respect to a fact about which no question is asked, in order that the concealment from the company of such a fact as that should avoid the policy, it must have been intentionally concealed; and the omission to state it because the insured did not think it material, or the entire omission to speak of it because not asked about it, or because it was at the time not recollected or was forgotten, or its omission in any manner in good faith, would not avoid the policy. For the concealment of a fact such as that, outside of anything asked in the policy, to have that effect, as stated, it must have been intentional."¹

To this action of the court the defendant took the following exceptions:—

"Said counsel next then and there excepted to so much of said charge as instructs the jury that before the failure of John Schardt, the insured, to disclose to the defendant company the fact of his defalcation to the plaintiff bank at the time of the application and policy in question could be available as a defence to his action the concealment must have been intentional on the part of the said insured, and that if his failure to divulge the fact arose from any of the causes stated in said charge such defence could not be established; and said counsel, insisting that the purpose, design, or intention of the insured in withholding the fact from the knowledge of the company is not material in making out said defence, except to the opinion of the court in its decision to the contrary."

Mr. *F. C. Maury* (Mr. *John B. Daniel* was with him on a brief), for plaintiff in error.

Mr. *M. T. Bryan*, Mr. *E. H. East*, and Messrs. *Vertrees & Vertrees* submitted a brief for defendant in error.

¹ Many passages not bearing on the accuracy of this part of the charge have been omitted in reprinting the statement and the opinion. The omitted passages dealt chiefly with warranties as affected by Pennsylvania Laws of 1885, p. 134, No. 101, representations, the admissibility of evidence that the applicant had made similar representations in procuring later insurance, as showing an intent to deceive in the present transaction (the point on which a new trial was granted), the admissibility of expert testimony as to materiality of facts misrepresented or concealed, materiality as a question for the jury, and the burden of proof. — Ed.

Taft, Circuit Judge. . . . For the error in excluding evidence . . . the judgment herein must be reversed. The case will doubtless be tried again, however, and it becomes our duty, therefore, to examine and decide other questions made upon this record by the defendant which must of necessity arise again on the second trial. . . .

If Schardt was not required by any specific question to disclose the fact of his embezzlements, the policy would still be avoided, if it were material to the risk, and he intentionally concealed it from the company. This is not controverted. The issue of law between the parties is whether the policy would not be avoided, even if his failure to disclose it were due, not to fraudulent intent, but to mere inadvertence or a belief that it was not material. It is insisted for the plaintiff in error that the motive or cause of the non-disclosure is unimportant, if the fact be found material to the risk, and was known to the insured when he obtained the insurance. The trial court took the other view and instructed the jury accordingly. If this were a case of marine insurance, the contention for the plaintiff in error must certainly be sustained.¹ . . .

The very marked difference between the situation of the parties in marine insurance and that of parties to a fire or life policy has led many courts of this country to modify the rigor of the doctrine in its application to fire and life insurance, and to lean toward the view that no failure to disclose a fact material to the risk not inquired about will avoid the policy, unless such non-disclosure was with intent to conceal from the insurer a fact believed to be material, that is, unless the non-disclosure was fraudulent. In marine insurance the risk was usually tendered and accepted when the vessel was on the high seas, where the insurer had no opportunity to examine her, or to know the particular circumstances of danger to which she might be exposed. The risk in such a case is highly speculative, and it is manifestly the duty of the insured to advise the insurer of every circumstance within his knowledge from which the probability of a loss could be inferred, and he cannot be permitted to escape the obligation by a plea of inadvertence or negligence. In cases of fire and life insurance, however, the parties stand much more nearly on an equality. The subject of the fire insurance is usually where the insurer can send its agents to give it a thorough examination and determine the extent to which it is exposed to danger of fire from surrounding buildings or because of the plan or material of its own structure. The subject of life insurance is always present for physical examination by medical experts of the insurer, who often acquire by lung and heart tests and by chemical analysis of bodily excretions a more intimate knowledge of the bodily condition of the applicant than he has himself. Then, too, the practice has grown of requiring the applicant for both fire and life insurance to answer a great many questions carefully adapted to elicit facts which

¹ The omitted passage quoted from *Carter v. Boehm*, *ante*, p. 125 (1766), and cited *Sun Mutual Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485 (1882). — ED.

the insurer deems of importance in estimating the risk. In life insurance, not only is the applicant required to answer many general questions concerning himself and his ancestors, but he is also subjected to an extended examination concerning his bodily history. This was true in the case at bar. When the applicant has fully and truthfully answered all these questions, he may rightfully assume that the range of the examination has covered all matters within ordinary human experience deemed material by the insurer, and that he is not required to rack his memory for circumstances of possible materiality, not inquired about, and to volunteer them. He can only be said to fail in his duty to the insurer when he withholds from him some fact which, though not made the subject of inquiry, he nevertheless believes to be material to the risk and actually is so, for fear it would induce a rejection of the risk, or, what is the same thing, with fraudulent intent.

A strong reason why the rule as to concealment should not be so stringent in cases of life insurance as in marine insurance is that the question of concealment rarely if ever arises until after the death of the applicant, and then the mouth of him whose silence and whose knowledge, it is claimed, avoid the policy is closed. The application is generally prepared, and the questions are generally answered under the supervision of an eager life insurance solicitor. Only the barest outlines of the conversations between the applicant and the solicitor are reduced to writing. The applicant is likely to trust the judgment of the solicitor as to the materiality of everything not made the subject of express inquiry, and, with the solicitor's strong motive for securing the business, there is danger that facts communicated to him may not find their way into the application. With respect to a contract thus made, it is clearly just to require that nothing but a fraudulent non-disclosure shall avoid the policy. Nor does this rule result in practical hardship to the insurer, for in every case where the undisclosed fact is palpably material to the risk the mere non-disclosure is itself strong evidence of a fraudulent intent. Thus if a man about to fight a duel should obtain life insurance without disclosing his intention, it would seem that no argument or additional evidence would be needed to show the fraudulent character of the non-disclosure. On the other hand, where men may reasonably differ as to the materiality of a fact concerning which the insurer might have elicited full information and did not do so, the insurer occupies no such position of disadvantage in judging of the risk as to make it unjust to require that before the policy is avoided it shall appear not only that the undisclosed fact was material, but also that it was withheld in bad faith. To hold that good faith is immaterial in such a case is to apply the harsh and rigorous rule of marine insurance to a class of insurance contracts differing so materially from marine policies in the circumstances under which the contracting parties agree that the reason for the rule ceases. The authorities are not uniform, and we are able to take that view which is more clearly founded in reason and justice.

In England, the tendency of the courts has been to hold that the same rules apply to fire and life insurance as to marine insurance, in reference to the effect of the concealment of material facts.¹ . . .

The rule had its origin in the peculiar exigencies of a very speculative business; to wit, marine insurance. To enforce it in respect to life insurance is to transfer the result of a usage prevailing in one branch of business to another where the conditions are very different, and are of a character that prevents the possibility of the existence of a definite usage well known to both parties in respect to the contracts made. It is the business of shipowners and their brokers frequently to deal in insurance, and they may be presumed to know the usages prevailing with respect to contracts that they are constantly making. In life insurance the insured never makes a business of taking such insurances, and in most cases he takes but one policy.² . . .

Coming now to the American authorities, we find very early in reported cases a disposition to depart from the strict rules of marine insurance law in the consideration of life and fire policies.³ . . .

In Massachusetts in the earlier authorities, the stringent rule of marine insurance as to concealments was declared applicable with all its rigor to fire policies. In *Curry v. The Commonwealth Ins. Co.*, 10 Pick. 535, it was held that if the insured did not communicate facts within his knowledge which increased the risk, though he was not

¹ The omitted passage cited, with occasional quotation or brief discussion, *Bufe v. Turner*, *ante*, p. 169 (1815); *Huguenin v. Rayley*, *ante*, p. 191 (1815); *Morrison v. Muspratt*, 4 Bing. 60 (1827); *Lindenau v. Desborough*, *ante*, p. 193 (1828); *London Assurance v. Mansel*, *ante*, p. 199 (1879); *Abbott v. Howard, Hayes' Irish Ex.* 381 (1832); *North British Ins. Co. v. Lloyd*, 10 Ex. 523, 533 (1854); and *Magee v. Metropolitan Life Ins. Co.*, 92 U. S. 93 (1875). — ED.

² Here were discussed *Wheelton v. Hardisty*, 8 E. & B. 232 (1858); *Thomson v. Weems*, *post*, p. 417 (1884); *Pollock on Contracts*, 4th ed., 490, n. 1; *London Assurance v. Mansel*, *ante*, p. 199 (1879); *Phoenix Life Ins. Co. v. Raddin*, *ante*, p. 204, n. 1 (1887). — ED.

³ Here were cited, frequently with comments, *Farmers' Ins. and Loan Co. v. Snyder*, 16 Wend. 481, 492 (1836); *Jolly's Admrs. v. Baltimore Equitable Society*, 1 H. & G. 295 (1827); *Burritt v. Saratoga County Mutual F. Ins. Co.*, *ante*, p. 178 (1843); *Clark v. Manufacturers' Ins. Co.*, *ante*, p. 181 (1850); *Gates v. Madison County Mutual Ins. Co.*, 5 N. Y. 469, 475 (1851); *Browning v. Home Ins. Co.*, 71 N. Y. 508 (1877); *Woodruff v. Imperial F. Ins. Co.*, 83 N. Y. 133 (1880); *Short v. Home Ins. Co.*, 90 N. Y. 16 (1882); *Haight v. Continental Ins. Co.*, 92 N. Y. 51, 55 (1883); and *Hartford Protection Ins. Co. v. Harmer*, *ante*, p. 185, n. 1 (1853).

From *Burritt v. Saratoga Mutual Fire Ins. Co.*, *ante*, pp. 178, 179, 180 (1843), was quoted the passage closing thus: "When thus called upon to speak, he is bound to make a true and full representation concerning all the matters brought to his notice, and any concealment will have the like effect as in the case of a marine risk." The comment was this: "The use of 'concealment' in this last passage should be remarked. It means there a failure fully to answer a question put, and it was such a concealment which Sir George Jessel had to consider in *London Assurance v. Mansel*, and which was defined by Sir Frederick Pollock. It is not a mere silence upon a matter not made the subject of inquiry. It is necessary to determine in which sense the word is used in deciding cases before their bearing on the present question can be clearly understood. Here we are considering only the duty of the insured in respect to something not inquired about." — ED.

questioned concerning them, and though he supposed the facts not to be material, the policy was void. This can hardly be reconciled with the later cases in the same court. In *Washington Mills Emery Mfg. Co. v. Weymouth and Braintree Mutual Fire Ins. Co.*, 135 Mass. 503, 505, the question was whether a failure to state that the insured did not own the land on which the building stood avoided the policy. No fraud appeared. The court said: "The defendant saw fit to issue this policy without any specific inquiries of the plaintiff as to the title to the land, and without any representations by the plaintiff upon this point. It was its own carelessness, and it cannot avoid the policy without proving intentional misrepresentation or concealment on the part of the plaintiff. An innocent failure to communicate facts about which the plaintiff was not asked will not have this effect;" citing *Commonwealth v. Hide and Leather Ins. Co.*, 112 Mass. 136; *Fowle v. Springfield Fire and Marine Ins. Co.*, 122 Mass. 191; *Walsh v. Fire Association of Philadelphia*, 127 Mass. 383. Nor does Chief Justice Shaw's definition of concealment in a fire insurance case seem to be as broad as that prevailing in marine insurance. In *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. 416, 425, he said, in defining the term as used in a fire policy: "'Concealment' is the designed and intentional withholding of any fact material to the risk, which the assured, in honesty and good faith, ought to communicate to the underwriter; mere silence on the part of the assured, especially as to some matter of fact which he does not consider it important for the underwriter to know, is not to be considered as such concealment." There are many other cases of fire insurance in which it is held that a non-disclosure of a material fact not inquired about does not avoid the policy unless it appears to have been withheld with fraudulent intent. *Alkan v. The New Hampshire Ins. Co.*, 53 Wis. 136; *Van Kirk v. The Citizens' Ins. Co. of Pittsburgh*, 79 Wis. 627; *Wytheville Ins. Co. v. Stultz*, 87 Va. 629, 636; *Sanford v. The Royal Ins. Co.*, 11 Wash. 653; *Pelzer Mfg. Co. v. St. Paul F. & M. Ins. Co.*, 41 Fed. Rep. 271.

The number of life insurance cases in which the question has arisen is small. In *Rawls v. The American Mutual Life Ins. Co.*, 27 N. Y. 282, 287, the Court of Appeals held that where an applicant for life insurance fully and truly answered all questions put to him by the company the mere omission to state matter, though material to the risk, would not be a concealment, and would not affect the validity of the policy on the ground that the applicant might presume that the insurer had questioned him on all subjects which he deemed material. In *Mallory v. The Travelers' Ins. Co.*, 47 N. Y. 52, 57, the same court sustained a charge to the jury, that, if the applicant did not conceal any fact which, in his own mind, was material in making the application, the policy was not void. See, also, *Cheever v. The Union Central Life Ins. Co.*, 4 Am. L. Rec. 155.

In *Vose v. The Eagle Life and Health Ins. Co.*, 6 Cush. 42, 48, the Supreme Judicial Court of Massachusetts announced the principle as

applicable to life policies, that the concealment of a material fact will avoid the policy, though it is the result of accident or negligence, and not of design. The case did not call for the application of such a principle. The applicant was asked if he was afflicted with any disease. He answered that he was not. At the time he had consumption, and had experienced several of the premonitory symptoms. His answers were made the basis of the policy. It is probable that the term "concealment," as used in this case, refers to an incomplete answer to a general question, rather than a failure to volunteer a fact not asked for, because the court uses in the opinion language which is incorporated in the headnote as follows: "It is the duty of the insured to disclose all material facts within his knowledge. Although specific questions, applicable to all men, are proposed by the insurers, yet there may be particular circumstances affecting the individual to be insured, which are not likely to be known to the insurers; and the concealment of a material fact, when a general question is put by the insurers at the time of effecting the policy which would elicit that fact, will vitiate the policy." But, whatever the effect of this case, we think the modern tendency, even of Massachusetts decisions, is to require that a non-disclosure of a fact not inquired about shall be fraudulent, before vitiating the policy; and, as already stated, this view is founded on the better reason. The subject is by no means as clear upon the authorities as could be wished, and the text writers find much difficulty in reconciling the cases. May on Insurance (3d. ed.), §§ 202, 203, 207. We hold that the charge of the Circuit Court upon this question was correct. . . .

For the error already referred to in the exclusion of evidence, the judgment of the Circuit Court is

Reversed, with instructions to order a new trial.

CHAPTER IV.

REPRESENTATION.

SECTION I.

Marine Insurance.

PAWSON v. WATSON.

KING'S BENCH, 1778. 2 Cowper, 785.¹

UPON a rule to show cause why a new trial should not be granted in this case, Lord MANSFIELD reported as follows: This was an action upon a policy of insurance. At the trial it appeared in evidence, that the first underwriter had the following instructions shown him: "Three thousand five hundred pounds upon the ship 'Julius Cæsar,' for Halifax, to touch at Plymouth, and any port in America: she mounts 12 guns and 20 men." These instructions were not asked for or communicated to the defendant; but the ship was only represented generally to him as a ship of force; and a thousand pounds had been done, before the defendant did anything upon her. The instructions were dated the 28th June, 1776, and the ship sailed on the 23d July, 1776; and was taken by an American privateer. That at the time of her being taken, she had on board 6 four pounders, 4 three pounders, 3 one pounders, 6 half pounders, which are called swivels, and 27 men and boys in all, for her crew; but of them 16 only were men (not 20, as the instructions mentioned), and the rest boys. But the witness said he considered her as being stronger with this force than if she had 12 carriage guns and 20 men. He also said (which is a material circumstance) that there were neither men nor guns on board at the time of insurance. That he himself insured at the same premium, without regard or inquiry into the force of the ship. Other underwriters also insured at the same premium, without any other representation than that she was a ship of force. That to every four pounder there should be five men and a boy. That in merchant ships boys always go under the denomination of men. This was met by evidence on the part of the defendant, saying, that guns mean carriage guns, not swivels, and men mean able men exclusive of boys. There were three causes of the

¹ s. c. 1 Doug. 11, n. 3.—ED.

same nature,¹ depending upon the same evidence: The defence in each was, that these instructions were to be considered as a warranty, the same as if they had been inserted in the policy; though they were not proved to have been shown to any but the first underwriter. In all the three cases the question reserved for the opinion of the court is, "Whether the written instructions which were shown to the first underwriter are to be considered as a warranty inserted in the policy, or as a representation, which would only avoid the policy, if fraudulent?" If the court should be of opinion that the instructions amounted to a warranty, then a new trial is to be granted in each, without costs; otherwise, the verdicts are to stand.

At the trial I was of opinion that it would be of very dangerous consequence to add a conversation that passed at the time, as part of the written agreement. It is a collateral representation. And if the parties had considered it as a warranty, they would have had it inserted in the policy. But, secondly, if these instructions were to be considered in the light of a fraudulent misrepresentation, they must be both material and fraudulent: and in that light, I held, that a misrepresentation made to the first underwriter ought to be considered as a misrepresentation made to every one of them, and so would infect the whole policy. Otherwise, it would be a contrivance to deceive many: for where a good man stands first, the rest underwrite without asking a question; and if he is imposed upon, the rest of the underwriters are taken in by the same fraud. The case was left to the jury under that direction.

Mr. *Wallace*, who showed cause, insisted that the instructions in question were no warranty, but a representation. That the policy is the formal instrument containing the final agreement of the parties; and therefore no instructions, parol or written, can be admitted to contradict it. 2. With respect to its being a fraudulent misrepresentation, the evidence proved, and the jury by their verdict found there was no fraud. On the contrary, the terms of the representation were more than complied with; for by the evidence it clearly appears that the force actually on board exceeded the force specified in the instructions. Therefore, he prayed the rule might be discharged.

Mr. *Munsfield*, Mr. *Macdonald*, and Mr. *Davenport*, *contra*.

LORD MANSFIELD asked, Whether there was any case that made a difference between a written and a parol representation? Upon receiving no answer, his Lordship proceeded to give his opinion as follows: There is no distinction better known to those who are at all conversant in the law of insurance than that which exists between a warranty or condition which makes part of a written policy and a representation of the state of the case. Where it is a part of the written policy, it must be performed; as if there be a warranty of convoy, there it must be a convoy; nothing tantamount will do or answer the

¹ The names of the other two causes were *Pawson v. Snell* and *Pawson v. Ewer*. —
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purpose; it must be strictly performed, as being part of the agreement; for there it might be said the party would not have insured without convoy. But as, by the law of merchants, all dealings must be fair and honest, fraud infects and vitiates every mercantile contract. Therefore, if there is fraud in a representation, it will avoid the policy, as a fraud, but not as a part of the agreement. If, in a life policy, a man warrants another to be in good health, when he knows at the same time he is ill of a fever, that will not avoid the policy, because by the warranty he takes the risk upon himself. But if there is no warranty, and he says, "the man is in good health," when in fact he knows him to be ill, it is false. So it is, if he does not know whether he is well or ill; for it is equally false to undertake to say that which he knows nothing at all of; as to say that is true which he knows is not true. But if he only says, "he believes the man to be in good health," knowing nothing about it, nor having any reason to believe the contrary, there, though the person is not in good health, it will not avoid the policy, because the underwriter then takes the risk upon himself. So that there cannot be a clearer distinction than that which exists between a warranty which makes part of the written policy and a collateral representation, which, if false in a point of materiality, makes the policy void; but if not material, it can hardly ever be fraudulent. So far from the usage being to consider instructions as a part of the policy, parol instructions were never entered in a book, nor written instructions kept, till many years ago, upon the occasion of several actions brought by the insured upon policies, where the brokers had represented many things they ought not to have represented, in consequence of which the plaintiffs were cast; I advised the insured to bring an action against the brokers, which they did, and recovered in several instances; and I have repeatedly, at Guild-hall, cautioned and recommended it to the brokers, to enter all representations made by them in a book. That advice has been followed in London; but it appeared lately, at the trial of a cause, that at Bristol, to this hour, they make no entry in their books, nor keep any instructions.

The question then is, "Whether in this policy the party insuring has warranted that the ship should positively and literally have twelve carriage guns and twenty men?" That is, "whether the instructions given in evidence are a part of the policy?" Now, I will take it by degrees. The two first underwriters before the court are Watson and Snell. Says Watson, "It is part of my agreement that the ship shall sail with twelve guns and twenty men; and it is so stipulated that nothing under that number will do. Ten guns with swivels will not do." The answer to this is, "Read your agreement; read your policy." There is no such thing to be found there. It is replied, yes, but in fact there is, for the instructions upon which the policy was made contain that express stipulation. The answer to that is, there never were any instructions shown to Watson, nor were any asked for by him. What color then has he to say that those instructions are any part of his

agreement? It is said he insured upon the credit of the first underwriter. A representation to the first underwriter has nothing to do with that which is the agreement or the terms of the policy. No man who underwrites a policy subscribes, by the act of underwriting, to terms which he knows nothing of. But he reads the agreement, and is governed by that. Matters of intelligence, such as that a ship is or is not missing, are things in which a man is guided by the name of a first underwriter, who is a good man, and which another will therefore give faith and credit to; but not to a collateral agreement, which he can know nothing of. The absurdity is too glaring, it cannot be. By extension of an equitable relief in cases of fraud, if a man is a knave with respect to the first underwriter, and makes a false representation to him in a point that is material, as where having notice of a ship being lost, he says she was safe, that shall affect the policy with regard to all the subsequent underwriters, who are presumed to follow the first. How then do Watson and Snell underwrite the ship in question? Without knowing whether she had any force at all. That proves the risk was equal to a ship of no force at all; and the premium was a vast one — eight guineas. So much therefore for those two cases. The third case is that of Ewer, who saw the instructions, with the representation which they contained. Did the number of guns induce him to underwrite the policy? If it did, he would have said, "Put them into the policy; warrant that the ship shall depart with twelve guns and twenty men." Whereas, he does no such thing, but takes the same premium which Watson and Snell did, who had no notice of her having any force. What does that prove? That he is paid and receives a premium, as if it were a ship of no force at all. The representation amounts to no more than this, "I tell you what the force will be, because it is so much the better for you." There is no fraud in it, because it is a representation only of what, in the then state of the ship, they thought would be the truth. And in real truth, the ship sailed with a larger force; for she had nine carriage guns, besides six swivels. The underwriters, therefore, had the advantage by the difference. There was no stipulation about what the weight of metal should be. All the witnesses say, "she had more force than if she had had twelve carriage guns, both in point of strength, of convenience, and for the purpose of resistance." The supercargo in particular says, "he insured the same ship and the same voyage, for the same premium, without saying a syllable about the force." Why, then, it was a matter proper for the jury to say Whether the representation was false? or whether it was in a fact an insurance, as of a ship without force? They have determined, and I think very rightly, that it was an insurance without force. Ewer makes an objection that the representation ought to be considered as inserted in the policy; but the answer to that is, he has determined whether it should be inserted in the policy or not, by not inserting it himself. There is a great difference, whether it shall be considered as a fraud. But it would be very dangerous to permit all collateral representations

to be put into the policy. I am extremely glad to hear that a great many of the underwriters have paid. Mr. Thornton has paid, who was the first person that saw the instructions. Shall the rest refuse, then? As to Watson and Snell, they have no pretence to refuse, for there is not a color for the objection made by them. As to Ewer, we are all satisfied with the determination of the jury against him. Therefore, the rule for a new trial must be discharged.¹ N. B. On the Monday following, Mr. *Davenport* said he was desired by the underwriters to ask whether it was the opinion of the court that to make written instructions valid and binding as a warranty, they must be inserted in the policy? Lord MANSFIELD answered that most undoubtedly that was the opinion of the court. If a man warrants that a ship shall depart with twelve guns, and it departs with ten only, it is contrary to the condition of the policy.

BIZE v. FLETCHER.

NISI PRIUS, KING'S BENCH, 1779. 1 Park Ins. 8th ed. 439.²

THIS was an action on a policy of insurance on the ship "Carnatic," East Indiaman, "at and from Port L'Orient to the isles of France and Bourbon, and to all or any ports or places, where and whatsoever, in the East Indies, China, Persia, or elsewhere, beyond the Cape of Good Hope, from place to place; and during the ship's stay and trade backwards and forwards, at all ports and places, and until her safe arrival back at her last port of discharge in France." But at the same time that this policy was subscribed, there was a slip of paper wafered to it, and shown to the underwriters, on which was written the following representation: The ship has had a complete repair, and is now a fine and good vessel, three decks. Intends to sail in September or October next (1776). Is to go to Madeira, the isles of France, Pondicherry, China, the isles of France, and L'Orient.

The ship did not sail till the 6th of December, 1776, and did not reach Pondicherry till the 23d of July, 1777. She continued there till the 23d of August following, when, instead of proceeding to China, she sailed for Bengal, where having passed the winter and undergone considerable repairs, she sailed from thence early in the year 1778 (being the second ship that left the Ganges), returned to Pondicherry, and

¹ On the effect of a representation made to a prior underwriter of the same policy, see *Stackpole v. Simon*, *post*, p. 285 (1779), which was a life insurance case; *Barber v. Fletcher*, 1 Doug. 305 (1779); *Marsden v. Reid*, 3 East, 572, 573 (1803); *Bell v. Carstairs*, 2 Camp. 543 (1810); *Brine v. Featherstone*, 4 Taunt. 869, 871 (1813); *Sibbald v. Hill*, *post*, p. 227 (1814); *Robertson v. Marjoribanks*, 2 Stark. 573, 575 (1819). And see *Elting v. Scott*, 2 Johns. 137 (1807). — Ed.

² s. c. 1 Doug. 284. — Ed.

after taking in a homeward-bound cargo at that place, proceeded in her voyage back to L'Orient, but was taken in October in that year by the "Mentor" privateer. The usual time in which the direct voyage between Pondicherry and Bengal is performed is six or seven days; but the "Carnatic" was about six weeks in going to Bengal, and two months on the way back from thence to Pondicherry. Both going and returning, she either touched at, or lay off Madras, Masulipatam, Visigapatam, and Yanon, and took in goods at all those places.

It was contended in this cause, at the trial, that the representation accompanying the policy restrained the voyage to the limits therein specified. They produced some letters from the owners to their correspondents, one of which was to the following effect: "We doubt not but on account of the storm the ship will be forced to go to Bengal to be laid down, which cannot be done at Pondicherry; in which case our captain will have entered a protest, which we will forward in time to you." In a subsequent letter they say nothing of the storm or leak, but mention a different cause for the ship's going to Bengal. These letters, it was said, raised a presumption that the necessity of going to Bengal was merely a pretence devised after the capture, and when the insured began to apprehend that the words of the policy would not cover a voyage to that place.

Lord MANSFIELD told the jury "that the first question was, whether the policy was void on account of misrepresentation? Now there is an essential difference between a warranty and a representation. The warranty is a part of the contract; a risk described in the policy is part of the contract. There can be no warranty by any collateral representation. The ground on which a representation affects a policy is fraud, the representation must be fraudulent; that is, it must be false and material in respect to the risk to be run. All risks are governed by the nature of them; and the premium is governed by the risk. Where a representation accompanies an instrument, it says, 'I will have this understood as my present intention; but I will have it in my power to vary it.' The great question in this cause is, whether the representation was false, and that in a material instance? Fraud is found out by the materiality of the point it is charged in. It is to be considered, then, whether they had really a view of going to China. A witness has proved that the difference of insurance is one per cent on going to Bengal, and not to China. If you think that this was a misrepresentation to avoid paying the one per cent, you will find for the defendant. But if you are satisfied that the real intention, at the time of the representation, was to go to China, the plaintiff will be entitled to your verdict; for the insured may change his intention, go to Bengal, and yet be protected by the policy, which clearly admits of that voyage, and must be understood by both parties in a greater latitude than the representation, being expressed in different and much more comprehensive terms. If, upon the whole evidence, you shall be of opinion that no fraud was intended, and that the variance between the intended

voyage, as described in the slip of paper, and the actual voyage as performed, did not tend to increase the risk to the underwriters, this slip of paper being only a representation, you must find for the plaintiff."

The jury found a verdict accordingly.

MACDOWALL v. FRASER.

KING'S BENCH, 1779. 1 Doug. 260.

THIS was an action upon a policy of insurance on the ship the "Mary and Hannah," from New York to Philadelphia." At the time when the insurance was made, which was in London, on the 30th of January, the broker represented the situation of the ship to the underwriter as follows: "The 'Mary and Hannah,' a tight vessel, sailed with several armed ships, and was seen safe in the Delaware on the 11th of December, by a ship which arrived at New York." In fact, the vessel was lost on the 9th of December, by running against a *cheval de frise*, placed across the river. The cause came on to be tried before Lord MANSFIELD, at the last sittings at Guildhall. The defence was founded on the misrepresentation as to the time when the ship was seen; and the representation and the day of the loss being proved, the jury found for the defendant. On Monday, the 8th of November, *Dunning* obtained a rule to show cause why there should not be a new trial, which came on to be argued this day.

The Solicitor-General and Dunning, for the plaintiff.

Lee and Davenport, for the defendant.

On the part of the plaintiff, the difference between a warranty and a representation was much enlarged upon. It was admitted that the representation in this case was false in point of fact, though the insured, at the time, believed it to be true. It was also admitted that a representation, if false in a material point, annuls the contract. But it was contended that the particular day, when the ship had been seen in the Delaware, was not material. That the meaning of the representation was to inform the underwriter that the ship had got safe through two-thirds of her voyage from New York, and beyond the reach of capture. What was stated as to that material part was perfectly true, and that was all that was necessary, as was decided in the cases on the insurance of the "Julius Cæsar."¹ If the representation had been, that she had been seen on the 8th or 9th in the Delaware, it would have made no difference in the premium. There might have been circumstances which would have rendered the day material, as a bad storm on the 9th or 10th; but there was nothing of that sort in this case. An intentional misrepresentation was not imputed to the insured. The manner in

¹ *Pawson v. Watson*, ante, p. 212 (1778). — Ed.

which the mistake arose was this: The captain who had met the ship said that he had seen her on the fifth day after her departure from New York. It seems a ship is said to sail from New York indifferently, either when she sails from the quay at New York, or from Sandy Hook. When the captain mentioned her departure from New York, he was understood to mean from Sandy Hook, and it was known that she had sailed from thence on the 6th; but it turned out that he meant to speak of her departure from the quay, which was some days before.

For the defendant, it was urged that the materiality of the fact misrepresented was before the jury, and that they had exercised their judgment upon it, and determined by their verdict that it was material.

LORD MANSFIELD. The distinction between a warranty and a representation is perfectly well settled. A representation must be fair and true. It should be true as to all that the insured knows; and, if he represent facts to the underwriter without knowing the truth, he takes the risk upon himself. But the difference between the fact as it turns out, and as represented, must be material. The case of the "*Julius Cæsar*" was very different from this. The ship, there, was only fitting out when the insurance was made. No guns nor men were put on board. It was only said what was meant to be done; and what was done, though different, was as advantageous, or more so, than what had been represented. There was no evidence of actual fraud in the present case, and no question of that sort seemed to be made. But there was a positive averment that the ship was seen in the Delaware on the 11th of December. The underwriter was deceived as to that fact, and entered into the contract under that deception. There was no evidence at the trial when she was seen in the Delaware, or in what condition; but suppose the fact had been explained in the manner now suggested, why did the insured take upon him to compute the day of the month on which she had been seen? Why did he not mention exactly what his information was, and leave the underwriter to make the computation? In insurances on ships at a great distance, their being safe up to a certain day is always considered as a very important circumstance. I am of opinion that the representation concerning the day was material.

WILLES, Justice. This is certainly only a representation; but, in an insurance on so short a voyage, it might have made a material difference whether the ship was known to be safe two days sooner or later. It ought to have been shown, on the part of the plaintiff, that it was not material, but there was no evidence that the ship was met on the 9th, or any other day. The materiality was proper for the consideration of the jury.

ASHHURST, Justice. The distinction which the court has made in the cases on the "*Julius Cæsar*," and some others, between a representation and a warranty, is extremely just. There is no imputation of fraud in this case; but the insured should have been more cautious. In the former cases the representation was of what was intended; here it was of a fact, stated as having happened within the knowledge of the

insured. He should have made the representation in the same words in which the intelligence is said to have been communicated to him.

BULLER, Justice. We cannot say the difference of the day was not material. The safety of the ship is the most material fact of any, in cases of insurance. The plaintiff admits that the place where she was met in safety was material. Why was not the time equally so? There was no intentional deceit, and it is perhaps unfortunate that the insured made the mistake; but I think the verdict right.

*The rule discharged.*¹

FILLIS v. BRUTTON.

NISI PRIUS, KING'S BENCH, 1782. 1 Park Ins. 8th ed. 414.

THE policy was on the brig "Richard," at and from Plymouth to Bristol. Several letters passed between the plaintiff and the broker, who effected the policy, as to the premium at which the insurance could be made; at last, it was underwritten four guineas per cent. The broker's instructions stated the ship ready to sail on the 24th of December. The broker represented to the underwriter that the ship was in port, when, in fact, she had sailed the 23d of December.

LORD MANSFIELD said "that this was a material concealment and misrepresentation." The jury, however, hesitated; his Lordship then laid down the following as general principles: "In all insurances it is essential to the contract that the assured should represent the true state of the ship to the best of his knowledge. On that information the underwriters engage. If he states that as a fact which he does not know to be true, but only believes it, it is the same as a warranty. He is bound to tell the underwriters truth. In the present insurance, the only material point is this, Had the ship sailed, or was she in port?"

Upon this the jury found for the defendant.

¹ In *Sawyer v. Coasters' Mutual Ins. Co.*, *post*, p. 320 (1856), METCALF, J., for the court, said: "In the present case it is not suggested that the misrepresentation was made designedly. And we need not express an opinion upon a point about which writers differ, namely, whether in such a case the policy is avoided on the ground of constructive or legal fraud, or on the ground that a positive representation as to a material fact is as essentially a part of the contract as a warranty is, and that its substantial truth is as much a condition precedent to the insurer's liability as is the literal truth of a warranty. It is sufficient for this case that the policy is avoided by misrepresentation."

And see the dissenting opinion of Lord ABINGER, C. B., in *Cornfoot v. Fowke*, 6 M. & W. 358, 379 (1840).—ED.

FITZHERBERT v. MATHER.

KING'S BENCH, 1785. 1 T. R. 12.

THIS was an action on a policy of insurance for £110 underwritten by the defendant on the 21st of September, 1782, at six guineas per cent, on a cargo of oats on board the ship "Joseph," lost or not lost, at and from Hartland to Portsmouth, beginning the adventure from the loading thereof on board the said ship at Hartland. The defendant pleaded the general issue, and paid the premium into court. The jury found a verdict for the plaintiff at the sittings at Guildhall, before BULLER, J., after last Trinity Term, subject to the opinion of the court on the following case:

"That on the 27th of July, 1782, William Bundock, of Pool, agent for the plaintiff, contracted with Richard Thomas, of Hartland, a corn-factor, for the purchase of 500 quarters of oats, to be consigned to William Fuller, at Portsmouth, on the plaintiff's account, and directed Thomas to send him (Bundock) a bill of loading and invoice, and also a like bill of loading and invoice to the plaintiff at Cuthbert Fisher's, Esq., London. That, in pursuance thereof, Thomas shipped the oats on board the ship insured, which sailed from Hartland on the 16th of September, 1782, and was lost the same day off the pier of Hartland. That on the 16th of September, 1782, Thomas wrote the two following letters to William Bundock and Cuthbert Fisher:

"HARTLAND, Sept. 16, 1782.

"To MR. WILLIAM BUNDOCK.

"SIR, — This morning I loaded the 'Joseph' with 175 quarters of oats to the address of William Fuller, Portsmouth, and the sloop sailed immediately; but I am afraid the wind is coming to the westward, and will force her back. I have engaged Harvey, which hope will carry the rest; and if the weather does not come foul, hope to despatch him this week. I have sent a bill of loading and a letter by the master to Mr. Fuller; also I have sent a bill of loading and advice to Mr. Fisher, that he may insure if he likes, as the equinox is near, &c.

"R. THOMAS.

"HARTLAND, Sept. 16, 1782.

"To CUTHBERT FISHER, Esq.

"SIR, — By an order from Mr. William Bundock, of Pool, I shipped this day on board the 'Joseph,' who immediately sailed for Portsmouth, a cargo of oats as under; and by the same order, as well as the orders of Thomas Fitzherbert, Esq., I took the liberty of drawing on you at three days' sight, in favor of Messrs. Scott and Willes, or order, £106 10s. to be placed to the account of Thomas Fitzherbert, Esq. I wish the whole safe to hand, and expect another vessel to be loaded this week, weather permitting. This evening appears stormy.

"I remain, &c.,

"R. THOMAS.

| | £ | s. | d. |
|--|-------|----|----|
| " Shipped 175 quarters of sweet dry oats at 12s. 2d. per quarter on board the 'Joseph,' of Pool | 106 | 9 | 2 |
| " Bills of lading | | | 10 |
| | <hr/> | | |
| | £106 | 10 | 0 |

"That about six or seven o'clock of the evening of the 16th September, Richard Thomas heard a report that the ship was on shore; and at six o'clock in the morning of the 17th he knew the ship was lost. That the mode of sending letters from Hartland to London is as follows: the letters are collected by a private hand, who goes with them from Hartland to Bideford about one or two o'clock on the day the post sets out from Bideford, and which leaves Bideford about nine o'clock in the evening. That the 16th of September was not a post day, and the above letters did not leave Hartland till one o'clock in the afternoon on the 17th, which was the post day from Bideford to London; and the letters which went from Bideford by the post of that evening were received in London on the 20th of September. That on the 19th the plaintiff wrote the following letter to Cuthbert Fisher, Esq. :—

"STUBB LODGE, NEAR PORTSMOUTH,
"Sept. 19, 1782.

"DEAR FISHER, — My correspondent, Mr. William Bundock, of Pool, having informed me he has sent two sloops to Hartland, in Devonshire, to load oats on my account and risk, I beg the favor of you to insure my amount of the cargoes to Portsmouth, as soon as the bills are sent you.

T. FITZHERBERT.

"That the last-mentioned letter, together with the aforesaid letter, from R. Thomas to Mr. Fisher, dated the 16th of September, were both received by Fisher in London on the 20th of September, and he thereupon directed the insurance in question to be effected. That, on the 21st of September, the defendant underwrote the policy stated in the declaration. If the court should be of opinion that the plaintiff may recover, then the verdict to stand; if not, then a verdict for the defendant."

Bower, for the plaintiff, made two questions:

1st. Supposing Thomas to be the agent of the plaintiff, whether his negligence in not sending an account of the loss of the ship shall vacate the policy?

The whole that is required in making this kind of contracts is, that they be made *bonâ fide* between the insured and the insurer. If there be a real disclosure as between them, the act of a third person is not material.

2dly. Whether Thomas be the plaintiff's agent? All the orders which Bundock had given to Thomas were to send such a quantity of oats on board a ship, and to send a bill of lading; the moment he had done that, his agency ceased.

Couper, for the defendant, contended that Thomas was the plaintiff's agent. Thomas suffered a letter to go to Fisher, informing him that the ship sailed several hours after he knew she was lost; he himself knowing an insurance might be made, as appears by his letter dated the same day to Bundock. The letter having been written before the loss was known makes no difference, because it did not go before Thomas actually knew of the loss. If there had been no reference to Thomas's letter, there could have been no insurance: this connects him with the principal. The case of *Stewart v. Dunlop*, in the House of Lords in 1785, on an appeal from the sessions of Scotland, is very strong. That was where a clerk of the assured, knowing of the loss of the ship, suffered the merchant to cause a policy to be made, without disclosing what he knew; on which ground the policy was vacated.

LORD MANSFIELD, Ch. J. This policy was effected by misrepresentation; and that misrepresentation arose from the proper agent of the plaintiff, who gave the intelligence. Now, whether this happened by fraud or negligence, it makes no difference; for in either case the policy is void.

It was by misrepresentation; because the underwriter was warranted, on the information of the agent, to take for granted that on the 17th September at 12 or 1 o'clock the ship was safe; for the agent gave an account of the ship being loaded, and said nothing of what had happened to her. Then there was strong ground to believe on this letter, that she was safe when the post came away.

How did this misrepresentation happen? The agent wrote the letter. And, supposing he was not an agent, he gave information to Fisher, as well as to the plaintiff, to make the insurance. He acted honestly when he wrote the letter; but on the 16th, at night, he heard the ship was on shore, and the next morning he knew that she was lost. The post did not go out till the afternoon of that day; therefore he had full opportunity to send an account of the loss.

If Thomas were not guilty of fraud, at least he was guilty of great negligence; and this policy, being effected by misrepresentation, is void.

WILLES, J. Thomas must be considered as the agent of the plaintiff. He shows by his first letter that he acted by the orders of Bundock, as well as of the plaintiff; and being his agent, the plaintiff must be liable for any misrepresentation of Thomas; and this is a gross misrepresentation.

ASHHURST, J. On general principles of policy, the act of the agent ought to bind the principal; because it must be taken for granted that the principal knows whatever the agent knows. And there is no hardship on the plaintiff; for if the fact had been known, the policy could not have been effected.

BULLER, J. In order to show that Thomas was not the agent for the plaintiff, Mr. Bower assumed one fact which is contrary to the case; for he said the insurance was not made in consequence of Thomas's

letter; but the fact is not so. According to the plaintiff's letter, the insurance was not to be made till Thomas's letter arrived; and the plaintiff expressly refers to the letter of Thomas, "when it shall arrive;" it was therefore the foundation of the insurance.

Though the plaintiff be innocent, yet if he build his information on that of his agent, and his agent be guilty of a misrepresentation, the principal must suffer. It is the common question every day at Guild-hall, when one of two innocent persons must suffer by the fraud or negligence of a third, which of the two gave credit? Here it appears that the plaintiff trusted Thomas; and he must therefore take the consequences.

Judgment for the defendant.

EDWARDS v. FOOTNER.

NISI PRIUS, KING'S BENCH, 1808. 1 Camp. 530.

THIS was an action on a policy of insurance on goods in the "Fanny," from London to Hayti.

The ship was captured by a French privateer with the goods on board; and the question was, whether the underwriters were discharged by a representation concerning her equipment.

It appeared that about a week before the policy was signed, the names of the underwriters were put down upon a slip, when the broker stated to the defendant, "that the 'Fanny' was to sail with the 'Hopewell' and 'Young Roscius,' both armed ships, and that she was herself to carry ten guns and twenty-five men." There was no evidence of any conversation upon the subject having passed between the parties either when the policy was signed, or in the intervening period. In fact, the "Fanny" sailed by herself, and carried only eight guns and seventeen men.

Topping, for the plaintiff, contended, that the ship was sufficiently equipt to be seaworthy, and that what was said when the defendant's name was put upon the slip could not be considered as a representation which the assured were bound to comply with, as the slip was no evidence of the contract, and the court could only look to what took place when the policy was subscribed. This very point had been lately decided in *Dawson v. Atty*, 7 East, 367, where it was held, that although the broker, when the slip was subscribed, had said that the ship was an American, yet, as he had not represented her to be of any particular country at the time when the policy was subscribed she did not require to be documented as an American, and, although she was captured for want of a certificate required by a treaty between the government of the captors and the United States of America, the owner of the goods recovered against the underwriters.

LORD ELLENBOROUGH. If a representation is once made, it is to be considered as binding, unless there is evidence of its being afterwards altered or withdrawn. In the case cited, the vessel was stated to be an American when the slip was made out; but when the policy came to be signed, the broker said generally, "that it was an insurance on goods in the 'Hermon,'" without describing her as of any particular country. There, the first conversation was qualified and controlled by what followed. But here there is no evidence of any conversation upon this subject between the parties subsequently to the statement that the ship was to carry ten guns and twenty-five men; and this having taken place when the insurance was talked of, and the terms of it were agreed upon, it must be referred to the policy, and treated as a representation which required to be substantially complied with on the part of the assured. *Verdict for the defendant.*¹ . . .

Topping and Taddy, for the plaintiff.

The Attorney-General and Park, for the defendant.

BOWDEN v. VAUGHAN.

KING'S BENCH, 1809. 10 East, 415.

THIS was an action upon a policy of insurance on goods at and from Lisbon to London. Previous to the effecting of the insurance a letter had been received by the plaintiff from his correspondent, dated Lisbon, 27th of October, 1807, in which the writer advises him that he had consigned to him 1,828 hides by the "Almirante Nelson," which were to be insured; stating that she was a Portuguese ship, and would sail in a few days. This letter was not shown to the underwriters at the time of subscribing the policy; but the broker represented that the ship was to sail in a few days; and he said upon his examination at the trial at Guildhall, that if it had been represented that the ship was not to sail in less than a month, the insurance could not have been effected; the French army marching to the attack of Portugal being then daily expected at Lisbon. There was no doubt, therefore, of the materiality of the representation: and in fact the vessel did not sail till the 29th of November, and was stopped by the enemy on the 30th before she left the Tagus. LORD ELLENBOROUGH, C. J., left the case to the jury; advising them to consider that the person by whom the representation was made was the owner of goods, who could only speak of the sailing of the vessel from probable expectation; and that if such representation were made *bonâ fide*, it should not conclude him. And the jury, being of opinion that the representation had been made *bonâ fide* on probable expectation, found a verdict for the plaintiff.

¹ A point foreign to representation has been omitted. — Ed.

Park now moved for a new trial, on the ground that no such distinction appeared in any of the cases, between a representation as to the time of sailing made by the owner of the goods, and one made by the shipowner; and that the effect of it with respect to the underwriter was the same, whether it proceeded from the one or the other. But

The court were of the same opinion with the Lord Chief Justice at the trial, that a representation as to the time of the ship's sailing, made by the owner of goods on board, must from the nature of the thing be considered only as a probable expectation, he having no control over the event.

Rule refused.

HUBBARD v. GLOVER.

NISI PRIUS, KING'S BENCH, 1812. 3 Camp. 313.

THIS was an action on a policy of insurance on the ship "*Alexander*," at and from Petersburg or Cronstadt to London, at a premium of 20 guineas per cent to return 10 for arrival.

The policy was subscribed by the defendant on the 13th of June, 1811. Before subscribing it, he wished a warranty to be introduced, that the ship should sail before the first of August; upon which the broker observed, "There is no occasion for that; the ship has sailed some time, and must now be at Gottenburgh. There is a cargo ready for her; and she is sure to be an early ship."

In point of fact she had reached Gottenburgh some days before this conversation, and she performed her voyage to Cronstadt without any accident or delay. The captain from his arrival there was ready to take the cargo on board; but the first part of it was not sent alongside till the 8th of September. On the 30th of the same month the ship sailed on the homeward voyage, and after lying some time for convoy at Matwick, was wrecked on the 11th of November off the coast of Denmark. Before she sailed from Cronstadt the winter risk had begun, and the current premium had risen to 30 guineas to return 10.

Scarlett, for the defendant, contended, that under these circumstances the underwriters were not liable. The broker had represented that there was a cargo ready for the ship. This he did not state as matter of expectation or belief; but he directly and positively asserted it as a fact within his own knowledge or that of his employer. Therefore, the only thing to be considered is, the materiality of the representation; and there can be no doubt that it was most material. If the cargo had been ready for the ship upon her arrival at Cronstadt, in all probability she would have returned in safety. Upon the representation made, the underwriters contemplated a summer risk, and were contented to receive the summer premium; but by the representation

being falsified, a winter risk was attempted to be thrown upon them, and the loss had arisen which the assured now sought to recover.

LORD ELLENBOROUGH. Had the desired warranty been introduced into the policy, that would have been falsified, and the underwriters would have been discharged. But I find no representation here upon the falsity of which they can defend themselves. The broker said, the ship had sailed some time, and must then have reached Gottenburgh; that a cargo was provided for her; and that she must be an early ship. Of these circumstances, only the first could be considered as within his own knowledge; and that was true. The next was likewise true, although only matter of probable conjecture; for the ship had reached Gottenburgh some days before. He said in unqualified terms that a cargo was ready; but this from its very nature was only the subject of expectation and belief. Neither he nor his principal could be supposed to have been at Cronstadt or Petersburg to see the cargo in a warehouse or on the wharf there; and I believe it is by no means an usual thing to have a cargo of Russia produce prepared for any particular ship before she sails on the outward voyage. All the broker could be understood to mean was, that a cargo had been ordered for the ship in question, and that there was every reason to suppose it would be ready for her by the time of her arrival, so that she might be expected to be an early ship. We have no evidence that this representation does not perfectly accord with the truth. The defendant, instead of insisting upon the warranty, chose to speculate upon probabilities. He erred in his calculation; but that is no reason why he should not pay the loss.¹

Verdict for the plaintiff.

Garrow, S. G., and Richardson, for the plaintiff.

Scarlett and Campbell, for the defendant.

SIBBALD AND OTHERS, APPELLANTS, v. HILL AND OTHERS,
RESPONDENTS.

HOUSE OF LORDS, 1814. 2 Dow, 263.

Appeal from the Court of Session of Scotland.

HILL, a London merchant (April 8, 1802), wrote to his brother to get some insurance done at Leith on two South Sea whalers, "Redbridge" and "Britannia," at and from the Southern Fishery to London. The letter had these words: "I have two ships in the Southern Fishery, on which I have done as much as my underwriters here are inclined to take, and I wish to do something at an outport, &c. I have no objection to give eight guineas per cent on these ships, which is the highest premium I have given." The brother wrote accordingly to Robb, a Leith mer-

¹ *Acc. v. Brine v. Featherstone*, 4 Taunt. 869 (1813). And see *Barber v. Fletcher*, 1 Doug. 305 (1779).—ED.

chant, one of the appellants, stating, *inter alia*, as follows: "Mr. Hill has done as much insurance upon the two ships as the underwriters here are inclined to take at eight guineas per cent." Some difficulty occurred in getting the insurance effected, owing to the ignorance of the Leith underwriters as to the nature of the risk. But the appellants, trusting to the skill and information of the Lloyd's underwriters, underwrote the policy of the "Redbridge" to the amount of £1,750, at eight guineas per cent. The vessel, on December 30, 1801, was captured on the coast of Chili; but the underwriters, having discovered that the premiums at Lloyd's on this ship had been 15, 18, and 25 guineas, refused to pay, and an action was brought by Hill in the Scotch Admiralty Court. The Judge-Admiral decided for the underwriters, on the ground of the misrepresentation; but his decree was reduced by the Lord Ordinary and Court of Session, from whose judgment the cause was appealed.

The interlocutor of the Lord Ordinary, adopted in substance by the court, found, "that the statement given by the pursuer, as to the amount of the premium he had given on former policies, was not a misrepresentation as to any of the circumstances attending the situation or condition of the ship, or nature of the voyage, which could affect the nature of the risk, but partakes rather of the nature of these *verba jactantia*, not very moral, perhaps, but very common, and not illegal, which are used at the cheapening of goods and other bargains, the seller alleging that such goods cannot be bought so cheap elsewhere, &c., and which representations or misrepresentations will not avail to set aside a sale, as concealments or misrepresentations may do as to the defects or qualities of the goods, &c."

There was another point as to the concealment of a material fact, but it seems unnecessary to state it, as the judgment of the Lords turned on the question of misrepresentation.

Park and *Nolan*, for appellants.

Adam and *Romilly*, for respondents.

Lord ELDON (Chancellor). It appeared to him that the judgment of the Lord Ordinary and Court of Session ought to be reversed, and that of the Judge-Admiral affirmed. But whatever might be their Lordships' opinion, it would be necessary to attend to these interlocutors, and alter the terms, so that the ground of their judgment might not be misunderstood. The Judge-Admiral's interlocutor found, "that in this case the rate of premium was fixed and accepted in consequence of false information, &c., holding out the same premium of eight guineas per cent as the highest premium exacted by the underwriters in London; whereas it appeared, and was now acknowledged by the pursuer, that the very lowest premium paid by him on the same vessel at London amounted to 15 guineas per cent." He had not been able to find that any such acknowledgment was made by the respondents, or that the circumstance was apparent; and therefore if it should be their Lordships' opinion that the Lord Ordinary was wrong, still the principle of their judgment might be misunderstood, if that judgment should state a fact which did not appear in the cause.

As to the judgment of the Lord Ordinary and that of the court, which was in substance the same, they (the judges) did not say that this was not such a misrepresentation as would affect the premium, but that it was not such a misrepresentation as could affect the nature of the risk, — “that it partook rather of the nature of these *verba jactantia*, not very moral, perhaps, but very common, and not illegal, which were used at the cheapening of goods,” &c. — he should suppose that at least the word *perhaps* ought to be left out, for there could be no doubt but that such misrepresentations were grossly immoral — “and which representations or misrepresentations would not avail to set aside a sale,” &c. Taking that as a general proposition, he could not admit the truth of it; for even in chaffering about goods, there might be such misrepresentations as would set aside the contract. When the misrepresentations were made under such circumstances and in such a way that they took the confidence of the purchaser, and induced him to act when otherwise he would not, this was a fraud which would affect the sale.

It appeared to him settled here, that if a person, meaning to effect an insurance, exhibited a policy underwritten by a person of skill and judgment, knowing that this would weigh with the other party and disarm the ordinary prudence exercised in the common transactions of life, and it turned out that this person had not in fact underwritten the policy, or had done so upon such terms as that he came under no obligation to pay, — it appeared to him to be settled here, that this would vitiate the policy. The courts in this country would say that this was a fraud, not on the ground that the misrepresentation affected the nature of the risk, but because it induced a confidence, without which the party would not have acted. If one, then, sent down a policy to Leith with the names of two or three underwriters at Lloyd’s, were the Leith underwriters to send to Lloyd’s to ascertain whether these were fair and *bona fide* subscriptions? — No. And where was the difference between sending policies and letters? But then another question had been raised, — Whether the real meaning of the letters was, that insurance had been effected on the same voyage at Lloyd’s at eight guineas per cent? He took the letters, in fair and obvious construction, as representing that insurance had been effected at Lloyd’s on the very same voyage at eight guineas per cent, and an attempt by nice criticisms to show that they were susceptible of a different meaning would not do. Such being his opinion on the first point, he thought it needless, unless their Lordships disagreed with him, to address himself to the rest.

REDESDALE *assentiente*.

Interlocutors of Lord Ordinary and Court reversed, and Judge-Admiral’s decree affirmed,¹ with an alteration as above.

¹ See *Whittingham v. Thornburgh*, *post*, p. 284 (1690–91), a life insurance case; and *Wilson v. Duckett*, 3 Burr. 1361 (1762). — Ed.

DENNISTOUN, BUCHANAN, & CO., APPELLANTS, v. LILLIE
AND OTHERS, RESPONDENTS.

HOUSE OF LORDS, 1821. 3 Bligh, 202.¹

Appeal from the Court of Session of Scotland.

UPON the 17th of June, 1814, the appellants, Messrs. Dennistoun, Buchanan, and Company, merchants in Glasgow, received a letter of advice from Messrs. William Duff and Company, their correspondents at New Providence, dated 2d April, 1814, containing copies of their letters to the appellants of the 19th and 24th of March preceding.

The following are extracts of such parts of the letters as relate to the subject of insurance. By the letter of the 19th March the appellants are informed thus: "At a prize sale of a South Sea whaler and her cargo of oil, that took place here yesterday, we purchased on your account about 40,000 gallons of spermaceti oil, at 3s. 9½d. sterling per gallon, 14,000 gallons of which we intend to ship upon that remarkable fast-sailing schooner 'Brilliant,' of 157 tons burthen, mounting six nine-pounders, to sail, *with or without convoy, about the first of May*; and on the value of which shipment you will please to make insurance. Messrs. Seton and Elliot will ship on board the 'Jessie' 60,000 lbs. St. Domingo coffee, which they wish you to have insurance done for at 50s. per 100 lbs., and 17,000 lbs. Cuba coffee, at 60s. per 100 lbs. *They also wish you to have insurance effected on the 'Brilliant' from hence to Greenock, valuing her at £1,400 sterling; to all of which we beg your attention.*" The letter of the 24th says, that the "Brilliant" would be cleared out as bound to Greenock and a port on the Continent. And in the letter of 2d April Messrs. Duff and Company state, towards the conclusion of the letter, which relates to a variety of other matters, "The 'Brilliant' *will sail on the 1st of May, a running vessel, in which the writer of this will take his passage.*"

Upon these advices an insurance was effected, *on ship and goods*, on the 18th of June, being the day after receiving the letters above quoted, although the contract or policy bears date on the 21st of June, three days later. At the time of entering into the contract, the letters of advice were shown to the respondents, who were some of the underwriters at Glasgow, with whom the insurance was effected.

The terms of the policy were, "From Nassau to Clyde, with leave to call at all ports and places whatsoever, *for convoy, or for any other purpose whatever, without* being deemed a deviation; and with or without letters of marque, leave to chase, capture, man and convoy, or send into port or ports, any vessel or vessels."

The insurance was done at the rate of six guineas *per cent*, to return three pounds *per cent* "for convoy for the voyage, or two pounds *per cent* for *partial convoy and arrival.*"

¹ s. c. 1 Shaw's Scotch App. Cas. 22. — Ed.

About the 20th of April his Majesty's ship "Martin" came into the harbor of Nassau, and being bound for Halifax, the commander offered to take the "Brilliant" under his protection. This being considered a great advantage, as the risk of capture between Nassau and Halifax was imminent, extraordinary exertions were used to complete the loading of the "Brilliant," and she sailed under convoy of the "Martin" on the 23d of April, being about eight days earlier than the date of sailing proposed in the foregoing letters.

Upon the 11th of May the "Brilliant" was captured by an American privateer, and carried into Boston.

When the intelligence of the capture arrived, the appellants applied to the underwriters, *and many of them settled the loss*. But the respondents resisted payment; whereupon the appellants brought an action before the Court of Admiralty, concluding for payment of the sums respectively underwritten for them; and, after the usual pleading,¹ the Judge-Admiral pronounced the following interlocutor: "The Judge-Admiral, having advised the libel, defences, answers, replies, and writings produced, finds, that by a letter, dated the 19th of March, 1814, from William Duff and Company, the correspondents of the pursuers, of New Providence, to them, they mentioned the ship 'Brilliant,' a remarkable fast-sailing schooner, was to sail, with or without convoy, about the 1st of May; and that by an after letter, dated the 2d of April last, 1814, the incorrectness of the word '*about*,' as applicable to the 1st of May, was explained by the same correspondents informing the pursuers that the 'Brilliant' was to sail for New Providence on the 1st of May, a running vessel, 'and in which the writer of this (William Duff) will take his passage': Finds it admitted, that these letters were communicated to the defenders, whereby they saw that the vessel was positively intended to remain in New Providence, and not to sail therefrom till the 1st of May last, and under this impression subscribed the policy in question: Finds, that the 'Brilliant' sailed on the 23d of April from New Providence, and, for anything known, may have been captured before the 1st day of May, when she was held forth to the defenders as remaining in the harbor: Finds, therefore, that although the representation made by the pursuers was absolutely innocent on their part, the fact stated by them to the defenders was

¹ The report in 1 Shaw's Scotch App. Cas. 22, 23, says: "In defence it was pleaded, that the nature and extent of the risk had been misrepresented; that it appeared from the letter of the 2d of April that the 'Brilliant' was to sail on the 1st of May, whereas she had sailed on the 23d of April, which fact was material, because the vessel had thus been 56 days at sea instead of 49, as was supposed when the contract was entered into, and so would have been considered a missing ship; and that in this question it was unimportant that the misrepresentation was unintentional. To this it was answered, that there was no warranty as to the period when the vessel was to sail; that the letters had been exhibited, so that the insurers were put in possession of all the information which Dennistoun, Buchanan, and Company had obtained; and that these letters represented nothing more than that it was the intention of Duff and Company to despatch the vessel on the 1st of May, without, however, fixing themselves down to that day, or preventing themselves from taking advantage of a convoy in the mean while." — Ed.

not verified, and a material change was thereby made in the risk undertaken by the latter; and therefore assoilzies the defenders, and finds them entitled to expenses."

The appellants brought the foregoing interlocutor under review of the Judge-Admiral, by petition, and the interlocutor thereon was: "The Judge-Admiral having advised this petition, and another dated 23d February last, with the writings produced, remains of the same opinion, that the risk which the underwriters undertook, being confessedly that on a vessel to sail on the 1st of May, was perfectly different from one on a vessel which sailed on the 23d April, inasmuch as the defenders undertook a risk on a vessel understood to be in the harbor, and safe on the 1st of May, when in fact she had been eight days at sea, refuses this petition, and adheres to the interlocutor complained of."

"*Note.*—The petitioners do not seem to dispute, that if the vessel had been taken before the 1st of May, they would have had no argument. They, however, state that the vessel was not captured till 11th May. This, in real reasoning, makes no difference, since it is a thousand chances to one that if she had not sailed till 1st May she would not have fallen in with the vessel which took her. The case of a vessel sailing the day before she is represented to sail is quite different from that of a ship being detained by unavoidable accidents beyond that day. In fact, it is an insurance on a vessel in jeopardy, when she is represented to be comparatively safe." And on the 19th of April, 1815, the Judge-Admiral modified the defenders' account of expenses to £10 1s. 4½d., and decerned against the appellants for payment of the same, and for the fees of extracting the decree.

The appellants pursued an action of reduction before the Lords of Council and Session of the foregoing interlocutors pronounced by the Judge-Admiral. This action was discussed before Lord Pitmilley, Ordinary, who pronounced an interlocutor, repelling the reasons of reduction, &c.

The appellants submitted the question to review in a representation, to which answers were given in; but the Lord Ordinary adhered to the interlocutor.

The appellants then brought these interlocutors under review of the Second Division of the Court of Session by a petition. The Lords adhered to the interlocutors complained of, &c.

The appeal was against the foregoing interlocutors.

On the part of the appellants distinctions were taken between a warranty and a representation,¹ and it was contended that the letters exhibited did not amount to a warranty, or anything more than a representation, which was not material; and that the statement of a future event, as an intended day of sailing, can be no more than an expectation. *Bowden v. Vaughan*, 10 East, 415; *Hubbard v. Glover*, 3 Camp.

¹ *Pawson v. Watson*, Cowper, 790; *Park on Ins.* c. 10, pp. 203, 205, c. 18, pp. 321, 322; *Marshall on Ins.* c. 9, s. 2, p. 342. — REP.

313; *Barber v. Fletcher*, 1 Doug. 305; ¹ *Bize v. Fletcher*, 1 Doug. 284; s. c. *Park on Ins.* 202. It was further argued, that the representation not being made *mala fide*, the policy was not vitiated by such a misrepresentation.

For the respondents it was contended, 1. That the day of sailing was a fact material to the risk, and being within the control of the appellants, a statement of intention was equivalent to a statement of fact. 2. That the vessel, having sailed on the 23d of April, was, at the time when the insurance was effected, what is termed "a missing ship." *Ratcliffe v. Shoolbred*, *Park on Ins.* 180; s. c. *Marshall on Ins.* 468; *Fillis v. Brutton*, *Park on Ins.* 182; s. c. *Marshall on Ins.* 467.

For the appellants, The *Attorney-General*,² Mr. *Abercrombie*.

For the respondents, Mr. *Wetherell*, Mr. *Denman*.

[In the course, and at the conclusion of the argument, the LORD CHANCELLOR³ made the following observations.]

The second letter, in which it is expressed that the vessel will sail on the 1st of May, was shown to the underwriters, and is it not the same thing whether the party means to misrepresent, or whether the thing actually communicated is a misrepresentation? The authorities turn upon the difference between expectation and representation. In the case of *Barber v. Fletcher* the representation is, that the ship is *expected* to sail. If the accuracy of a representation as to time is to be given up, that doctrine must apply equally to the question of place. The letter of the 2d of April speaks in terms of uncertainty as to the sailing of the "Dart" and the "Jessie," but as to the "Brilliant" the statement is positive. Do the appellants carry their arguments so far as to assert, that in cases which go beyond expectation, where there is a misrepresentation of a material fact, without a warranty or *mala fides*, the policy, according to the authorities, is not vacated? In the case of such a misrepresentation, *mala fides* is not necessary to render the contract inoperative. The principle of the judgment is the same in all the cases, although we cannot agree in all the decisions. The principle, and the application of the principle, are different things. To maintain the argument for the appellant, it is necessary to contend, that if the vessel had been captured on the 24th of April the underwriters would have been liable.

19th March, 1821. The LORD CHANCELLOR: This case resolves itself into two questions:—first, whether the representation was made, of which there is no doubt; and secondly, whether it is a representation of an expectation, or a statement as of a past fact, which is material to the risk.

I have formed an opinion upon the subject, but wish to give it further consideration; and this is the more necessary, as this branch of law is not well understood in Scotland. The case is to be determined upon a consideration of the facts, as a jury would decide under the direction of

¹ In this case the word "expected" was used. — REP.

² *Sir Robert Gifford*. — ED.

³ Lord ELDON. — ED.

a judge as to the law applicable to those facts. The question for a jury would be, Was there in this case a misrepresentation of a material fact affecting the risk covered by the policy?¹

The LORD CHANCELLOR: In the absence of the noble Lord,² who was present at the hearing of this appeal, and by his desire, I suggest, that upon inspection of the policy of insurance (which is not sufficiently stated in the printed cases), it appears to be a policy upon the ship as well as goods. It is not, therefore, like the case of *Bowden v. Vaughan*, which was cited on the argument. In that case the policy was effected by the owner of goods, and on goods only. If there should be any desire to make further observations on the matter of the policy, they may be suggested at the meeting of the House on Wednesday.

5th April, 1821. The LORD CHANCELLOR [after stating the question on the appeal]:—There is a difference between the representation of an expectation and the representation of a fact. The former is immaterial, but the latter avoids the policy if the fact misrepresented be material to the risk. After the most attentive consideration of the case, it appears to me that the judgment of the court below is right.

Judgment affirmed.

BAXTER v. THE NEW ENGLAND INSURANCE CO.

CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF MASSACHUSETTS,
1822. 3 Mason, 96.

ASSUMPSIT on a policy of insurance, dated on the 28th of September, 1821, whereby Aaron Baldwin, “for whom it may concern, and payable to him in case of loss,” procured insurance of “\$4,000, on property on board the brig ‘Robert,’ at and from Kingston, Jamaica, to St. Andrews (N. B.), four per cent on specie, and two per cent on merchandise.” Loss averred to be on the 24th of August, 1821, by pirates, of certain gold on board. Plea, the general issue.

At the trial the loss and interest in the plaintiff was proved or admitted; and the principal question was, whether there was not a misrepresentation avoiding the policy. On the 6th of August, 1821, the plaintiff (who was master of the “Robert”) wrote to C. Curry (the agent in procuring the insurance through Baldwin), “I shall leave this on the 12th inst.” On the 20th of September Curry wrote to Baldwin for the insurance, and added in a postscript, “Mr. Patterson’s brig ‘James’ has arrived with specie and produce, in thirty-two days.” On the next day Curry wrote to Baldwin, “I am informed to-day by

¹ Before the motion for judgment was finally made, the LORD CHANCELLOR intimated that the House would (if desired) hear a further argument on the terms of the policy; but the proposal was declined by the agents.—*REP.*

² REDESDALE.—*REP.*

the master of the 'James,' that she [the brig "Robert"] would not sail until four days after the 'James.'" Upon the communication of these letters the insurance was procured. In fact, the "James" sailed from Kingston on the 20th of August; the brig "Robert" sailed three or four days before that time; and the brig "John and Robert" was to sail three or four days after the "James."

It was proved that the difference of time, whether the brig "Robert" sailed before or after the "James," whether on the 12th or 24th of August, was very material to the risk, as the very delay in her passage would give rise to suspicion of her being captured by pirates.

STORY, J. I think upon this evidence the plaintiff is not entitled to recover. There has been a material misrepresentation, and whether it be innocent or otherwise does not vary the legal result. It was represented in the first letter that the brig "Robert" would sail on the 12th of August; in the second, that she would not sail until the 24th of August. In point of fact, she had sailed about the 16th of August. And this difference of time is proved to be material to the risk.

Plaintiff nonsuit.

Shaw, for plaintiff.

Hubbard, for defendant.

RICE ET AL., ADMINISTRATORS, v. NEW ENGLAND
MARINE INSURANCE CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1827. 4 Pick. 439.

ASSUMPSIT upon a policy of insurance¹ made by the defendants on the 28th of September, 1821, on property belonging to Baxter, the plaintiffs' intestate, on board the brig "Robert," of which Baxter was master, at and from Kingston, Jamaica, to St. Andrews, New Brunswick. The loss was admitted, the vessel having been piratically assailed on the voyage described in the policy, and plundered of the property.

The defence was that there was a misrepresentation as to the time of the vessel's sailing from Kingston; and it was satisfactorily proved that the fact supposed to have been misrepresented was material to the risk undertaken by the defendants.

On this point it was proved by Aaron Baldwin, who procured the policy, that on the morning of the day on which it was obtained, he received from one Currie, of Campo Bello, the agent of Baxter, two letters, one dated the 20th of September, in which he desires Baldwin to procure insurance, and states that Baxter expected to sail on the 12th of August, the other dated the 21st of September, in which he mentions the arrival of the "James" after a passage of thirty-two

¹ Baxter v. New England Ins. Co., ante, p. 234 (1822), was an action upon the same policy. — ED.

days from Kingston, and that he was informed by Hewett, the master of the "James," that the "Robert" would not sail until four days after the "James." Baldwin testified that both of these letters were handed by him to Hall, the president of the company, who read them, and with the witness calculated, from the facts therein stated, the probable time of the "Robert's" sailing from Kingston to be about the 24th of August, which would leave her out twenty-nine days, which was within the ordinary passage from Kingston to St. Andrews; whereupon the words, "Expected to sail about the 24th ult.," were inserted in the margin of the policy. Currie, before writing this letter of the 20th of September, had received a letter from Baxter, dated the 6th of August, saying, "I shall leave Kingston on the 12th;" and the vessel did, in fact, sail on the 12th, so that when the policy was effected she would have been out forty days, which was out of time. She did in fact arrive at St. Andrews on the 22d of September, but her arrival was not known.

The cause was submitted to the jury on the question whether the facts stated in Currie's letter of September 21st, of the "Robert's" having been left at Kingston when the "James" sailed from that port, and that she was to sail four or five days after the "James," were in truth communicated to Currie by Hewett by mistake, or whether Currie misapprehended Hewett and stated the facts in his letter by mistake. The defendants contended that as the information was in fact not true, the policy which was obtained upon it was void, although Currie truly stated the information he had received; but in this they were overruled, and the Chief Justice instructed the jury, that if they were satisfied from the evidence that Hewett did state to Currie the facts as related in Currie's letter, the contract was valid, notwithstanding the facts proved not to be true.¹ . . .

A verdict was found for the plaintiffs; but if the instruction to the jury was incorrect, . . . a new trial was to be granted.

Prescott and Hubbard, for the defendants.

Shaw and Bartlett, *contra*.

PARKER, C. J. . . . We are to take it as proved, then, that the information obtained from Hewett was truly and correctly represented to the president of the office; and if this be so, although the fact thus communicated was not true, there was no misrepresentation, for the insured or his agent is bound only to communicate all the information he has; and if the insurer is not satisfied with that, he may require a warranty.

Nor do we think the case proves a misrepresentation in the other point which has been urged in argument. Baxter wrote to Currie, his agent, from Kingston, and, in a postscript, stated that he should sail on the 12th of the month. Currie, in his letter of the 20th of September to Baldwin, whom he desires to procure insurance, says that he (Baxter)

¹ In reprinting the statement and the opinion, a point as to evidence has been omitted. — ED.

expected to sail on the 12th. We think that the statement of the day on which a vessel will sail, is substantially nothing more than stating an expectation that she will sail on that day. The most positive intentions to sail on any future day amount only to a strong expectation, for it must depend upon the elements and other causes affecting the sailing of vessels whether such intention shall be executed or not. And if the time of sailing be material to the risk, the insurer would be as likely to require a warranty that the vessel would sail or had sailed on the day proposed, if it were stated positively, as if stated only as an expectation.¹ . . .

We do not think that a representation that a vessel will sail on a future day is, under the circumstances of this case, a fact, but an expectation.

But even if we had not come to this opinion, the case would stand well for the plaintiffs, for the insurance was not at all influenced by the supposed misrepresentation of Baxter's information in the letter to Currie. It was on the letter of Currie of the 21st of September, in which he gives the information obtained from Captain Hewett, that the president and Baldwin made their calculations, in consequence of which the memorandum was made in the margin of the policy, "Expected to sail about the 24th of August." This necessarily superseded the prior information, because, if true, it established the fact that the vessel had not sailed until several days after the 12th, and created a probability that she would sail about the 24th; and it was upon the expectation founded on this probability that the policy was effected.

We are satisfied that, though this is an unfortunate case for the office, there is no principle of the law of insurance upon which they can be exonerated from the loss. *Judgment according to verdict.*

FLINN v. HEADLAM.

KING'S BENCH, 1829. 9 B. & C. 693.

ASSUMPSIT on a policy of insurance on ship from Liverpool to Trouserberg, loss by perils of the sea. Plea, the general issue. At the trial before Lord TENTERDEN, C. J., at the London sittings after Trinity Term, 1828, it appeared that the policy was effected in 1821 by Corrie, the agent of the owner, through Headlam and Conway, brokers, at Liverpool; that the vessel sailed on the voyage insured, and was lost by perils of the sea. For the defendant, evidence was given that when Corrie took the order for insurance to Headlam and Conway, they observed that the ship was old, and inquired what cargo was on board. Corrie answered that she was old, but had been repaired, that the cargo had been insured by the charterers in the office of B. and E., where he,

¹ Here *Dennistoun v. Lillie*, *ante*, p. 230 (1821), was discussed. — **ED.**

Conway, might obtain further information. Conway then said that if Corrie would get a certificate of her repair and seaworthiness, the insurance should be effected. A certificate was obtained, stating the ship to be strong, stiff, and stanch, perfectly seaworthy, fit to prosecute her then intended voyage, and carry a cargo of rock-salt. A clerk to Headlam and Conway swore that he first offered the risk to Hebson, an underwriter of great experience in Liverpool. That Hebson, on seeing the character of the ship in Lloyd's book, and hearing she was to carry rock-salt, said he would have nothing to do with her. The witness communicated this to Corrie, who answered that she would only carry as much rock-salt as would put her in ballast trim, and that, upon this being reported to Hebson, he subscribed the policy. On cross-examination, this witness admitted that before the policy was subscribed, the certificate of seaworthiness had been left at the office of Headlam and Conway. The ship sailed deeply laden with rock-salt, but it did not appear whether it was shipped before or after the representation made by Corrie. On this state of facts it was contended for the defendant that the policy was void on account of the misrepresentation of Corrie as to the quantity of rock-salt on board the vessel. For the plaintiff it was said that if the underwriters meant to insist upon it as part of the contract, that only a certain quantity of rock-salt should be carried in the vessel, they should have had it inserted in the policy; and that, at all events, such a representation would not affect any underwriter but Hebson, to whom it was made. Lord TENTERDEN observed to the jury that it did not appear distinctly whether the representation by Corrie was made as to the rock-salt then actually on board, or as to that which was expected to be shipped, and he advised them to find for the defendant if they thought that a material misrepresentation was made by Corrie as to the quantity then on board; but to find for the plaintiff if they thought that the representation was respecting the cargo expected to be shipped, and he desired them to say on what ground their verdict proceeded, in order that any question of law arising upon it might be argued. He observed, also, that perhaps the underwriters might be guided by the certificate of seaworthiness, and not by the representation of Corrie. The jury found a verdict for the plaintiff, and said they thought the representation was not material. In Michaelmas Term a rule *nisi* for a new trial was obtained, on the ground that the misrepresentation by Corrie was such as rendered the policy void, and that the jury ought not to have found that it was not material.

The *Attorney-General* and *Alderson* showed cause.

Brougham and *Patteson*, *contra*.

Lord TENTERDEN, C. J. It is certainly very desirable that parties subscribing a policy should take care to have inserted in it those representations which they consider the basis of their contract. The neglect to do so leads to much confusion and litigation. In the present case, no complaint has been made against the mode in which the question was presented to the jury, and if they thought that the defendant took

the risk, not on the representation that only a small quantity of rock-salt had been, or would be, put on board, but on account of the certificate of seaworthiness that had been left with the brokers, they said rightly that the representation by Corrie was not material. I am, therefore, of opinion that no sufficient ground for disturbing their verdict has been pointed out.

*Rule discharged.*¹

CUSHING BRYANT ET AL. v. THE OCEAN INSURANCE CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1839. 22 Pick. 200.

THIS was an action on a policy of insurance dated on the 10th of January, 1837, whereby the defendants caused the plaintiffs to be insured the sum of \$9,000 on the brig "Hope," for one year, to all ports and places.

The trial was before SHAW, C. J.

It appeared that the brig, which was a new vessel, sailed, after the policy attached, from Damariscotta for New Orleans, and was totally lost and abandoned at sea in March, 1837.

The defence relied on was, that prior to and at the time of effecting the insurance, Cushing Bryant, who acted as agent of the plaintiffs for this purpose, made a representation in a letter to the defendants, that he was taking in paving stones for ballast and should fill up with hay, and send the vessel to New Orleans, from which place she would go into the usual freighting business; but that instead of ballasting the vessel with paving stones and filling her up with a cargo of hay, the owners had put in a cargo of paving stones without hay, which was a much heavier and more perilous cargo, especially for a new vessel, and increased the risk.

¹ Flinn v. Tobin, Moo. & M. 367 (1829), which was tried soon after the decision of the principal case, was apparently an action against another underwriter of the same policy. The facts were substantially like those in the principal case. The arguments of counsel turned chiefly on the distinction between a misrepresentation of facts that have already occurred and a statement as to facts that are to happen hereafter. Lord TENTERDEN, C. J., in summing up, said: "I think the defendant in this case will not be entitled to a verdict, unless he satisfy the jury that there was a fraudulent misrepresentation of the cargo which the 'Andromache' was to carry. If he does so, the plaintiff cannot recover; but the mere fact of a misrepresentation, without fraud, will not be enough to prevent the plaintiff's recovering; for the contract between the parties is the policy, which is in writing, and cannot be varied by parol. No defence, therefore, which turns on showing that the contract was different from that contained in the policy can be admitted; and this is the effect of any defence turning on the mere fact of misrepresentation, without fraud. If, however, fraud was practised to induce the defendant, or the first underwriter, to sign the policy, no signatures so obtained can be binding. The question therefore is, whether you think there was any wilful and fraudulent misrepresentation made, for the purpose of getting the policy signed." The verdict was for the plaintiff. — ED.

The plaintiffs objected to the admission of the evidence of these facts, on the following grounds :

1. That it was an attempt to control and alter the terms of the policy, by evidence of proposals and negotiations which preceded it, and which were all embraced in the terms of the contract itself ; and that there being a stipulation in the policy to cover the vessel to all ports and places with any lawful cargo, it could not be restrained, by a previous proposal, to a particular employment. 2. That as a representation, it did not relate to any existing fact, but as to what was intended to be done, and could not be deemed false and fraudulent, unless made with a fraudulent intent to mislead the defendants.

It was admitted by the defendants that they did not expect to prove, that at the time when the representation was made, the plaintiffs had actually laden a cargo of paving stones on board the brig, or that there was a fraudulent intent on the part of the plaintiffs to deceive them ; but they insisted that they relied upon the representation, and had a right so to do, so that without it they would not have taken the risk, or not at the same premium, and that they were not bound by their contract unless the plaintiffs made such representation good.

Whereupon it was ruled that the evidence offered was not admissible for any other purpose than to prove a fraudulent intent on the part of the insured to mislead the defendants and to induce them to take the risk, or to take it at a lower premium than they otherwise would have done ; that as a representation, not of a fact, but of an intention, it did not avoid the policy, unless made with a fraudulent intent ; that as it related solely to the employment of the vessel within the time for which she was insured, it was not of an independent or collateral fact affecting the risk, but was embraced in the terms of the contract, and must be considered as absorbed in the contract afterwards formally executed, or as by mutual consent withdrawn and waived by the execution of the policy.

Whereupon the defendants consented to be defaulted, the default to be subject to the opinion of the whole court.

If the court should be of opinion that the evidence ought to have been admitted for the purpose for which it was offered, the default was to be taken off and a new trial granted ; otherwise the default was to stand.

Peabody, for the defendants.

C. G. Loring and *F. C. Loring*, for the plaintiffs.

WILDE, J. The sole question in this case is, whether there was any such misrepresentation made to the defendants by one of the plaintiffs, in his application for insurance, as will by law avoid the policy.¹ . . .

It has been argued that a misrepresentation will avoid a policy, whether made with a fraudulent design, or by mistake or negligence, as the insurer is thereby led into an error, and computes the risk upon false grounds. This is undoubtedly true as to all facts represented ;

¹ Here the case was stated. — Ed.

and so if facts material to the risk, and which the assured were bound to disclose, are, by mistake or negligence, not disclosed, the omission though not fraudulent would avoid the policy. And on this ground there is no doubt, that if the defendants could have proved that, at the time the representation was made, the plaintiffs had no intention to take in a cargo of hay, such a false representation would avoid the policy. Indeed, if they had no such intention it would have been a fraudulent misrepresentation. That was a question of fact for the jury to decide, if the defendants had inclined to submit it to their decision. But no representation of a party's expectation or belief, unless fraudulently made, will avoid a policy. Nor is there any distinction between a party's expectation, and intention, as to any matter relating to the voyage.¹ . . .

The defendants' counsel have endeavored to distinguish the case under consideration from that of *Bize v. Fletcher* and some of the other cases cited. In those cases, it is said, the events expected were prevented by necessity, or were not within the control of the assured; whereas, in the present case, the plaintiffs might have well carried their declared intention into effect, for aught that appears to the contrary, if they had seen fit so to do. But we do not consider this as a sound distinction. No doubt circumstances may be supposed that might justify a jury in finding that the plaintiffs' declared intention was a mere pretence, and that they in fact had no such intention. But if the intention was real, and they had a right to change their intention, there is no evidence to prove that they did not act with good faith.

If the evidence offered was intended to prove an agreement or promise not embraced in the policy, it was clearly inadmissible.

It is a familiar principle of the law of insurance that a representation is no part of the policy. It is a collateral statement of facts or circumstances relative to the proposed adventure, which may be an inducement to the contract, but is not inserted in the policy. It is said truly, that if information be stated as mere opinion, expectation, or intention, it does not amount to a representation. The information of the plaintiffs' intention as to the nature of the cargo was contained in a letter to the defendants, in which other facts were stated amounting strictly to a representation. The whole was intended as such, and must have been so understood by the defendants. But this is not material; for if the information of the plaintiffs' expectation and intention is strictly no part of the representation, it is clearly no part of the policy, and cannot avail the defendants in any manner.

It is admitted that by the principles of the common law this evidence could not be admitted, but in respect to contracts of insurance it is contended that a more liberal rule of evidence should be applied. We think there is no ground for this distinction. The reason of the rule applies to contracts of insurance, as well as to other contracts. The written contract is the best evidence of the understanding and intention

¹ Here was stated *Bize v. Fletcher*, 1 Doug. 287 (1779); s. c. *ante*, p. 216. — Ed.

of the parties. A representation or other parol evidence is admissible to explain a latent ambiguity, or to prove a usage which may affect the policy; but the like evidence is admissible in explanation of other written contracts. A case is cited, 1 Marshall (3d edit.), 352, where on insurance from Archangel to the Downs, and thence to Leghorn, with a parol agreement that the policy should not attach till a certain period, it was held, that the plaintiff could not recover in contravention of the parol agreement. In *Weston v. Emes*, 1 Taunt. 115, the court held, that this case could not be law, and expressed their opinion that it could not have been so decided.

But if the parol evidence were admissible, it could not sustain the defence. It would only prove the declaration of an intention of the plaintiffs previous to the policy, and as it was not afterwards inserted in the policy the defendants must be presumed to have taken upon themselves the risk of any change of intention; otherwise they would have required a warranty.

In *Whitney v. Haven*, 13 Mass. R. 172, it was proved by the broker that the plaintiff declared, at the time of effecting the policy, that the vessel was to sail within five days, and that the defendant said that his name should be taken off the policy, or that he would not be bound, if she did not then sail. She did not sail within the five days; and the delay was relied upon as a sufficient defence. But the court decided that the defendant could not avail himself of it, not because the delay was justified by the apprehended danger of capture, but because the stipulation was no part of the written contract; and that parol evidence was not sufficient to give it effect. This was evidently considered by the court as quite clear; and we are all of the same opinion.

We are therefore of opinion that the evidence offered in defence was not admissible, and that the ruling of the court at the trial was, in all respects, correct.

Motion for a new trial overruled.

LEWIS AND ANOTHER v. THE EAGLE INSURANCE CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1858. 10 Gray, 508.

ACTION of contract upon a policy of insurance on the schooner "Emeline," valued therein at \$6,000. . . .

A second trial¹ was had before THOMAS, J., who, after a verdict for the plaintiffs, made a report to the full court, so much of which as is material to the understanding of their decision was as follows:

The defendants in their answer alleged that "the said vessel was valued by the plaintiffs to them at the time when said policy was made, and represented by the plaintiffs to the defendants to be of the value

¹ Only so much of the case has been reprinted as relates to the second trial. — Ed.

of six thousand dollars, and upon the faith of such valuing and representations the defendants executed the said policy wherein said vessel is valued at six thousand dollars; and the defendants say that the same was a gross and fraudulent overvaluation of said vessel by the said plaintiffs;” and further alleged that “they were induced to make the policy declared upon by the fraudulent representations of the plaintiff W. G. Lewis, who represented to the defendants, in order to obtain said insurance of six thousand dollars, that he had paid five thousand dollars for the said vessel, or she cost five thousand dollars, and that he had laid out one thousand dollars on her, whereas the said vessel was bought by him for two thousand one hundred and fifty dollars.”

The defendants offered evidence tending to prove the allegations in the answer. And the presiding judge instructed the jury as follows:

“If, upon the evidence, the jury find an overvaluation, fraudulently made on the part of the assured or his agent, with the intent of destroying the property, and of recovering from the insurers the amount for which it is so valued, such a fraudulent purpose would render the contract void.

“The law requires of the parties to a policy of insurance the exercise of good faith. A misrepresentation is a false representation of a material fact by one of the parties, tending directly to induce the other to enter into the contract. This principle, applicable to all contracts, is peculiarly applicable to a policy of insurance, which is ordinarily made upon the statements and representations of the assured. A representation of what a vessel cost, or what was paid for it, is a representation as to a material fact; and if the plaintiffs, in effecting this policy, fraudulently, and in order to obtain the insurance, represented that the vessel cost \$5,000 and \$1,000 for coppering, when, in point of fact, the entire cost was \$3,150, it was a misrepresentation upon a material point, which, if false, would avoid the policy.

“But this question is to be tried upon the exact answer filed by the defendants; and that answer, as made, requires proof that the representation was fraudulent, as well as false, and, in point of fact, induced the defendants to make the contract; that the defendants had taken this burden on themselves; and that the burden in this matter was on the defendants.”

Sohier & C. W. Loring, for the defendants.

Choate & Richardson, for the plaintiffs.

MERRICK, J. The representation made by the plaintiffs, upon obtaining insurance upon their vessel, that it cost them five thousand dollars and one thousand more for coppering, was of and concerning facts material to be known by the underwriters; and, if false, avoided the policy which they had issued, and relieved them from all liability thereon. Upon this point the instructions given to the jury were correct. But the instructions went further than this; and it was ruled that, upon the exact answer filed by the defendants, they must prove, in order to avoid the policy, not only that the representation made by

the plaintiffs was false, but that it was also fraudulent. This, we think, would necessarily have been understood by the jury as importing that the alleged fraud was a distinct subject of inquiry, not to be deduced from the mere proof of the false representation relative to the cost of the vessel; and that unless this fraud was established by other evidence, they would not be warranted in finding a verdict for the defendants. There is nothing in their answer, which imposes upon the defendants the burden of proving this fact, in addition to the fact of a false representation, in order to maintain their defence. It is true that they allege in general terms that the representation of which they complain was falsely and fraudulently made. But whether this representation was designedly and intentionally erroneous, and made with the corrupt purpose of gaining an undue advantage or not, is immaterial in relation to the question at issue between the parties; for if it was false, it clearly exonerated the defendants from the performance of the contract on their part, and wholly avoided the policy. It is unnecessary to multiply citations in support of this position, because, as is remarked by Mr. Phillips in his treatise on insurance, the doctrine is constantly assumed, and runs through the whole jurisprudence on the subject, that material representations having reference to past or existing circumstances discharge the underwriters from all liability in respect of the risks to which they relate. 1 Phil. Ins. §§ 537, 677; *Elton v. Larkins*, 5 Car. & P. 385. The ruling of the court, therefore, which required the defendants to produce proof of the fraudulent character, as well as of the falsity, of the plaintiffs' representations concerning the cost of their vessel, in order to sustain their defence, must be held to have been erroneous; and for this cause only, as the instructions which were given to the jury appear in all other particulars to have been unexceptionable, the verdict for the plaintiffs must be set aside, and a

New trial granted.

THE HARMONY FIRE AND MARINE INSURANCE COMPANY v. HAZLEHURST.

COURT OF APPEALS OF MARYLAND, 1869. 30 Md. 380.

APPEAL from the Superior Court of Baltimore City.

The appellant in this case was sued by the appellee on a policy of insurance effected upon the steamer "Richmond." The facts are sufficiently stated in the opinion of the court.

L. L. Conrad and S. Teackle Wallis, for the appellant.

Geo. H. Williams and John H. B. Latrobe, for the appellee.

BARTOL, C. J. At the trial of this cause, the Superior Court rejected the prayers on both sides, and gave instructions to the jury upon the law of the case. Two prayers having been asked by the appellant, the

defendant below, of which the second was granted substantially and embodied in the court's instructions, the only questions presented on this appeal arise upon the first prayer of the defendant, and the instructions given to the jury.

The suit was instituted upon a policy of insurance on the steamer "Richmond," underwritten by the appellant. The only matter in controversy grew out of alleged misrepresentations affecting the risk, as to the age and rate of the steamer, which had been made by Cole, the insurance broker, in his application to the Phoenix Insurance Company, for insurance on the same steamer in behalf of another party, and which it is alleged the appellant acted on, in executing the policy now in question.

The evidence was conflicting as to the truth of the alleged representations; no fraud or bad faith was charged against any of the parties concerned in procuring the policy.

But the defence rested on the ground that the appellee was bound by the representations made by Cole, and if they were relied on by the appellant in executing the policy, and were found by the jury to be untrue in any particular which they might find to be material to the risk, the appellee would not be entitled to recover, although they were made in good faith. This defence is presented by the appellant's first prayer.

The general proposition as to the effect of a material misrepresentation in avoiding the policy was not denied; but the particular point presented by that prayer, upon which the dispute arose, was whether upon the evidence of the witnesses Bedell and Cole, the appellee was bound in law by the representations alleged to be untrue. The evidence shows that Cole, an insurance broker in Baltimore, made an application to the Phoenix Insurance Company of New York for an insurance on the steamer "Richmond," for and on behalf of Jacob Brandt, Jr. On that application was indorsed a description of the steamer stating her age, and her rate as "A, No. 1." Those representations as to her age and rate, though made in good faith, were alleged to be untrue, and evidence was offered tending to prove that she was much older, and her true rate was lower, and the single question arising upon the prayer was whether the appellee was bound by the representations so made.

There was no evidence that Carey, the appellee's agent, made any representations whatever to Cole concerning the age or rate of the steamer when he applied to him to procure insurance, or that he authorized Cole to make any representations to the appellant, or that he, Carey, had any knowledge that any representations on that subject had been made by Cole to the Phoenix Insurance Company. All the evidence shows that in the application for insurance made by Cole on the appellee's behalf, and in the procuring of the policy in question, no representations whatever were made. The fact that the appellant in taking the risk acted upon representations which had previously been made by Cole to a different company, and in behalf of another party with whom the

appellee was not in privity, could not in any manner affect the rights of the appellee — there being no evidence that the appellee's agent ever adopted such representations, or had any knowledge of them.

The single fact upon which the appellant relies to hold the appellee bound by the representations made by Cole, is that when his agent Carey called on Cole for the purpose of obtaining insurance he was informed by Cole that he had a negotiation pending in New York for insurance on the steamer for other parties, and would communicate with him when he heard from New York about it. But Cole did not state that he had made any representations on behalf of such other parties, nor was Carey bound to inquire as to that matter, being a stranger to the transaction. His was a distinct and independent application on behalf of the appellee, unaccompanied by any representations whatever; and if the appellant, in acting upon that application and assuming the risk, chose to rely upon representations which had been made on behalf of other parties, in their application to a different company for insurance, and without the knowledge of the appellee or his agent, the rights of the appellee under the contract would not be affected thereby; and for these reasons we think the first prayer of the appellant was properly rejected.

The only error alleged by the appellant in the court's instruction consists in its having submitted to the jury to find, as necessary to the defence, that the appellee adopted the acts of Cole in making the representations before spoken of. The objection to that part of the instruction taken at the trial, and relied on as cause for reversal, is that the court thereby submitted to the jury a question of law.

If that were so, it would present no ground for a reversal in the present case, as the appellant could not have been injured thereby. *Hanson v. Campbell*, 20 Md. 223, 233.

Unless the acts of Cole had been adopted by the appellee, he was not bound by them. So far as such adoption was sought to be established as a legal inference to be deduced from the evidence, it was a question of law, and was correctly decided by the court below in passing upon the appellant's first prayer.

And there being no evidence of any such adoption in fact, no injury could result to the appellant by reason of the court's submitting that question to the jury.

*Judgment affirmed.*¹

¹ On the topic of this section, see also : —

Driscoll v. Passmore, 1 B. & P. 200 (1798);

Suckley v. Delafield, 2 Caines, 222 (1806);

Clason v. Smith, 3 Wash. C. C. 156 (1812);

Reid v. Harvey, 4 Dow, 97 (1816);

Mackintosh v. Marshall, 11 M. & W. 116 (1843);

Anderson v. Pacific F. and M. Ins. Co., L. R. 7 C. P. 65 (1872);

Durkee v. India Mutual Ins. Co., 159 Mass. 514 (1893);

Nova Scotia Marine Ins. Co. v. Stevenson, 23 Can. S. C. 137 (1894). — ED.

SECTION II.

Fire Insurance.

COLUMBIA INSURANCE CO., PLAINTIFFS IN ERROR, v. LAWRENCE, WHO SURVIVED POINDEXTER.

SUPREME COURT OF THE UNITED STATES, 1836. 10 Pet. 507.¹

THE case is stated in the opinion of the court.

Jones, for the plaintiffs in error.

Swann and *Berry*, for the defendant.

STORY, J., delivered the opinion of the court.

This is a writ of error to the Circuit Court of the District of Columbia, for the county of Alexandria.

The original action was *assumpsit*, brought by the defendant in error against the insurance company, upon a policy of insurance, against fire underwritten by the company, on the 9th of April, 1823, whereby the company insured for the defendant in error, and his partner, Poindexter (since deceased), \$7,000 on their stone mill, called the Elba Mill, four stories high, situated on an island about a mile from Fredericksburg, in Virginia. The declaration averred a total loss by fire, on the 14th of February, 1824.

There was a former suit brought on the same policy, against the company, in which the plaintiff obtained a verdict and judgment. That judgment was brought before this court on a writ of error, in January term, 1829; and the judgment was reversed. The cause will be found fully reported, with the grounds of the reversal, in the second volume of Mr. Peters's Reports, 2 Pet. 26, *et seq.* One of the grounds of that reversal was the omission, before the suit was commenced, to procure a certificate from a magistrate, in compliance with the ninth fundamental article of the rules of the company, upon which the policy was made; and to which those rules were annexed, as a part of the conditions of the contract. On the 14th of February, 1829 (after the reversal and the reason thereof were made known), being five years after the loss, a new certificate was obtained from Mr. Hooe, a magistrate of the county in which the mill was situated. The original suit was afterwards discontinued in the Circuit Court, on the 5th of November, 1830. The present suit was afterwards commenced in September, 1831.

In the court below, various pleas were interposed by the company, upon some of which there were issues to the country; and others, which were special, eventuated in demurrers. Upon the former, a verdict was at the trial found for the plaintiff; and upon the latter (as

¹ The case has been reprinted from 12 Curtis's Decisions, 216. — ED.

well as upon the verdict), judgment was ultimately pronounced in favor of the plaintiff. Bills of exceptions were also taken at the trial upon various points of law raised in argument; and the correctness of the ruling of these points, raised both upon the special pleadings and upon the trial of the issues of fact, are upon the present writ of error brought before us for revision. All the leading facts of the case, except the new certificate of Hooe before mentioned, and the testimony of Joseph Howard (which will hereafter be a subject of comment, upon the inquiry as to his competency), are precisely the same as were before us upon the writ of error in 1829. And as the testimony of Howard, if admissible, does not in our opinion at all vary the operation and pressure of the point of law in the case, we deem it unnecessary to do more than to refer to the case, as reported in Peters's Reports, for all the material facts.¹ It may be proper, however, to state, that it was

¹ In *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25, 44-48 (1829), the facts as to the misrepresentation of title were thus stated in the opinion of the court by MARSHALL, C. J.:—

"The mill insured was built on an island in the Rappahannoc, which was demised by Charles Mortimer to Stephen Winchester, for three lives, renewable forever, at the yearly rent of £80 (\$266.66); with a condition of re-entry for rent in arrear, etc.

"1801, Dec. 19. S. W. conveyed one undivided third part to Richard Winchester, and another undivided third part to Joshua Howard.

"1806, May 9. R. and S. Winchester conveyed to Joshua Howard, by deed of mortgage in fee, their two-thirds of the said island, with other property to a considerable amount, in order to secure the said Howard to the amount of \$40,000.

"1813, Jan. 27. Joshua Howard conveyed the whole island to William and George Winchester.

"1813, Sept. 23. William and George Winchester conveyed the island to Joseph Howard and Joseph W. Lawrence.

"1818, July 22. Joseph Howard entered into an agreement with Joseph W. Lawrence, by which the said Lawrence was to take the island, etc. at the price of \$30,000; for which amount in debts, due from Howard & Lawrence, he was to procure a release; on his doing which, Howard was to execute a deed for the property; on the failure or inability of Lawrence to procure this release, the contract was to be void.

"1822, Nov. 28. Joseph W. Lawrence enters into an agreement with Thomas Poindexter, Jun., for the sale of one-half of the island, mills, etc.; for which the said Poindexter agrees to assume and take upon himself one-half the debts due from Howard & Lawrence to the banks in Fredericksburg; which were secured by a deed of trust.

"Nov. 29. An agreement between Howard and Lawrence to work the mills in partnership.

"By the deeds of January 27, and Sept. 23, 1813, all the title of Joshua Howard to the island on which the mills insured were erected, passed to Joseph Howard and Joseph W. Lawrence. What was that title?

"He held one-third part in his own right, and the remaining two-thirds as mortgagee.

"The agreement of July 22, 1818, between Howard and Lawrence, does not appear to have been performed on the part of Lawrence; nor is there any evidence of his ability to perform it: but it does not appear that Howard has taken any step to avoid it, or has asserted any title in himself.

"The agreement of Nov. 28, 1822, between Lawrence and Poindexter, admits Poindexter to an undivided moiety of any interest Lawrence might have in the property.

"Lawrence & Poindexter then, when the insurance was made, were entitled to one-third of the property under the deed made by Charles Mortimer, and to the remaining

then decided that there was no waiver by the company of their right to the preliminary proofs, required by the ninth article of their rules; and that the assured had an insurable interest.¹ . . .

The next question which arises is, whether there has been, in the proposal for the insurance, a misrepresentation of the interests of the assured in the property insured; and if there has been, whether if that misrepresentation is material to the risk, and would have enhanced the premium, it avoided the policy. The proposal for insurance describes the property and interest thus: "What premium will you ask to insure the following property, belonging to Lawrence and Poindexter, for one year, against loss or damage by fire, on their stone mill, four stories high, covered with wood, situate, etc." It was decided by the court, in the former case, in 2 Pet. 47, etc., that the real interest existing in Lawrence and Poindexter, at the time of the proposal, was not such as is described therein. It was further decided by the court, in the same case, that a misrepresentation of the interest of the assured, which is material to the risk, would avoid the policy. The language of the court on that occasion was: "The contract for insurance is one in which the underwriters generally act on the representation of the

two-thirds as mortgagees; but one moiety of the whole, which moiety was derived from Joseph Howard under the agreement of July 22, 1818, was held under an agreement which had not been complied with, and which purported on its face to be void if not complied with; but the other contracting party had not declared it void, nor called for a compliance with it.

"It cannot be doubted, we think, that the assured had an interest in the property insured. Lawrence had an unquestionable title to a moiety of one-third, subject to the rent reserved in the original lease, and to a moiety of the remaining two-thirds as mortgagee. He had such title to the other moiety as could be acquired by an agreement for a purchase, the terms of which had not been complied with.

"The title is thus stated, because those words which declare the contract to be void if Lawrence should fail to comply with it, do not, we think, render it absolutely void, but only voidable. No time for performance is fixed; and if Howard is content with what has been done by Lawrence, and does not choose to annul the contract, the underwriters of this policy cannot treat it as a nullity. Lawrence, having this title under an executory contract, sells to Poindexter one undivided moiety of the property. These two persons, being both in possession, partly under legal conveyances and partly under executory contracts, require an insurance on it against loss by fire. . . .

"The original offer for insurance was in these words, 'What premium will you ask to insure the following property belonging to Lawrence & Poindexter, for one year against loss or damage by fire? On their stone mill four stories high, covered with wood, on an island about one mile from Fredericksburg in the county of Stafford; the mill called Elba mill. Seven thousand dollars are wanted. Not within thirty yards of any other building, except a corn house, which is about twenty yards off.'

"The policy states that the underwriters insure Lawrence & Poindexter against loss or damage by fire, to the amount of \$7,000 on *their* stone mill, etc.

"The declaration charges that the defendants insured the plaintiffs \$7,000 against loss or damage by fire on *their* stone mill, etc.; and avers that they were interested in, and the equitable owners of the premises insured as aforesaid, at the time the insurance was made as aforesaid, &c." — ED.

¹ In reprinting the opinion, passages not bearing on misrepresentation of title have been omitted. — ED.

assured; and that representation ought, consequently, to be fair, and to omit nothing which it is material for the underwriters to know. It may not be necessary that the person requiring insurance should state every encumbrance on his property, which it might be required of him to state if it was offered for sale. But fair dealing requires that he should state everything which might influence, and probably would influence, the mind of the underwriter in forming or declining the contract, etc. Generally speaking, insurances against fire are made in the confidence that the assured will use all the precautions to avoid the calamity insured against, which would be suggested by his interest. The extent of this interest must always influence the underwriter in taking or rejecting the risk, or in estimating the premium. So far as it may influence him in these respects, it ought to be communicated to him. Underwriters do not rely so much upon the principles as on the interest of the assured; and it would seem, therefore, to be always material, that they should know how far this interest is engaged in guarding the property from loss."

We think this reasoning entirely satisfactory, and founded in the true exposition of the contract of insurance. Whenever the nature of this interest would have, or might have a real influence upon the underwriter, either not to underwrite at all, or not to underwrite except at a higher premium, it must be deemed material to the risk; and if so, the misrepresentation or concealment of it will avoid the policy. One of the tests, and certainly a decisive test, whether a misrepresentation or concealment is material to the risk, is to ascertain whether, if the true state of the property or title had been known, it would have enhanced the premium. If it would, then the misrepresentation or concealment is fatal to the policy. Now, at the trial of the present case, the counsel for the insurance company, in their second bill of exceptions, prayed the court to instruct the jury, that if they "find from the evidence that a full disclosure of the actual title of the insured in the premises, as it existed at the time, was material to, and would have considerably increased the estimate and value of the risk and premium; and that no other disclosure of the same was made than as aforesaid [*i. e.* in the offer of insurance], then there was a material concealment, which avoids the policy." The court, being divided in opinion, did not give this instruction to the jury, and it was consequently refused. In our opinion, upon the principles already stated, it ought to have been given; and the refusal was an error for which the judgment must be reversed. But the court rightly rejected the instructions upon the same subject asked in the first bill of exceptions, which proceeded upon the ground that if there was any misrepresentation of the interest of the assured, that alone, whether material or not to the risk, would avoid the policy. The instruction asked upon the same subject, in the second bill of exceptions, is still more objectionable, as it called upon the court to declare to the jury, as matter of law, that the non-disclosure of the true nature and extent of the title and interest of the assured

in the premises, was a concealment of circumstances materially affecting the risk, which avoided the policy, thus taking from the jury the proper examination of the fact, whether it was material to the risk or not. . . .

The judgment of the Circuit Court must be reversed for the error already stated; and the case remanded, with directions to the court to award a *venire facias de novo*.

CARPENTER v. THE AMERICAN INSURANCE COMPANY.

CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF RHODE ISLAND,
1839. 1 Story, 57.

THIS was an action of assumpsit on a policy of insurance upon the Glenco Factory and machinery, underwritten by the American Insurance Company at Providence, on the faith of certain representations contained in letters written by Samuel G. Wheeler to the Insurance Company. At the time that the policy was underwritten, he and his brother Henry M. Wheeler were proprietors of the factory and machinery under the copartnership name of Henry M. Wheeler & Co. The policy bore date on the 12th of December, 1836, and was as follows:

"The American Insurance Company, &c., do insure Henry M. Wheeler & Co. against loss of damage by fire to the amount of six thousand dollars, to wit: fifteen hundred dollars on the Glenco Cotton Factory, water-wheel and fixed machinery, thirty-five hundred dollars on movable machinery, and one thousand dollars on stock contained therein. Said factory is situated in Livingston, New York. This insurance is made with reference to letters of S. G. Wheeler, dated the 14th November and 6th December, 1836, with knowledge of additional insurance on the same property by the Providence Washington Insurance Company to the amount of fifteen thousand dollars, and with the agreement that the assured may assign this policy to Epenetus Reed," &c.

The whole interest of Samuel G. Wheeler and Henry M. Wheeler was by a subsequent assignment transferred to Jeremiah Carpenter, the present plaintiff, and indorsements thereof were made on the policy as follows: "1837, Dec. 14th. Samuel G. Wheeler by letter dated this 13th Dec. 1837, certifies, that he has transferred his interest in the Glenco Factory and machinery to Jeremiah Carpenter, and thereupon it is agreed that the within policy shall be for his benefit and not that of said Wheeler. See letter to Jeremiah Carpenter, Dec. 14th, 1837." And subsequently, "1838, May 4th, Assignment by Henry M. Wheeler and Samuel G. Wheeler of their interest in this policy to Jeremiah Carpenter. See letter to Samuel G. Wheeler, May 4th, 1838."

The policy was subsequently renewed by Wheeler & Co. on the 18th December, 1837; by which renewal it was to continue in force for one year from the 12th of December, 1837; and again by Jeremiah Carpen-

ter on December 11th, 1838, by which it was to continue in force from December 12th, 1838, to December 12th, 1839.¹ . . .

The factory and machinery were afterwards destroyed by fire on the night of April 9th, 1839, and this action was brought to recover the insurance.

Rivers and Whipple, for the plaintiff.

Pratt and Atwell, for the defendants.

STORY, J., delivered the opinion of the court as follows. We are clearly of opinion that the policy in this case, having been obtained upon a misrepresentation of the material facts, is utterly void. The original proposal for the insurance by the letter of the 14th of November, 1836, referred the defendants to the description of the property at Providence Washington Insurance Company's office, at which it was insured for \$15,000, the property being therein valued at \$19,000. The defendants after examining that policy and description declined, by the letter of the 17th of November, to take the additional sum proposed, upon the very ground that the sum already insured thereon was as much as was proper to be taken on such a valuation. In order to induce the defendants to take the risk the letter of the 6th of December, 1836, represented, that since the original insurance was made, additions had been made to the factory, &c., fully equal to \$10,000. Upon the faith of this statement the present policy was underwritten. It now turns out that this representation is utterly untrue (whether by design or by mistake is not material), and no such additions have been made since the former policy. No one can doubt the materiality of this representation; for it was the very point (the increased value) upon which the policy was underwritten. It seems to us, therefore, that this makes an end of the case; for a false representation of a material fact is, according to well-settled principles, sufficient to avoid a policy of insurance underwritten on the faith thereof, whether the false representation be by mistake or by design.

It is suggested that the misrepresentation was in fact unintentional and without any fraudulent design, and that Epenetus Reed (the mortgagee) for whose benefit the insurance was made, was entirely ignorant of the misrepresentation; and that, under such circumstances, his rights under the policy ought not to be prejudiced thereby. But this suggestion cannot avail for the plaintiff, or for Reed. The misrepresentation made by an agent in procuring a policy is equally fatal, whether made with the knowledge or consent of the principal or not. The ground in each case is the same. The underwriters are deceived. They execute the policy upon the faith of statements material to the risk, which turn out to be untrue. The mistake is, therefore, fatal to the policy, as it goes to the very essence of the contract.²

The plaintiff discontinued his suit, and costs were awarded to the defendants.

¹ The letters summarized in the opinion have been omitted. — ED.

² *Acc.*: *Continental Ins. Co. v. Kasey*, 25 Gratt. 268 (1874). See *Ring v. Phoenix Ass. Co.*, 145 Mass. 426 (1888). — ED.

DENNISON *v.* THOMASTON MUTUAL INSURANCE
COMPANY.

SUPREME JUDICIAL COURT OF MAINE, 1841. 20 Me. 125.

THIS was an action upon a policy of insurance against fire upon the plaintiff's dwelling-house and store, &c., in Washington Block, in the city of Bangor, bearing date Jan. 5, 1837.

On the trial of the cause, before SHEPLEY, J., the plaintiff introduced the policy of insurance, which was in the usual form. Among the conditions of insurance referred to, and made a part of the policy, was this: "No insurance will entitle the insured to any indemnity for loss or damage, if the description by the applicant of the building or property insured be materially false or fraudulent; or if any circumstance material to the risk be suppressed," &c.

In the application for insurance, in reply to the inquiry, "what distance from other buildings?" the answer given (so far as material to this case) was, "east side of the block, small one-story sheds, and would not endanger the building, if they should burn." To the inquiry, "what are the buildings occupied for, that stand within four rods? how many buildings are there, to the fires of which this may in any case be exposed?" no answer was given.

Warren Preston, Esq., called by the plaintiff, testified that he was the agent of the insurance company when the policy was taken out; that the plaintiff called upon him to obtain insurance, and was informed that the company were not inclined to take property in the city; that he wrote to the company, stating generally the situation of the buildings, and received an answer, saying, that "Mr. Dennison had better forward an application to enable the president to decide understandingly;" that he handed the plaintiff a blank application to be filled up; that the plaintiff requested him, the witness, to fill it up, saying, he did not understand it; that he went with him into the building and the back part, so that he could see all the buildings in the rear, and having seen them, he made out the answers to the questions; that both of them came to the conclusions therein stated; that he sent on the application and representation so made out and signed by the plaintiff, and received in return the policy, which he handed the plaintiff; that on Monday after the fire, the plaintiff came and notified him of the loss, and he, by his request, and within ninety days, wrote the company, stating the facts in relation to the loss.

It appeared from the testimony introduced by the plaintiff, that fronting on Wall Street, and east of the building insured, stood a two-story wooden building, about thirty by sixty feet, occupied for stores, belonging to one Prince; and that from the back wall of the building insured to the rear of the wooden building designated as Prince's, the

distance was fifty-nine feet; that north of Prince's, and separated by a passage of four feet, stood a wooden building belonging to one Call, which fronted on Wall Street; that the building insured fronted Main Street, was of brick, three stories on Main and four stories high in the rear towards Wall Street; that in the rear of the building, and between it and Prince's, stood a one-story wood-shed; that northerly and adjoining stood another brick building, similar to the one insured, called Richards' building, and in the rear of that also a wooden shed; that the fire commenced in the second story of Call's building, and extended to Prince's, and thence to the wooden shed in its rear; that the fire took on the coving of Richards' building, from Call's building, and extended from thence to the plaintiff's; that the wood-shed in rear of Richards' building was on fire when the fire took first in Richards' building; that all these buildings were burnt, except a wood-shed torn down; that there was but little air, except that caused by the fire; that it was ebb-tide, and that the wells were not to be depended upon.

There was evidence, likewise, that all the wooden buildings were on fire when the coving caught. There was likewise testimony as to the condition of the fire department, and its exertions in relation to the extinguishing of the fire.

There was much evidence in relation to the fire and the situation of the buildings; but as the facts sufficiently appear from the opinion of the court and the preceding statement, it is not fully reported.

A verdict was found for the plaintiff, subject to the opinion of the court, whether the plaintiff, on this testimony, or so much of it as may be legally admissible, is entitled to recover; the defendants' counsel objecting to all that part of it relating to the condition of the fire department and its exertions, and the statements of its members and others relating to those matters. If the plaintiff is entitled to recover, judgment is to be entered on the verdict; and if entitled to recover interest from an earlier date than sixty days after affidavit furnished and notice annexed, the verdict is to be amended accordingly.

Preble, for the defendants.

Rogers and *Cutting*, for the plaintiff.

WHIRMAN, C. J. A verdict was taken for the plaintiff subject to the opinion of the court, upon a report of the judge, before whom the trial was had, of the evidence and rulings by him made in the progress of the trial. And it is agreed that such judgment shall be entered, either upon the verdict or upon nonsuit, as the court may deem reasonable.

The action is upon a policy of insurance against fire, underwritten by the defendants, on the dwelling-house of the plaintiff, situated in Bangor, which was consumed by fire. The defendants, for their defence, rely upon what they consider to have been a misrepresentation made at the time the policy was effected. The misrepresentation alleged is contained in the answer to a written interrogatory, propounded to the plaintiff, as to the distance of other buildings from the premises insured. The answer was in these words: "East side of the block are small one

story wood-sheds, and would not endanger the buildings if they should burn."

In evidence, it appeared that small sheds projected out from near the back part of the brick block of buildings (one of which was the house in question) twenty-four feet, being twelve feet in width, and eight feet stud; and leaving a passage-way in the rear of them of fourteen feet wide, adjoining some two-story wooden buildings, standing on another street, forty-nine feet from the plaintiff's house, and in which the fire which consumed the plaintiff's house originated.

The first question which arises is, was this a misrepresentation, or was there a suppression of the truth tantamount thereto, and material to the risk. It does not seem to be necessary, in order to avail the defendants in their defence, that the misrepresentation or suppression of the truth should have been wilful. If it were but an inadvertent omission, yet if it were material to the risk, and such as the plaintiff should have known to be so, it would render the policy void.

In the case at bar, it has now been rendered undeniable that the burning of the two-story buildings on another street endangered the plaintiff's house; and to the interrogatory propounded it now would seem that the existence of those buildings might, with propriety, have been stated. But this does not prove that, before the occurrence of the fire, it would have been deemed material to name them, as being near enough to put the plaintiff's house in jeopardy. It is not an unfrequent occurrence, after a disaster has happened, that we can clearly discern that the cause which may have produced it would be likely to have such an effect, while, if no such disaster had occurred, we might have been very far from expecting it. In this case, it is essential to determine whether the plaintiff was bound to have known that a fire originating in the two-story wooden buildings would have endangered the burning of his house. If, as a man of ordinary capacity, he ought to have had such an apprehension, then he ought to have named those buildings in reply to the interrogatory propounded; for what a man ought to have known, he must be presumed to have known. This knowledge, in a case like the present, must have been something more than that, by possibility, a fire so originating might have endangered his house. This kind of knowledge might exist in regard to a fire originating in almost any part of a city like Bangor; for a fire originating in an extreme part of it, if the wind were high and favorable for the purpose, might endanger all the buildings, however remote, standing nearly contiguous one to another to the leeward of it. Any danger like this could not have been in contemplation when the interrogatory was propounded. Such buildings only as were so nearly contiguous as to have been, in case a fire should originate therein, productive of imminent hazard to the safety of the plaintiff's dwelling, could have been in view by the defendants. And the question is, were the two-story wooden buildings of that description?

In reference to this question, it may not be unimportant to consider

that the defendants, at the time when this policy was effected, had an agent residing in Bangor, whose business it was to attend, in their behalf, to the applications for insurance from that quarter. It may be believed that the selection of this individual was the result of knowledge with regard to his intelligence and capacity for such purpose. It was not, however, his business, perhaps, to prepare representations to be made by applicants for insurance. But it did so happen that he assisted the plaintiff in preparing the answers to the standing interrogatories, one of which is the interrogatory before named, intended to produce a representation upon which to found the estimates of the propriety of assuming the risk proposed. He, it seems, examined the premises, looked at the wood-sheds and the two-story wooden buildings beyond them. To him it did not seem to have occurred, that the vicinity of those buildings was such as to render it necessary that the two-story wooden buildings should be named in answer to the interrogatory; for he, at the request of the plaintiff, penned the reply thereto as he thought proper.

It does not appear that any witness has testified that, anterior to the disaster, he should have anticipated such an event as within the range of probability. What other individuals of intelligence did not foresee to be likely to occur, could not reasonably be expected of the plaintiff. And what he could not be expected to know, he cannot be considered as culpable for not knowing. And what he could not be expected to apprehend, he could not be bound to communicate; and, in not communicating any such fact, he could not be considered as guilty of concealing it, even inadvertently, and much less wilfully.

As to the wooden sheds, they were named; and the description given of them is precisely in conformity to the truth. They were named, however, in connection with an opinion, that if they took fire, they would not endanger the house. There is, then, no misrepresentation with regard to their existence. The misrepresentation complained of, in reference to them, is merely in matter of opinion. But opinions, if honestly entertained and honestly communicated, are not misrepresentations, however erroneous they may prove to be. That this opinion was uttered *bona fide*, and in perfect singleness of heart and purpose, may well be believed, and may fairly be deducible from the fact that it was expressed in concurrence with the unquestionable belief, at the time, of its correctness, by the confidential friend of the defendants. An opinion so uttered, if not in good faith, might well be complained of, as it might tend to throw the defendants off their guard. In such case, it might tend to show a fraudulent design, and, in connection with evidence of misrepresentation of facts, even short of what otherwise might be necessary to vacate a contract, would be likely to have that effect.

But it is by no means clear, if the fire had not originated elsewhere than in the sheds, that it would have been attended with essential danger to the main building. The neighbors and firemen of the city

might be expected to be able to extinguish a fire so originating. Such buildings are easily pulled to pieces; and an engine brought to bear upon them would do great execution. It may therefore, even now, be very questionable whether the opinion complained of may not be adopted as well founded to a very considerable extent at least.

As to the testimony of the witnesses touching the condition of the fire department and its exertions, and whatever relates thereto, we see no ground from thence arising to question the correctness of the finding of the jury. The most that can be said of that part of the evidence is, that it is irrelevant, and not of a tendency to influence a jury one way or the other.

We are of opinion, therefore, that judgment must be entered upon the verdict, with interest as agreed.¹

ALSTON v. THE MECHANICS' MUTUAL INSURANCE COMPANY.

COURT OF ERRORS OF NEW YORK, 1842. 4 Hill, 329.

ERROR to the Supreme Court. The action in the court below was upon a fire policy on a building and some personal property belonging to the plaintiff, which bore date August 27, 1838. The term of insurance was five years, commencing at the date of the policy. In the policy, the building was described as a brick dwelling-house and shop; and, after setting forth the size of the building and its height above the basement, the policy added — "which basement is privileged as a cabinet-maker's shop." The personal property covered by the policy consisted of "stock in trade in the cabinet business," household furniture, wearing apparel, and family stores. Among other conditions contained in the policy was this: "If the said David Alston [the plaintiff] shall make any misrepresentation or concealment, or if such building or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, this policy shall be void and of no effect." After issue joined in the court below the cause was referred.

On the hearing, the plaintiff gave in evidence the policy, the preliminary proofs of loss, &c., and then called one Pratt, who testified as follows, viz.: Witness knows the building described in the policy; it was burned down the last of August, 1838; plaintiff occupied the house, and had for some time occupied it as his own. It was totally destroyed except the brick. Witness made out an estimate of the cost of the house, and it amounted to \$1,781, &c. Plaintiff is a cabinet-maker and had tools, stock in trade, &c. His shop was in the basement of the

¹ *Acc.*: Standard Oil Co. v. Amazon Ins. Co., 14 Hun, 619 (1878).

See *Greet v. Citizens' Ins. Co.*, 5 Ontario App. 596 (1880); and *Campbell v. Victoria Mutual Fire Ins. Co.*, 45 Upper Canada Q. B. 412 (1880). — *ED.*

building. The witness further testified, on cross-examination, that he lived near the house and saw the fire. The first he saw of it, it appeared to be in the basement,—i. e. in the shop. This was between nine and ten o'clock in the evening. A fire was kept in the shop, sometimes in the fireplace and sometimes in the furnace,—a portable furnace, for cooking and heating glue.

The defendants then called Lyman Garfield, their secretary, who testified to the following facts: On the 27th of August, 1838, the plaintiff called on the witness for the policy of insurance, the application for it having been sent in sometime previously. Witness told the plaintiff the company had concluded not to accept the proposals; adding, that he [the witness] understood the plaintiff was using a fire in the fireplace of the cabinet-maker's shop [the basement story of the building] and that the house had before taken fire from that cause. The plaintiff inquired where the president of the company [Mr. Starbuck] resided. Witness informed him; whereupon the plaintiff left, and in about half an hour returned with the president. Some conversation then ensued, and the plaintiff finally said: "I will abandon the use of the fireplace; I have got a stove and will use that." Witness understood him he had a stove in the basement. Upon this statement, we agreed to give him the policy, and did give it to him.

Mr. Starbuck, the president, was then called by the defendants and gave a more full statement of the conversation at the time alluded to by Garfield. He testified, among other things, that after the plaintiff was informed of the company's unwillingness to accept the risk, the plaintiff said: "Suppose I should abandon the fireplace in the basement, would you then take it?" Witness thereupon consulted with the secretary, and then spoke to the plaintiff, who said he would abandon the fireplace in the basement altogether; that he would not use it himself nor suffer any other person to use it, but would use a stove which he had. Witness and Mr. Garfield then told the plaintiff if he would do that, they would take the risk, and it was taken accordingly. The building burned up two or three days afterwards. The using of a fireplace in the basement, instead of a stove, was material to the risk.

The above testimony of Garfield and Starbuck was objected to by the counsel for the plaintiff in due season; but the referees were of opinion that it was admissible, and therefore overruled the objection.

It appeared from other evidence given, that the plaintiff used the fireplace in the basement, for the purpose of cooking, the next day after the policy was delivered. His affidavit forming a part of the preliminary proofs of loss contained this clause: "I occupied at the time [of the fire] the basement or lower rooms [of the building] as a cabinet-maker's shop, for the manufacturing of furniture, and believe, according to the best of my knowledge, that the fire originated in the last-mentioned basement rooms, where I was at work late at night varnishing furniture, a fire being on the hearth at the time for that purpose," etc.

The referees reported in favor of the defendants, and the plaintiff afterwards moved the court below to set aside the report, but the motion was denied. A report of the case in that court, together with the opinion there delivered on denying the motion, will be found in 1 Hill, 510 *et seq.* After judgment, the plaintiff sued out a writ of error.

E. C. Littlefield and *A. Taber*, for the plaintiff in error.

S. Stevens, *contra*.

WALWORTH, Chancellor. The loss in this case was clearly covered by the terms of the policy. Those terms unquestionably embraced a loss by fire arising from the use of the basement of the premises as a cabinet-maker's shop, which included the ordinary use of fire for varnishing and the melting of glue. The policy also, by implication at least, gives the assured the right to occupy and use the basement as it was used at the time when the insurance was made; for it contains an express provision that if the premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, the policy shall be void. And the attempt now is to prove, by parol, that the assured, at the time this contract of insurance was made, agreed that he would thereafter occupy this basement room in such a manner as to render the risk less hazardous than it was at the date of the policy. The question then arises whether this supposed agreement, which, if actually made and if there has been no misunderstanding between the parties as to its nature and extent, was of itself a part of the contract of insurance and should have been inserted in the written policy, as a condition or warranty, can be converted into what the defendant's counsel calls a promissory representation; and thus avoid the policy on the ground that the assured has not performed his part of the agreement, when no such agreement is either expressed or implied in the written policy which was executed by the agents of the insurance company.

Marshall, who I admit is a writer of very considerable authority on the law of insurance, does indeed speak of two different kinds of representation, one of which he calls an affirmative and the other a promissory representation. But I have not been able to find any case in which a court has adopted this distinction. And the only other writer on the law of insurance, who appears to have considered a representation as a contract between the parties, is Ellis. He says "a representation in insurance is in the nature of a collateral contract." (Ellis's Law of Fire and Life Ins. 29.) I have examined Millar, Weskett, Annesley, Hughes, Evans, Park, Beaumont, Phillips, Emerigon, Blaney, Quenault, Grun & Joliat, Vincens, Lafond, Persil, Merlin, Pardessus, Boulay Paty, and the works of some other English and foreign writers on the subject of marine, fire, and life insurances; and so far as they say anything on the subject, I find them to concur in saying that misrepresentation, in reference to insurance contracts, is a false affirmation as to some fact, material to the risk; which affirma-

tion is made by the assured, or his agent, either from a mistake as to the fact represented, or with a design to deceive the insurer.

Annesley says, if there be a misrepresentation, it will avoid the policy, as a fraud; but not as a part of the agreement, as in the case of a warranty. And if the representation is false in any material point, even through mistake, it will avoid the policy; because the underwriter has computed the risk upon circumstances which did not exist. (Ann. on Ins. 124.) Blaney says, it is necessary that the contracting parties should have equal knowledge, or ignorance, of every material fact or circumstance which may or can affect the insurance. And if on either side there is any misrepresentation, *allegatio falsi*, or *suppressio veri*, which would in any degree affect the amount of the premium or the terms of the engagement, the contract will be deemed fraudulent and absolutely void. (Blan. on Life Assurance, 59.) Evans states the difference between a representation and a warranty to be, that the one induces an error in regard to the subject of the contract, and the other is a stipulation of the contract itself. And he divides representations into but two classes,—those which are intentionally false, and misrepresentations through mistake. (Evans' Law of Ins. 58, 64.) Hughes speaks of a representation as the assertion of a material fact which the insured knows to be false, or which he makes in an unqualified manner without knowing whether it is true or not. (Hughes' Law of Ins. 345.) Phillips, an American writer, whose treatise on the law of insurance stands deservedly high, says, a representation is a material fact stated before completing the contract; and a misrepresentation is the statement of such a fact which turns out not to be true. (1 Phil. on Ins. 90.) And Mr. Justice Park, lately one of the English judges, a recent edition of whose valuable work on marine insurances and insurances on lives, and against fire, has been published by Barrister Hildyard, places misrepresentations under the head of frauds in policies. He divides them into two classes,—representations intentionally false, and the misstatement of a material fact by mistake. And he defines a representation to be a state of the case; not a part of the written instrument, but collateral to it and entirely independent of it. He also says, if there be a misrepresentation, it will avoid the policy as a fraud, but not as a part of the agreement. (1 Park on Ins., 8th London ed. 404, 433; see also Quenault des Assur. Terrestres, 289, No. 374, 375; Persil Traité des Assur. Terr. 297, No. 210, 211; Grun & Joliat des Assur. Terr. 260, No. 208; and 2 Boulay Paty Cours de Droit Commercial Maritime, 87, tit. 10, § 14.) Chancellor Kent also, in his brief notice of contracts of insurance, speaks of two kinds of misrepresentations only: those which are intentional and avoid the contract for actual fraud on the part of the assured or his agents; and those which arise from mistake or oversight, which do not affect the policy unless they are untrue in substance and are material to the risk. (3 Kent's Com. 283.) It is hardly possible to suppose that if there was such a term known to the

law of insurance as a promissory representation, rendering the contract void for the non-performance of a stipulation in the nature of a collateral executory agreement, which the parties did not think proper to make a part of the written contract, it would have been passed over in silence by all the writers I have referred to.

Nor do I find any such thing as a promissory representation mentioned in the decisions of the courts.¹ . . .

These cases therefore show that a statement as to a future fact or event which is in its very nature contingent, and which the insurer knows the party could not have intended to state as a known fact, but as an intention or expectation merely, if honestly made and not with an intent to deceive, is not a collateral contract or a promissory representation which the assured is bound to see performed to render his policy valid. But if the underwriter considers the statement material to the risk, and is unwilling to insure at the contemplated premium without binding the assured to the performance of it as a condition precedent to his liability, he should make it a part of the contract stated in the policy.

Where the assured acts in good faith without any intent to deceive, and without concealing or misstating any fact within his knowledge which it is essential to the underwriters to know, to enable them to judge of the propriety of assuming the risk and the amount of premium and other conditions of the policy, common justice requires that the party who pays the premium should be informed, by the terms of the written agreement, what is the real contract between him and the underwriters, and it should not be left to the uncertain recollection of any one to prove a different agreement from that which is contained in the written policy. For it frequently happens that where negotiations are carried on between parties, and they suppose they understand one another as to the terms of the bargain, they find, when they come to reduce their agreement to writing, that they do not understand it alike. It is for this reason that parol proof is not admissible to vary or alter the terms or the legal meaning of a written contract, by showing what either party said while the negotiation was going on. Fraud, misrepresentation, and deceit are necessary exceptions to this general rule; but there is no good reason why anything which is in fact a part of the contract between the parties, should form an exception to the rule in an insurance case.

The case now under consideration, I am inclined to think, shows the importance of adhering rigidly to this rule in insurance cases as well as others. For although I have no reason to suppose the president and secretary of the company have not stated the supposed agreement

¹ Here were discussed *Bize v. Fletcher*, *ante*, p. 216 (1779); *Macdowell v. Fraser*, *ante*, p. 218 (1779); *Curell v. Mississippi M. & F. Ins. Co.*, 9 La. 163 (1836); *Dennis toun v. Lillie*, *ante*, p. 230 (1821); *Baxter v. New England Ins. Co.*, *ante*, p. 234 (1822); *Rice v. New England Marine Ins. Co.*, *ante*, p. 235 (1827); *Bryant v. Ocean Ins. Co.*, *ante*, p. 239 (1839), and *Allegre v. Maryland Ins. Co.*, 2 Gill & J. 136 (1830). — Ed.

in relation to the use of the fireplace, exactly as they understood it, I have great doubts whether the plaintiff understood that he was to be precluded by that agreement from using the fireplace to heat his glue-pot and warm his varnish; or that he was to remove his cooking apparatus from the basement room the instant the policy was signed, without giving him a reasonable time to put up his stove for cooking in another part of the house. It must be recollected that the conversation took place in dog-days, when a stove was not wanted to warm his shop; but when his family were using the fireplace in that room for family purposes. He therefore most probably spoke in reference to that use of the fireplace, when he said he would abandon the fireplace and use his stove. And as the president and secretary do not themselves agree in respect to the words he used, it is possible that both have misapprehended what he did in fact mean to say on the subject; or he may have inadvertently used language which did not properly express what he intended to agree to on the subject. That he understood he was to abandon the use of the fireplace for cooking, is very probable. For it appears the family only cooked there until the next day, when he had probably gotten his stove up in another part of the house, or had made some other provision for the necessary fire for family purposes. And if he thus discontinued cooking in the fireplace in good faith, immediately after he had obtained his insurance, it is hardly probable that he would have used the fireplace for the temporary purpose of varnishing, if he had understood that his agreement with the officers of the insurance company extended so far as to embrace such a use. By the terms of his policy, the basement was privileged as a cabinet-maker's shop, which of course included the necessary use of fire for gluing and varnishing.

In *Whitney v. Mayer* (13 Mass. Rep. 172), the Supreme Court of Massachusetts decided that the underwriter could not set up a parol agreement between the parties, which was not inserted in the policy, to defeat the insurance; but that if the underwriter intended to avail himself of it, he should have made it a part of the written contract. A similar decision was made by Lord Tenterden in *Flinn v. Tobin* (1 Mood. & Malk. Rep. 369). And in this case, no one who reads the testimony can for a moment doubt that a promise to abandon the fireplace and use a stove, was an agreement, and not a representation of a fact. I think the referees erred, therefore, in receiving parol evidence of such an agreement to defeat the policy; and that their report should have been set aside and a *venire de novo* awarded.

The judgment of the court below is therefore erroneous, and should be reversed.

BOCKEE, Senator. There is no rule better settled than that "parol evidence shall not be admitted to contradict, add to, or vary the terms of a written instrument." Whether the admission of the testimony of Garfield and Starbuck was a violation of this rule is the only point to be inquired into. If the evidence was properly admissible, or if the

stipulation or agreement given in evidence had been contained in the policy, the case would present such a violation of contract on the part of the plaintiff in error as would probably bar him from a recovery. It is not denied that a fraudulent representation, material to the risk, might be proved by parol, and would avoid the policy. Fraud is an element that vitiates all contracts. A representation is of some matter extrinsic the contract, and generally, if not always, relates to the present state and condition of the subject insured. The proof shows that the plaintiff said "he would abandon his fireplace in the basement altogether; he would not use it himself or suffer any other person to use it for any purpose whatever, but would use a stove which he had." It is contended by the defendant's counsel that this is a promissory representation, fraudulently made, material to the risk, and that the non-fulfilment of it precludes the plaintiff from recovering on the policy. How such a promissory representation, relating to a thing which the party is to do *in futuro*, is to be distinguished from a contract or agreement, I am unable to comprehend. It is a representation in no other sense than every contract, promise, or agreement is a representation that the party will do or refrain from doing a particular thing. By whatever name it is called, it is neither more nor less than an engagement that fire should not be used in the basement fireplace. If this had been contained in the policy, it would have been a warranty, binding upon the plaintiff. Being out of the policy, it is no more than conversation between the parties, inadmissible as evidence of their rights under this written contract. If it was material to the risk, it was material that it should be inserted in the policy, or at least that the evidence of it should be in writing. It was essentially a part of the contract, — a stipulation by the plaintiff adding to and varying the terms of the policy. It can hardly be said that a contract is both written and verbal. To admit parol evidence in this case would be breaking down a salutary and established rule; and there would be no longer any security in written contracts. In the case of *Bize v. Fletcher* (Douglas, 284), cited by the court below, the question was not on the admissibility of parol evidence of a promissory representation, but whether a writing annexed to the policy was to be considered a part of the contract, and therefore a warranty to be strictly performed; or whether it was to be taken as a representation, collateral to and out of the policy. So in the case of *Edwards v. Footner* (1 Camp. 530), where a ship was to sail with a certain number of guns and men, the question was whether a written memorandum not attached to the policy was to be considered a warranty or a representation. The precise question before this court is not whether a promissory representation may exist, but whether parol evidence of such representation can be given, where, if the representation was included in the policy, it would be a warranty, and where the effect of the evidence will be to add to and vary the written contract between the parties. On this question, perhaps no decision can be found in the

books exactly in point, for the reason that the rule applicable to the case is one of the most ancient landmarks of the law of evidence and has never been questioned or disturbed. The policy of insurance was the highest evidence of the contract between these parties, and parol evidence to show the contract variant from what appears by its terms in writing, would be productive of dangerous consequences and was improperly received. The decision of the court below ought to be reversed.

The PRESIDENT and Senators DICKINSON and HOPKINS delivered oral opinions in favor of reversing the judgment of the court below.

All the members of the court, nineteen being present, concurring in this result, the judgment was unanimously reversed.¹

DAVENPORT *v.* NEW ENGLAND MUTUAL FIRE INSURANCE COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1856. 6 Cush. 340.

In this case, which was argued by *T. D. Eliot*, for the plaintiff, and *T. G. Coffin* and *C. B. Farnsworth*, for the defendants, the material facts appear in the opinion of the court.

FLETCHER, J. This is an action of assumpsit on a policy of insurance, dated March 3d, 1846, by which the defendants, a company established by the laws of New Hampshire, insured a building of the plaintiff's in New Bedford for \$2,500 for the term of three years. The building was destroyed by fire on the 15th of May, 1848.

The case was opened to the jury, and a verdict taken for the defendants, subject to the opinion of the whole court, upon the facts to be reported; the court to draw such inferences therefrom as a jury might draw. There were several grounds of defence relied upon, of which it is necessary to refer only to one, which is quite decisive of the case. At the time the insurance was made the estate was encumbered by two mortgages, upon which large sums of money were due. In the printed application, signed by the plaintiff, there is this question distinctly put to him, to wit: "is the property encumbered;" to which the plaintiff gave a written answer, in the negative. The defendants now insist that the policy is void, on account of this misrepresentation.

The plaintiff contends that this misrepresentation is immaterial, because the defendants are a corporation created by the laws of New Hampshire and established in that State, and therefore would have no lien on the property by the statute of this Commonwealth; and that a law of New Hampshire would not operate, in this Commonwealth, to

¹ *Acc.*: Kimball *v.* Ætna Ins. Co., 9 Allen, 540 (1865).—ED.

give the defendants a lien, if there were any such law in that State, which was denied. As the defendants, therefore, would have no lien on the property, the plaintiff maintains that the misrepresentation as to the encumbrances is immaterial.

But, irrespective of the lien, whether the defendants would or would not have one, the misrepresentation was clearly a material misrepresentation. It was material for the insurers to know of the encumbrances, in reference to the responsibility of the insured, and his ability to meet his engagements to the company; it was material to know who was interested in or had any title to the estate; but more particularly and especially was it material for the defendants to know what interest the plaintiff himself had in the premises, and whether his estate was encumbered or unencumbered.

It is manifest that the defendants deemed this information material; and they put the direct question, and it was a proper and a practical question; and it was material that the plaintiff should answer it truly. The plaintiff having given an untrue answer, whether by accident, mistake, or design, it matters not, to a direct, plain, and practical question, cannot now be heard to say it was immaterial.

*Judgment on the verdict.*¹

COLLINS v. CHARLESTOWN MUTUAL FIRE INSURANCE COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1857. 10 Gray, 155.

THOMAS, J. This is an action of contract upon a policy of insurance on a lead mill. The parties insured were Benjamin Collins and George L. Stearns, partners under the firm of Collins & Stearns. Collins, the plaintiff, is a mortgagee of the premises, to whom the policy was payable in case of loss. The making of the policy and the loss by fire within the term being admitted, the defendants rely upon two grounds of defence. First, that there was a misrepresentation in the application of the assured as to the title of the estate. Secondly, a representation and warranty as to the use to which the building was then and should be thereafter applied, and a breach of that warranty and representation.

1. The estate was conveyed by deed to George L. Stearns, one of the partners. The legal title was in him. In the application signed by Collins and Stearns, in answer to the question, "Do you own the land upon which the buildings stand?" the answer is "Yes." The policy secures a lien upon the land and buildings. One of the pro-

¹ Acc.: Ryan v. Springfield F. & M. Ins. Co., 46 Wis. 671 (1879). See Byers v. Farmers' Ins. Co., 35 Ohio St. 606 (1880). Compare Strong v. Manufacturers' Ins. Co., 10 Pick. 40 (1830). — Ed.

visions of the by-laws is, that "the policy shall become void and of no effect, if the application shall not contain a full, fair, and substantially a true representation of all the facts and circumstances respecting the property, so far as they are within the knowledge of the assured and are material to the risk."

So far as respects the lien, the insurance company is not affected. The property is owned by one of the parties to the note. Each partner is liable *in solido*. The lien is therefore perfect. Nor is it easy to see how it was material to the risk, whether the title to the estate was in one or both the partners.

But though the legal title to the land was in one of the partners, the equitable title was in the firm. Stearns held the estate in trust for the partnership. By the written articles of copartnership, Collins was to be charged on the books of the partnership with one-half of the cost of the mill. Upon the books of the partnership, Stearns was credited with the agreed value of the mill. The estate became part of the capital of the firm. It was the property of the firm, though the legal title was in one of the partners only. Such was the state of the title when the application was made. In the statement that Stearns & Collins owned the estate we see no misrepresentation material to the risk.

The case of *Smith v. Bowditch Mutual Fire Ins. Co.*, 6 Cush. 448, is quite distinct from that at bar. By the 17th article of the by-laws of that company it was provided that any policy issued by the company should be void unless the true title of the insured should be expressed in the application for insurance; and the plaintiff had no legal title to the estate of which he represented himself the owner. He had only a bond for a deed. No lien therefore was secured. Nor was the true title of the insured expressed in the application.

In the case of *Davenport v. New England Mutual Ins. Co.*, 6 Cush. 340, in answer to the question whether the estate was encumbered, the answer was in the negative, the estate being at the time subject to heavy mortgages. The case of *Bowditch Mutual Fire Ins. Co. v. Winslow*, 3 Gray, 431, is to the same point. It goes no further.

In *Allen v. Charlestown Mutual Fire Ins. Co.*, 5 Gray, 384, the distinction is made between the preceding cases and one in which the statement as to title was substantially correct, and where the difference, if any existed, did not impair the lien of the company or otherwise affect the risk.

But, as if to free the case before us from difficulty, in January, 1854, the partnership was dissolved. Collins transferred his interest in all the assets of the partnership to Stearns. The dissolution and conveyance were made known to the insurance company, and on the 24th of March, 1852, with full knowledge of the facts, they indorsed on the policy this agreement: "Agreed that this policy shall from this date stand good to George L. Stearns." And we think it does stand good, unless there is force in the second ground of defence, which is misrepresentation of the purpose for which the building was to be used.

2. To the question, "For what purpose occupied, and by whom?" the answer is, "By the applicants, for the manufacture of lead pipe only."

The defendants offered evidence to show that the attic of the building was used for the manufacture of reels upon which the lead pipe is coiled. But the answer, and we think satisfactory answer, made by the plaintiff was, that the making of the reels upon the premises was a necessary and essential part of the manufacture of lead pipe. The evidence was submitted to the jury under these instructions: "that the term 'manufacture of lead pipe' would include all that was reasonably necessary and essential for carrying on the business of manufacturing lead pipe in the building insured; that if, for the proper and reasonable carrying on of the business, it was essential to manufacture reels upon the premises, by the machinery and in the manner proved, the representation that the building was used for the manufacture of lead pipe only was sufficient; that the mere fact that it was more economical or convenient to make reels upon the premises was not sufficient to authorize the insured to make such use of the premises." These instructions seem to us entirely correct.

In this view of the case, the question whether the word "only" was contained in the application becomes immaterial. It does not change the force of the words "manufacture of lead pipe," or exclude anything essential to it.

*Judgment on the verdict for the plaintiff.*¹

E. D. Sohler and *H. G. Hutchins*, for the defendants.

W. G. Russell, for the plaintiff.

DICKSON v. THE EQUITABLE FIRE ASSURANCE CO.

QUEEN'S BENCH OF UPPER CANADA, 1859. 18 U. C. Q. B. 246.

ACTION, on a policy of insurance, for \$1,100, against fire, upon a wooden building, comprising a tavern and two tenements under the same roof, occupied as dwelling-houses. The risk taken was from the 16th of March, 1858, for a year.

There was another sum of \$900, insured in the Western Assurance Company upon the same property for the same period, with the knowledge and assent of the defendants.

The plaintiff averred that the premises were totally destroyed by fire within the year.

Pleas. — 1. *Non est factum.* 2. That the policy was obtained by fraud, the plaintiff having in his application to the defendants falsely represented the present cash value to be £750, whereas the building was of much less value.

¹ On the first point, see the cases cited *post*, p. 276, n. 1. On the second point, see *Sims v. State Ins. Co.*, 47 Mo. 54, 63 (1870). — ED.

At the trial, at Toronto, before ROBINSON, C. J., it appeared that there was a driving-shed attached to the buildings insured, which was insured, as well as the other buildings, in the Western Assurance office. This was stated in the evidence to have been worth about £100; and when the plaintiff applied for insurance to the Western Assurance Company, he stated all the buildings to be worth from £300 to £350. In his application to these defendants, made ten days afterwards, he declared the other buildings alone, without the driving-shed, to be of the value of £750. The whole formed a range of wooden buildings under one roof, about 116 feet long by 30 feet wide.

On the part of the plaintiff, the only evidence of value was given by a carpenter, who valued the buildings insured by the defendants at \$2,500, but he made up his estimate after they had been totally consumed. He stated that he had been in the building while it was standing, but had never gone through it. Part of this range of wooden buildings had a stone foundation under it, and that afforded a guide in regard to the dimensions of that part. He did not know the interior arrangements of the buildings, and took all his information from the account given to him by the plaintiff, no one being present on the part of the defendants. He could not recollect the size of the building, and could not state what portion of the \$2,500 he had allowed on account of the main building, the tavern.

On the other side, the defendants put in the plaintiff's affidavit of the loss by fire, in which he swore that the tavern and two other tenements were worth \$2,089. They called a witness, who swore that he was a carpenter; that he had worked in the building insured; that he had made an estimate of the value of all the buildings since the fire; that he considered the tavern and two dwellings to be worth \$1,200, and no more, and the driving-house about \$400; and he had made an offer to rebuild the whole for \$1,600.

The learned Chief Justice told the jury that it was for them to determine from the evidence, whether, when the plaintiff made his application to the defendants for insurance, he could have believed that he gave a true account of the value, when he declared that the tavern and small tenements were worth \$3,000; that however it might have happened that the plaintiff gave so exaggerated an account of the value in his application to the defendants, whether it was from any mistake of his or not, it was fair towards the defendants to consider that if they were misled by it, and in consequence took a risk which they might otherwise have thought it imprudent to take, they ought not to be held liable, even although there might be no direct evidence of a fraudulent design in the plaintiff, because the defendants would equally be imposed upon. The jury were out a long time, and came in with a verdict for the plaintiff for the full amount insured.

Galt, Q. C., obtained a rule *nisi* for a new trial, on the ground that the verdict was against law and evidence, and the judge's charge.

M. C. Cameron showed cause.

ROBINSON, C. J., delivered the judgment of the court.

This is certainly a singular case in its facts. The buildings were all totally consumed, and yet the plaintiff only estimated his loss at \$2,089, and even that is between \$300 and \$400 more than a witness swore he had offered to restore them for. Moreover, what the defendants had been asked to insure did not include one of the buildings burnt, — namely, the driving-house. On what pretence the plaintiff, after having declared the value of the whole range of buildings to be from £300 to £350, when he obtained his first insurance for \$900, could go only ten days afterwards to the office of these defendants, and declare the value of a portion only of the building (that is, leaving out the driving-shed) to be \$3,000, or £750, it is certainly hard to understand. One can easily understand a probable motive to this over-valuation in the plaintiff's application, for having told these defendants (which he did) that he was already insured to the extent of \$900 on buildings worth only \$1,400, he could not have expected to be able to effect with them a further insurance of \$1,100 on the same buildings. How the plaintiff came to make such a statement of the value was not explained. It was sworn that the statement was filled up from his dictation. It seemed to me at the trial that so remarkable a misrepresentation on a point very material to be considered in deliberating upon the risk, must be looked upon in law as a fraudulent misrepresentation that will avoid the policy, although it might possibly have happened from some unexplained mistake of the plaintiff. It had all the effect that actual and intended fraud would have in misleading the defendants, and it seems to us that it ought to be attended with the same consequences, as respects the plaintiff's right to recover. It would have been folly in the defendants to have taken an insurance to an amount which, added to the former insurance, would exceed the value of the building insured by about £150, and this a wooden building in part occupied as a tavern.

Though this case certainly seems to be very strong against the plaintiff's right to recover under such circumstances, we have had some doubt about setting aside the verdict, for there is a manifest difference between marine risks and risks upon buildings. Ships when insured are generally not in a situation to be inspected and examined by the insurer, who is therefore obliged to depend on the account of the ship given by the owner, but it is not so with buildings on shore. The company or their agent has generally convenient means of inspecting them, seeing their real condition, and judging of their value; and it seems in this case to have been careless and imprudent, in the defendants' agent, to take no trouble of the kind, though he admits that he had gone past the building. It would be hard on the insured if he should lose the benefit of his policy in such a case, because after the loss there might be a difference of opinion about the real value of the buildings; but, on the other hand, when the circumstances are so striking as they are here, and the over-valuation so manifest, it should hardly lie in the plaintiff's mouth to say to the defendants, "You should not have put confidence

in my representation, and since you did not choose to examine for yourselves, you have no right to complain of being deceived."

Whether upon the facts proved here there was so plain and so material a misrepresentation made by the plaintiff as ought to avoid the policy, though not upon a point respecting which there is any warranty or condition in the policy, is a question that must be left to the jury, because they alone can draw inferences of fraud; but it is of consequence that their verdict should in such cases conform to the evidence.

We think that what the law regards as a fraudulent overvaluing [is] required to be proved in order to support the plea, and that the evidence was so strong to lead to the conclusion in this case that there ought to be a new trial, with costs to abide the event.

*Rule absolute.*¹

FRANKLIN FIRE INSURANCE CO. v. VAUGHAN.

SUPREME COURT OF THE UNITED STATES. OCTOBER TERM, 1875.
92 U. S. 516.

ERROR to the Circuit Court of the United States for the Eastern District of Arkansas.

Mr. *U. M. Rose*, for the plaintiff in error.

Mr. *Albert Pike*, *contra*.

Mr. JUSTICE HUNT delivered the opinion of the court.

In seeking to recover the amount insured upon his goods destroyed by fire the insured was bound to prove only his policy, his loss, and the service of preliminary proofs. This proof he made.

The insurance was for \$2,500. The jury found the value of the goods destroyed by fire to be \$7,204.

Defence is made on the ground of a violation of that condition of the policy which provides, that "if the interest of the assured in the property is not absolute it must be so expressed in the policy, otherwise the insurance shall be void," and of a misstatement in answering that there was no encumbrance on the property insured.

The insured had bought the goods of one Flowers. They were in the store of Harris & Co., auctioneers, at the time of the purchase, and were left there for sale by and under the direction of Vaughan, the purchaser. It was agreed by him that the first proceeds of the sale should be paid to the vendor to the amount of \$3,150; and if the auctioneers advanced money upon the stock they were authorized to retain the possession and control of the goods as their security. There is no evidence or claim that any such advance was made.

¹ This case has since been again tried, and a second verdict having been rendered for the plaintiff, on evidence not differing materially from that given at the first trial, the court refused to disturb it. — REP.

We see nothing in the writing produced to justify the claim that the property insured was encumbered, or that any person other than the vendee had any interest in it, or that the title of the insured was not absolute. The property was sold to the insured in April, 1873; and the evidence showed that when so sold it was in the auction store of Harris & Co. for sale. The goods remaining there, the purchaser took possession and proceeded to make sale of them as was also proved on the trial. The writing produced contains no limitation of Vaughan's title, and expresses no right of possession or control in any person other than himself, except in the event that Harris & Co. should make advances. The paper stipulated that Harris & Co. might hold the possession and control of the goods as security for their advances. There was no such stipulation in favor of the vendor. He did not profess to retain any right in the goods or any control over their possession. So far as he was concerned, Vaughan had the full power of disposition. His claim was upon the money realized from the sales. To bring his claim into enjoyment it was necessary that sales should first be made, and Vaughan, and Harris & Co., as the agents of Vaughan, were intrusted with this duty. The goods were, and the proceeds of the goods when sold would be, the property of Vaughan. His agreement as to the proceeds did not affect his title or estate. While it is possible that in the event of a fraudulent combination to defraud him, Flowers might have invoked the aid of a court of equity in securing the proceeds of the sales, there is nothing to affect the present title of his vendee. It may be likened to the familiar case of an insurance upon a house in the name of the mortgagor, which he promises to hold for the benefit of the mortgagee. While under certain circumstances equity would interfere in behalf of the mortgagee, it can scarcely be doubted that until the occurrence of such circumstances the mortgagor is the owner of the policy and its fruits.

A defence was also sought to be made on the ground of the over-valuation of the goods by Vaughan when he obtained the insurance. The policy was preceded by an application in this form: —

“ Application of James L. Vaughan for insurance, &c., in the sum of \$6,000, on the property specified; the value of the property being estimated by the applicant.

| Valuation. | Sum to be insured. | Rate. |
|-------------------------|--------------------|----------------------|
| On stock, &c., \$12,000 | \$6,000 | 3-10 of 2 per cent.” |

Which statement was signed by Vaughan and agreed to be true so far as it was known to him, and so far as it was material to the risk. This was on the 23d of March, 1873. The fire occurred on the fifth day of May, 1873.

The sale of goods after the purchase and before the fire amounted to the sum of \$653. The jury found the goods which were actually destroyed to have been worth \$7,204. These two sums show the value of the goods; to wit, \$7,857.

The value of the goods was to be estimated by the applicant. He gave this estimate at \$12,000; and there is not the slightest evidence that such was not his honest estimate of their value. Insurance agents as well as other persons know with what partiality most men estimate their property, and how much more valuable they esteem it when their own than when it is their neighbor's. They do not object to this principle when the premiums are received for issuing policies. It is only when losses occur that they seek to apply the more rigid test of actual value.

The value of a stock of goods is not always, nor usually, indicated by its purchase price. Such goods are often bought in the country to sell at retail and at a profit. What may be expected to be obtained for them under such circumstances may reasonably be considered their value; and that the owner and purchaser should estimate them at much more than he gave for them, and should hope and expect to make large gains and profits upon their sale, was, no doubt, understood by the agent making the insurance.

The counsel for the plaintiff in error, in his brief, concedes that it is not every over-valuation which will avoid a policy; but he objects to the charge of the judge, that, to produce this result, the over-valuation must be "grossly enormously" in excess of the truth. It is hardly just to the judge holding the circuit, or to the claimant, that the charge should rest upon this statement. The judge undoubtedly said, "If the valuation was grossly enormously in excess of the value of the goods, then the burden is cast on the plaintiff of showing that he acted honestly and in good faith in making the valuation, and that it was not made for any fraudulent purpose or with any fraudulent intention, but was an honest and unintentional error." He did not, however, say that nothing less than this would have that effect. He said also, "The law exacts the utmost good faith in contracts of insurance, both on the part of the insured and the insurer; and a knowing and wilful over-valuation of property by the insured, with a view and purpose of obtaining insurance thereon for a greater sum than could otherwise be obtained, is a fraud upon the insurance company that avoids the policy. . . . It is a question of good faith and honest intention on the part of the insured; and though he may have put a value on his property greatly in excess of its cash value in the market, yet if he did so in the honest belief that the property was worth the valuation put upon it, and the excessive valuation was made in good faith, and not intended to mislead or defraud the insurance company, then such over-valuation is not a fraudulent over-valuation that will defeat a recovery."

Looking at the whole charge, as we must do, we think the jury were correctly instructed, and that there was nothing said which the company can properly except.

*Judgment affirmed.*¹

¹ *Acc.*: Behrens v. Germania F. Ins. Co., 64 Iowa, 19 (1884); and Baker v. State Ins. Co., 31 Oregon, 41 (1897).

Contra: Bobbitt v. L. & G. Ins. Co., 66 N. Car. 70, 79-81 (1872).

Compare *Catron v. Tennessee Ins. Co.*, 6 Humph. 176 (1845); and *Lycoming Fire Ins. Co. v. Rubin*, 79 Ill. 402 (1875).

In *Insurance Co. of North America v. McDowell*, 50 Ill. 120, 126-128 (1869), WALKER, J., for the court, said:—

"It is urged that the mill was overvalued at the time the application was made. . . . We are at a loss to perceive how such a statement in the application can be material, provided the risk taken is less than its value, or where the value at the time of loss exceeds the amount covered by the insurance. To hold that an over-valuation vitiates a policy, without reference to its value at the time of the loss, would be to hold that a mere diversity of opinion in reference to value might render a policy obtained in the most perfect good faith void, simply because the assured had placed a higher estimate on his property than that fixed by his neighbors.

"As a matter of prudence and precaution against loss, these companies may, and perhaps do, endeavor to avoid insuring property at more than its value, so as to thereby avoid all temptation to carelessness and destruction of the property. But at the same time there is no law prohibiting such bodies from insuring property at its full, or even an over-value. Nor have these companies inserted any condition that an over-value shall avoid the policy.

"Nor can it be said that where the owner is mistaken in the value of his property, and places it too high in his application, he intended to defraud the company. A survey is generally made by the agent of the company, and if regarded too high, and as a matter of importance, the agent should then object. After examination he can, of course, determine whether he regards the value fixed in the application as too high. In this case the local agent who issued the policies swears that he went through and carefully examined the mill, and we must presume that he had some knowledge of the value of the property, and if it was regarded important by the company to know its value the agent could have learned it upon inquiry. The agent accepted the application without objection and received the premiums and paid them to the companies. It would be unprecedented to permit the companies to receive an application, issue a policy, receive the premium, and then say we knew that your policy was void when we received your money, and that whilst you in good faith relied upon the validity of your policy we knew that we had incurred no risk. And where the agent knows or can judge of the value of the property, and accepts an application without objection, even if the valuation is higher than it should be, we cannot say that it is so far material as to vitiate the policy."

In *Redford v. Mutual F. Ins. Co.*, 38 U. C. Q. B. 538, 541-542 (1876), HARRISON, C. J., for the court, said:—

"It is not, however, every answer to every question in an application for insurance which is to be deemed and taken as an assertion or representation of a fact. See *Benham v. The United Guarantie and Life Ass. Co.*, 7 Ex. 744; *Anderson et al. v. The Pacific Fire and Marine Ins. Co.*, L. R. 7 C. P. 65.

"The question may be so put as to ask for a mere statement of opinion, and the question, looking at its subject-matter, may be of that character that an opinion only shall be deemed to be given, and thus not held to be the assertion or representation of a fact, so as in the event of innocent exaggeration to avoid a policy.

"No man can generally do more than state his opinion as to the value of property. There is nothing about which there may be greater difference of opinion among men than the value of real estate. The owner of real estate generally sets a higher value upon it than another, and this simply because it is his own, and he flatters himself to be better off in the world than he really is,—a mistake very commonly made by men in all conditions of life.

"A man may be able to state with something like absolute accuracy the distance of his house from any other building, the material of which his house is built, the number of stoves therein contained, and other matters of description, the accuracy of which before the making of the representation may be absolutely tested.

"But when a man is called upon to speak of the value of that which he has no desire to sell,—a value which fluctuates from year to year, if not from day to day,—

FARMERS' MUTUAL FIRE INSURANCE COMPANY v.
FOGELMAN.

SUPREME COURT OF MICHIGAN, 1877. 35 Mich. 481.

ERROR to St. Joseph Circuit.

H. H. Riley, for plaintiff in error.*John B. Shipman*, for defendant in error.

GRAVES, J. Defendant in error took a policy from the company August 11th, 1869, on a barn and other property situated on a farm in he can only speak in language of approximation; he can do no better than state his belief or opinion.

"It would be well for insurance companies not to rely too much upon representations as to value, but rather to inspect for themselves before accepting risks. . . .

"Unless the evidence show the over-valuation to have been intentional and fraudulent the over-valuation does not usually affect the policy, and for this reason, that the statement as to value is not so much the assertion of a fact as the expression of an opinion. See *Dickson v. The Equitable Fire Assurance Co.*, 18 U. C. Q. B. 246; *Park v. The Phoenix Ins. Co.*, 19 U. C. Q. B. 110."

In *Harrington v. Fitchburg Mutual F. Ins. Co.*, 124 Mass. 126, 130-131 (1878), LORD, J., for the court, said:—

"The exact question then is, If a person honestly and in good faith applies for insurance upon property, the locality of which and all the circumstances affecting the risk he fully discloses, and discloses also the exact amount of insurance existing, and honestly and in good faith puts a value upon the property, and the existing insurance with what he obtains is less than three-fourths of the value as he believes and represents it to be, and the insurer, with full knowledge of the amount of the existing insurance and with a full knowledge of his valuation, issues a policy in which it consents to other insurance to the amount of three-fourths of the value, and it subsequently appears that, in point of fact, the real value at that time was less than the applicant believed it to be, would this avoid the policy thus issued? The mere statement of the proposition suggests its solution. The applicant tells where the property is, he tells what it is, he tells by what it is surrounded, and the purposes for which it is used; all these are facts which he is bound to know, and in reference to which he is bound to tell the truth. Valuation is necessarily a matter of judgment or opinion, and it is matter of common belief that the owner of property is liable to put upon it a higher valuation than others. In the absence of fraud there can be no injustice in holding the parties to such a contract as this to the valuation which was acted upon, if not by both parties, at least by the applicant with the knowledge of the other party that he was thus acting. And this is especially true in this case in which the extent of the insurance was fully disclosed, and in which the parties are fully protected against any liability other than their proportion of three-fourths of the value of the property. We are, therefore, of opinion that, when all the facts and circumstances are honestly and in good faith disclosed, a mere error of opinion in an honest valuation of property fully described does not avoid the contract. There is less reason for strictness in this respect where the limit of insurance is three-fourths the value, because the insured assumes a portion of the risk himself. And, in analogy to other cases of insurance, where property may be insured to its full amount, the valuation agreed upon, and for which insurance is issued, though it exceeds the real value of the property, if made in good faith and without fraud, is conclusive between the parties."

See also *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 507-508 (1877); *Schmidt v. Mutual City and Village F. Ins. Co.*, 55 Mich. 432 (1885); and *Morotock Ins. Co. v. Fostoria Novelty Co.*, 94 Va. 361, 368-369 (1897).—ED.

St. Joseph County, and on the 24th of July, 1874, the barn was destroyed by fire. An action was brought for the loss, and defendant in error recovered. The company asks for a reversal. They object, that in the application defendant in error represented that he was owner of the farm and barn, but in fact was not.

There is no dispute concerning the form of his representation. He was asked: "Are you the owner of the buildings to be insured, and of the farm upon which they are situated?" To which he replied, "Yes." The question arises upon the correctness of his answer. It was ruled below, and his counsel here contends, that the facts showed that he was the equitable owner, and if so, that was sufficient. Counsel for the company claims that the facts were not sufficient to make out an equitable title.

It appears that when the application was made, and until May 22d, 1871, the legal title stood in the name of Mrs. Fogelman, wife of defendant in error, and that she deeded to him at this last-named date; that some time prior to her marriage with him, which occurred March 26, 1868, her father bought this farm, paying two thousand dollars in cash, and caused it to be conveyed to her as her property upon her giving back to him a mortgage upon it to secure the balance of the purchase price, being four thousand dollars; that the place was worth some six thousand dollars; that shortly before her marriage a verbal agreement was entered into between herself, her intended husband, Mr. Fogelman, and her father, that if Mr. Fogelman would move upon the place, cultivate and improve it, care for and support the family, and pay off the encumbrances, Mrs. Fogelman, when required by her husband, the defendant in error, would convey to him the legal title; that in pursuance of this arrangement, defendant in error in good faith actually moved upon the premises, and carried out and performed the terms thus verbally expressed; that he lived on the premises with his family, worked the lands, paid the taxes, kept up the fences, made improvements, and conducted the cultivation as owner; that he used the proceeds as his own, applying what was necessary for the support of his family; that he took with him a span of horses, four head of cattle, and other personal property, and all of which was now on the farm; that prior to the application for insurance he had actually paid enough on the four-thousand-dollar mortgage to reduce it to two thousand two hundred dollars; that the money so paid was raised in part and mostly from crops taken off of the farm, but that the rest was obtained from crops raised by him on other lands; that no account was kept of these matters between himself and wife; that after the policy was obtained, and prior to the loss, he had paid some fifteen hundred dollars or eighteen hundred dollars more on the mortgage from the proceeds of crops produced on the farm; that the conveyance from his wife to him was delayed because money was scarce, and because the parties at one time supposed she could not convey directly to him.

It is urged for plaintiff in error that there was here no contract on the

part of defendant in error; that he was left to do just as he pleased, either to go on or abstain. The arrangement should be judged of in the light of all the circumstances. There was, of course, nothing precise or formal in it.

The father had just bought for his daughter's benefit a farm worth six thousand dollars, and was giving her two thousand dollars of the purchase price, but wished the balance of four thousand dollars to be cleared up without his aid. He was acting in contemplation of the immediate marriage of his daughter with defendant in error, and the two last were acting upon his wishes, and on their own ideas of prudence.

The three were looking at the farm in question as the future home of the two. The arrangement was a domestic arrangement, an affair in the family. The daughter and son-in-law were to be settled, and the father was aiding. Through the father the daughter held the legal title to a farm worth six thousand dollars, but subject to a mortgage of four thousand dollars. It was thought best that the son-in-law should carry on the place and pay up this mortgage and have the legal title. We are not confined to mere words. We must look at the acts of the parties. They are expressive. The defendant in error at once repaired with his wife to the farm. He carried his personal property there. He there labored. He went to paying up the mortgage. He paid the taxes. He made improvements and repairs, and acted precisely as though he was purchaser. Unless he was carrying out the arrangement as one accepted by and obligatory upon him his course is not explained. His wife considered that he had fully acceded to the verbal understanding, and was performing his share. The whole circumstances, in fine, prove that he undertook to pay up the mortgage, and on his part carry out the verbal understanding.

When he applied for insurance he had made large expenditure, and could not retire without great loss, and at the same time what remained to be done was small in comparison with the value of the farm.

That he was then owner by equitable title seems hardly open to discussion. *Twiss v. George*, 33 Mich. 253. And it is not claimed that he must have been vested with the legal title also, in order to support his statement in the application that he was owner.

He was owner of the barn by equitable title, and the risk of its destruction was his risk. Nobody was under obligation to rebuild for him, and he could protect himself only by insurance.

Judgment affirmed, with costs.¹

The other Justices concurred.

¹ See *Strong v. Manufacturers' Ins. Co.*, 10 Pick. 40 (1830); *Curry v. Commonwealth Ins. Co.*, 10 Pick. 535 (1830); *Catron v. Tennessee Ins. Co.*, 6 Humph. 176 (1845); *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. (11 Vroom) 568 (1878); *Susquehanna Mutual F. Ins. Co. v. Staats*, 102 Pa. 529 (1883); *Buck v. Phoenix Ins. Co.*, 76 Me. 586 (1885); *Gilman v. Dwelling-House Ins. Co.*, 81 Me. 488 (1889); *Wainer v. Milford Mutual F. Ins. Co.*, 153 Mass. 335 (1891); *Capital City Ins. Co. v. Caldwell Bros.*, 95 Ala. 77 (1891). — ED.

ARMOUR ET AL., APPELLANTS, v. THE TRANSATLANTIC FIRE
INSURANCE COMPANY, RESPONDENTS.

COURT OF APPEALS OF NEW YORK, 1882. 90 N. Y. 450.

APPEAL from judgment of the General Term of the Superior Court of the City of New York, entered upon an order made on the first Monday of March, 1881, which affirmed a judgment in favor of defendant, entered upon an order dismissing plaintiffs' complaint on trial. (Reported below, 15 J. & S. 352.)

This action was upon a policy of fire insurance, the material portions of which, as well as the facts pertinent to the questions discussed, are stated in the opinion.

D. M. Porter, for appellants.

Lewis Sanders, for respondent.

RAPALLO, J. The court at the trial dismissed the complaint in this action, on the defendant's evidence, and refused the plaintiffs' request to submit the questions of fact in the case to the jury. The only questions for our consideration are whether the facts alleged on the part of the defendant were, or either of them was, sufficient to defeat the plaintiffs' claim to recover, and so clearly proved by conclusive or uncontroverted evidence as to justify the court in withdrawing the case from the consideration of the jury. The action was upon a policy of insurance issued by the defendant upon a warehouse of the plaintiffs in the City of Chicago, which was partially destroyed by fire upon the 25th of January, 1879. The warehouse consisted of three sections, and the amount of insurance on one of the sections covered by the plaintiffs' policy was \$3,000. The loss on that section was about \$14,000, and the total insurance thereon about \$17,000. The amount insured on all three sections was \$38,000, exclusive of defendant's policy, at the time of the loss. The *pro rata* share of loss claimed from the defendant was \$2,440.

The defendant set up three defences. 1st. That the policy was issued upon a misrepresentation of the plaintiffs, through their agent, that the rate of insurance in Chicago on the premises insured was, at the date of their application for said insurance, seventy-five cents for every \$100 insured for the term of one year; whereas, in fact, the rate of insurance upon the property in Chicago at the time of plaintiffs' application was \$1.25 for every \$100 insured. 2d. That at the time of the application for said insurance, the plaintiffs, by their agent, represented that the property sought to be insured was already insured in the amount of \$200,000 in various other companies, of which a list was furnished; that the defendant relied upon the truth of said representation in making the policy and accepting the risk, but that in fact none of the property mentioned in said policy was insured in the amount of \$200,000, or to

exceed the sum of \$50,000. 3d. That, according to the terms of the policy, the defendant was entitled to terminate it on giving notice to the plaintiffs, and that it did so elect to terminate it before the alleged loss by fire.

The plaintiffs, after making the *prima facie* proof necessary to maintain the action on their part, rested their case, and the defendant introduced evidence in support of the defences set up by it. We have carefully examined the evidence, and think there may be some question as to whether the allegation of misrepresentation as to the rate of insurance should not have been submitted to the jury; but the defence of misrepresentation as to the amount of insurance on the property was, we think, so fully established that a verdict in favor of the plaintiffs could not have been sustained.

The insurance was effected by the plaintiffs through Mr. Cameron of Chicago, who, with the knowledge of the plaintiffs, employed a broker in New York, named Dickinson, to obtain the insurance in that city. The whole warehouse was divided into three separate sections, — A, B, and C. Mr. Cameron was authorized by the plaintiffs to procure \$80,000 upon the entire building, viz.: \$20,000 on section A, and \$30,000 each on sections B and C. The plaintiffs at that time had over \$200,000 of insurance upon the stock of merchandise in the warehouse, but had no insurance upon the building. Mr. Cameron, by letter, instructed Mr. Dickinson in New York as to the situation of the building, and informed him that he probably should request him by telegraph to effect the insurance in question, in New York, on the building; that \$200,000 had already been placed on the three sections at three-quarters per cent. Mr. Cameron, in his testimony taken on commission, says that in employing that language he referred to the insurance on the stock in the warehouse, and did not intend to refer to the insurance on the building. But, nevertheless, the letter which conveyed Mr. Cameron's instructions states distinctly that \$200,000 had already been placed, in Chicago, on the three sections of the warehouse, and Mr. Dickinson states that he understood that the \$200,000 of insurance was upon the warehouse.

Mr. Hoenig, the general manager of the defendant, testifies that when Dickinson applied to the defendant for the policy in question, he stated to him that he already had \$200,000 of insurance on the building in Chicago, and that in issuing the policy he acted upon the statement of Mr. Dickinson that the board rate of insurance in Chicago was seventy-five cents on \$100, and that there had already been procured insurance on the building to the amount of \$200,000. Mr. Dickinson does not contradict this statement, but testifies that he exhibited to Mr. Hoenig the list of companies which he had received from Chicago, stating that they were on the risk, and that he understood that that risk was on the building, and he was not informed that it was on the stock, until after the fire. There is consequently no conflict of evidence on that point between these two witnesses.

By the terms of the policy of the defendant other insurance was permitted without notice, and it was provided that losses should be apportioned on the whole sum insured, and it was further provided that any omission to make known every fact material to the risk, or any over-valuation, or any misrepresentation whatever, either in a written application or otherwise, should avoid the policy. The representation in this case was not fraudulent, and arose from a mistake or misapprehension of the plaintiffs' agent, but, nevertheless, it was a very material representation, and was untrue, the insurance on the entire building being, as appears by the testimony of one of the plaintiffs, only \$30,000 at the time of the application to the defendant, and the insurance on the section which was injured only \$17,000. Had the insurance been \$200,000, the proportion of loss chargeable to the defendant would have been comparatively trifling. The risk was greatly enhanced by the comparatively small amount of insurance actually existing.

On the other branches of the defence, the testimony indicates that the defendant issued the policy to Mr. Dickinson with the express understanding that if the board rate in Chicago was more than three-quarters per cent, the policy should not take effect, and should be returned, and that long before the fire, having ascertained that the rate was \$1.25, they recalled the policy and demanded its surrender. There is, however, some slight conflict of evidence in relation to these points, but it is unnecessary to consider them, as we find that the misrepresentation as to the amount of other insurance is so clearly established that a recovery by the plaintiffs could not have been sustained. It is not necessary, in all cases, in order to sustain a defence of misrepresentation in applying for the policy, to show that the misrepresentation was intentionally fraudulent. A misrepresentation is defined by Phillips to be where a party to the contract of insurance, either purposely or through negligence, mistake, or inadvertence, or oversight, misrepresents a fact which he is bound to represent truly (Phil. Ins., § 537), and he lays down the doctrine that it is an implied condition of the contract of insurance that it is free from misrepresentation or concealment, whether fraudulent or through mistake. If the misrepresentation induces the insurer to enter into a contract which he would otherwise have declined, or to take a less premium than he would have demanded had he known the representation to be untrue, the effect as to him is the same if it was made through mistake or inadvertence, as if it had been made with a fraudulent intent, and it avoids the contract. An immaterial misrepresentation, unless in reply to a specific inquiry, or made with a fraudulent intent, and influencing the other party, will not impair the contract. But if the risk is greater than it would have been if the representation had been true, the preponderance of authority is to the effect that it avoids the policy, even though the misrepresentation was honestly made. (Phillips on Ins., §§ 537-542; *Wall v. Howard Ins. Co.*, 14 Barb. 383.)

A material misrepresentation by the agent for effecting the insurance

will defeat it, though not known to the assured, and though made without any fraudulent intent on the part of the agent, to the same extent as though made by the assured himself. (*Carpenter v. Am. Ins. Co.*, 1 Story's C. C. 57.) In this case (which was a case of fire insurance) Story, J., says: "A false representation of a material fact is, according to well-settled principles, sufficient to avoid a policy of insurance underwritten on the faith thereof, whether the false representation be by mistake or design."

The rules as to misrepresentations and concealments, or omissions to state facts material to the risk, are more strict in cases of marine than of fire insurance. But the distinctions are founded on the differences in the character of the property, and the greater facility the insurers possess, of obtaining information as to its condition and surrounding circumstances in cases of insurance on buildings, etc., than on vessels, which are often insured when absent or afloat, and the distinctions are applied, ordinarily, in cases where the insurer sets up the omission of the insured to state material facts. In those cases there is a difference between the rules applicable to marine insurances and those applicable to fire insurance. But where the defence is a material affirmative representation as to a matter which is presumably within the knowledge of the party applying for the insurance, and as to which the insurer has not the same means of knowledge, there is no ground for any distinction between cases of fire and marine insurance. (See Phillips on Ins., § 635, etc.)

Where any doubt exists as to the materiality of the misrepresentation, it is a question of fact for the jury. But in this case it so clearly appears that the amount of risk incurred by the defendant was so much greater than it would have been had the representation as to other insurance been true, that a verdict that the representation was immaterial could not have been sustained. Aside from these considerations, however, in the present case the parties stipulated in the policy that any misrepresentation whatever, either in a written application or otherwise, should avoid the policy, and the parties by this agreement put every material representation on the same footing as a warranty. (*Burritt v. Saratoga Co. M. Fire Ins. Co.*, 5 Hill, 188.) That that is the effect of such an agreement was reaffirmed in this court in *Gates v. The Madison Co. Mut. Ins. Co.*, 2 N. Y. 49-53.

The judgment should be affirmed.

All concur.

Judgment affirmed.

CITIZENS' INSURANCE COMPANY v. HOFFMAN.

SUPREME COURT OF INDIANA, 1891. 128 Ind. 370.

FROM the Vanderburgh Circuit Court.

*S. J. Peelle, W. L. Taylor, A. Gilchrist, and C. A. De Bruler, for appellant.**T. E. Garvin, Jr., and G. Cunningham, for appellee.*

MILLER, J. The appellee sued the appellant to recover on a policy of insurance, by which the appellant, in consideration of fifteen dollars, agreed to indemnify him to the extent of \$1,500 against loss by fire of the property therein described.

The complaint was in two paragraphs. The first averred a total loss of \$90,000, and asked for judgment for \$1,500, the full amount of the policy.

The second averred a loss of \$51,000, a total insurance of \$60,000, and that the defendant was liable for such proportion of the loss as the amount of its policy bore to the whole amount of insurance carried.

The defendant answered in two paragraphs.¹ . . .

In the second paragraph it is alleged that the application for the policy was in a letter addressed by the plaintiff to the managers of the defendant; that in such application the plaintiff represented that the amount of insurance upon the property described in the policy filed with the complaint, which was at all times carried by the plaintiff, was \$90,000, including the amount applied for; that in such letter the plaintiff represented and guaranteed that there was, and should thereafter be, during the time the defendant might insure the property, an insurance in the sum of \$90,000; that the letter had been lost and the defendant was therefore unable to file a copy of the same with the answer; that the policy was issued solely in consideration of the representation and guarantee contained in the letter; that by the terms of the policy the defendant only agreed to pay the one-sixtieth of the loss which the plaintiff might sustain by fire on each of the items of property described in the policy.

It is averred that the plaintiff, in violation of said representation and guarantee, did not keep and maintain \$90,000 insurance upon the property, but only had \$60,000 insurance at the time of the fire; that the total loss sustained was \$51,000, of which the defendant was liable for \$850 and interest, and no more.

Demurrers were sustained to each of these paragraphs of answer, and the defendant declining to plead further, judgment was rendered for \$1,275 and interest.

Appellant assigns as error the ruling of the court in sustaining the demurrers to these paragraphs of answer. . . .

¹ In reprinting the opinion, passages not dealing with the second paragraph of the answer have been omitted. — Ed.

In the second paragraph of answer the letter written by the assured to the company is relied upon either as a warranty or a representation.

In *Commonwealth Ins. Co. v. Monninger*, 18 Ind. 352, this court, in distinguishing between a representation and a warranty, cites, with approval, the following definition of a representation as "a verbal or written statement, made by the assured to the underwriter, before the subscription of the policy, as to the existence of some fact, or state of facts, tending to induce the underwriter more readily to assume the risk, by diminishing the estimate he would otherwise form of it. It is a part of the preliminary proceedings which propose the contract; and a warranty is a part of the contract, as it has been completed." *May Ins.* (3d ed.), section 159; *Wood Fire Ins.* (2d ed.), section 150.

It will be observed that there is no allegation in the answer that there was \$90,000 insurance on the property at the time the policy was issued. Neither is it claimed in the answer that at, or prior to, the time the policy was issued the assured made any statement of fact that was not, at the time, true.

It is contended, that, if the application did not contain a misstatement of fact, it constituted a warranty or guarantee that the assured would maintain \$90,000 insurance on the property.

It nowhere appears from the policy that the application was incorporated in, or made a part of, the same. We find in the policy this clause: "If an application, survey, plan, or description, is referred to in this policy, such application, survey, plan, or description is hereby made a part of this contract, and a warranty by the assured."

This language is significant when taken in connection with the fact that no reference was made in the policy to any application having been made for insurance.

The necessity for making the application a part of the policy in order to make any statements therein contained warranties, is tersely stated by Elliott, J., in *Presbyterian, etc., Fund v. Allen*, 106 Ind. 593, as follows:—

"Statements made by the insured in his application for insurance are not deemed warranties unless they are incorporated in the policy, or, in some appropriate method, referred to in that instrument."

It does not come within the rule of construing and reading together papers contemporaneously executed, as parts of the same contract (*Burns v. Singer Mfg. Co.*, 87 Ind. 541, and *Singer Mfg. Co. v. Forsyth*, 108 Ind. 334), for the policy is a complete instrument and contract within and of itself, containing no reference or allusion to any other instrument.

It is evident, from the averments of the answer, taken in connection with the policy, that the company, instead of accepting the terms of the letter, by inserting a clause in the policy to that effect, as is usual, when a given amount of insurance is to be maintained, issued the policy, giving the assured the privilege of making other insurance, without limit or notice, until required.

The general and well-settled rule is, that the application forms no part of the policy, unless it is referred to and adopted. *Wood Fire Ins.*, section 138; *May Ins.*, section 159; *Owens v. Holland Purchase Ins. Co.*, 56 N. Y. 565; *Commonwealth Ins. Co. v. Monninger*, *supra*.

Holding, as we do, that the company did not adopt, or treat the application as a part of the policy, no inference arises that the policy was issued upon the terms or conditions mentioned in the letter, or application, for it might well be inferred that the terms of the application were not satisfactory to the insurers, and that they therefore chose to make the contract upon their own terms, and independent of the application.

We are of the opinion that the court did not err in sustaining the demurrer to the second paragraph of the answer.

*Judgment affirmed.*¹

¹ On the topic of this section, see also:—

Clark v. Union Mutual F. Ins. Co., 40 N. H. 333 (1860);
Bellatty v. Thomaston M. F. Ins. Co., 61 Me. 414 (1872);
Wood v. Firemen's F. Ins. Co., 126 Mass. 316 (1879);
Jackson v. St. Paul F. & M. Ins. Co., 99 U. S. 124 (1885);
Lamb v. Council Bluffs Ins. Co., 70 Iowa, 238, 242 (1886);
Mutual Mill Ins. Co. v. Gordon, 121 Ill. 366 (1887);
Insurance Co. v. Leslie, 47 Ohio St. 409 (1890);
Germania F. Ins. Co. v. Deckard, 3 Ind. App. 361, 365-367 (1891);
Davis v. Ætna Mutual F. Ins. Co., 39 Atl. Rep. 902 (N. H., 1893).—ED.

SECTION III.

Life Insurance.

WHITTINGHAM v. THORNBURGH ET AL.

CHANCERY, 1690-91. 2 Vern. 206.¹

DEFENDANT Thornburgh in March, 1689, caused a policy of insurance to be drawn for the insuring the life of one Edward Harwell for a year, and left it at one Samuel Luplon's office, to get subscriptions at *five pounds per cent premium*; and to draw in the plaintiffs and others to underwrite the policy, procured one Marwood, a near neighbor of Harwell's, to underwrite *one hundred pounds*; and he giving out he knew Harwell healthy and like to live, and the plaintiffs relying on such information, underwrote the policy. Whittingham for a *hundred pounds*, the other *four* for *fifty pounds* apiece. Harwell soon after died.

It appearing that Thornburgh had no estate or interest that depended on Harwell's life; that Marwood's subscription was only colorable to draw in others, and that Harwell was in a languishing condition; though Marwood affirmed and pretended he was his neighbor and a healthful man, and the plaintiff having on the first discovery of the contrivance offered to return the *premium*, and published the fraud to prevent others from being drawn in; and the defendants intending to get a very large subscription, having, by a like contrivance, got between *one and two thousand pounds*, on making the like insurance on the life of William Sweeting, the court therefore decreed the policy of insurance to be delivered up to be cancelled, and a perpetual injunction against the verdict thereon obtained at law, and the plaintiffs their full costs both at law and in this court, and the money received for the premium to go in part of their costs.²

¹ s. c. *sub. nom.* Wittingham v. Thornborough, Prec. Ch. 20, where it is stated: "They agreed with one Marwood, a known merchant upon the Exchange, and a leading man in such cases, to subscribe first; but in case Harwell died within the year, Marwood was to lose nothing, but on the contrary was to share what should be gained from the other subscribers." —ED.

² The editor of Vernon adds: "The decree so as to the payment of costs, &c. but nothing said as to the money received for the premium to go in part of costs. Reg. Lib. 1680, B, fol. 264." —ED.

STACKPOLE v. SIMON.

NISI PRIUS, 1779. 2 Park Ins. 8th ed. 932.

It was an action on a policy of insurance for £150, at four guineas per cent, in case Drury Sheppey should die at any time between the 1st of April, 1777, and the 1st of April, 1778, both days included, and during the lifetime of John Sheppey, the father of Drury: but in case the said John should die before the said Drury the policy to be void; the question was, as to the representation of the life at the time of the insurance. The interest in the insurance was £900, due from Drury Sheppey to the plaintiff. It was admitted, that the life expired within the time limited in the policy. Drury Sheppey had a place in the custom-house of Ireland, and was in bad circumstances. He went to the south of France for the benefit of his health, or to avoid his creditors, and there died. The broker who effected the policy, told the underwriters that the gentleman for whom he acted, would not warrant, but from the account he (the broker) had received, *he believed it to be a good life*.

LORD MANSFIELD. "As to the interest, this policy may be considered as a collateral security for the debt due to the plaintiff. Where there is no warranty, the underwriter runs the risk of its being a good life or not. If there be a concealment of the knowledge of the state of the life, it is a fraud. It is a rule that every subsequent underwriter gives credit to the representation made to the first; and it is allowed that any subsequent underwriter may give in evidence a misrepresentation to the first. The broker here does not pretend to any knowledge of his own, but speaks from information. There is no fraud in him."

*There was a verdict for the plaintiff.*¹

¹ In *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622, 655-658 (1885), GREEN, J., for the court said:—

"There has been a considerable diversity of opinion as to what constitutes a misrepresentation which avoids a policy. Some hold that, if the representation is materially untrue, it avoids the policy, even when it is made in good faith and is the result of ignorance. (*Campbell v. New England Mutual Life Ins. Co.*, 98 Mass. 381, and *Vose v. Eagle Life and Health Ins. Co.*, 6 Cush. 42.) But there are other cases, in which it is held that a representation as to a material fact will not necessarily avoid a policy, simply because it is untrue, and that in addition to its untruth its falsity must be known to the insured (*Wheelton v. Hardisty*, 8 E. & B. 232; *Anderson v. Fitzgerald*, 4 H. L. C. 484. See also remarks of Lord Mansfield in *Ross v. Bradshaw*, 1 W. Bl. 312, and in *Stackpole v. Simon*, 2 Park Ins. 8th ed. 932. See also *Rawlins v. Desborough*, 2 Moo. & R. 328, 333; *Huckman v. Fernie*, 3 M. & W. 505; *Swete v. Fairlie*, 6 C. & P. 1.) It seems to me that no peculiar or arbitrary rule should be applied to life policies. After a long controversy in England it may now be regarded as well settled there, that to make a vendor responsible in damages for a representation, which turns out to be untrue, it must be made *mala fide* and not in the *bona fide* belief that it is true. And this is supported by the weight of American authorities. See *Crislip v. Cain*, 19 W. Va. 438, 471-472, where these English cases are all cited. But it should always in this connection be borne in mind, that, if one represents as personally known

WAINWRIGHT, EXECUTOR, v. BLAND AND OTHERS.

EXCHEQUER, 1836. 1 M. & W. 32.

ASSUMPSIT against the defendants, three of the directors of the Imperial Life Insurance Company, on a policy of insurance for £3,000 dated 22d October, 1830, for insuring the life of the deceased, Miss Helen Frances Phœby Abercromby, for the period of two years from that date. The declaration averred the death of Miss Abercromby on the 21st of December, 1830, and the plaintiff's appointment as her sole executor, by her will dated the 13th of the same month. Plea, the general issue.

At the trial before Lord ABINGER, C. B., at the Middlesex Sittings after Michaelmas Term, it clearly appeared that the policy was effected by the deceased, by the persuasion and for the benefit of Mr. Wainwright, the plaintiff, and his wife, who was the deceased's half-sister; that the premiums were paid by the plaintiff; that on the deceased's first attendance at the company's office, on the 14th October, 1830, in

to him what is not true, though he may believe it, he has in contemplation of law acted *mala fide*, and is guilty of a legal fraud though he may in point of fact have acted *bona fide*; and in such a case he is responsible for any injury resulting from his false representation. (*Cabot v. Christie*, 42 Vt. 121; *Hammatt v. Emerson*, 27 Me. 308, 326; *Bennett v. Judson*, 21 N. Y. 238; *Stone v. Denny*, 4 Met. 151; *Ilazard v. Irwin*, 18 Pick. 95; *Fisher v. Mellen*, 103 Mass. 506.) These cases are cited and this doctrine considered and approved in *Crislip v. Cain*, 19 W. Va. 438, 491-493.

"This doctrine has peculiar and special application to policies of life insurance, for it is obvious, that most of the facts set out especially in the applications now generally attached to the policy and expressly made a part of it are facts peculiarly within the knowledge of the insured and, whether he says so or not, must be regarded as stated on his own personal knowledge; and hence with reference to most facts, especially when stated in answer to questions propounded to him, he must be regarded as making them on his own personal knowledge and as being by him intended to be so understood by the insurer. This being the case, if a part of this description is untrue in point of fact, he is guilty of legal fraud, though he may not have intended to deceive, and really did not act *mala fide* in point of fact. But sometimes facts are stated by the insured, which the insurer must from the nature of the fact stated have known were not stated as facts absolutely true and within the personal knowledge of the insured. When the fact stated is of this description, on the principles we have laid down the policy should not be avoided merely because the statements turn out afterwards to be in point of fact untrue, if the statement was made in perfect good faith and with the full belief, when the statement was made, that it was true. Of this character would be a statement in an application that the insured was of 'sound body;' for of course the insurer must have understood such a statement as made not upon the personal knowledge of the insured, but upon his belief from all the knowledge he had of his constitution. For of course men sometimes believe that they are of 'sound body' when in point of fact they have some 'internal disease,' which in its character is fatal. When such a statement as this is made in an application for a life policy, on the principles we have laid down the policy is not forfeited, if the statement turns out to be untrue, if when it was made, the insured believed that he was of 'sound body,' and had no suspicion that he was the subject of an 'internal disease' fatal in its character. If, on the other hand, the insured in his application should state in answer to a ques-

company with Mrs. Wainwright, she represented that the insurance was intended to secure a sum of money to her sister, which she should be able to do if she outlived the term of two years; and that, on being asked by the actuary whether she had effected insurances with any other office, she answered, "I wish to insure £5,000, but as your office only takes £3,000, I shall propose £2,000 to some other office." The defendants having subsequently ascertained that she had effected a policy for £5,000 with another office, and had made a proposal to a third which had been declined, on her attending again at the Imperial Office, on the 22d October, the actuary informed her that the directors were much displeased at her not answering his former question in a straightforward way. She said, "I know very little of the business myself; I do as my friends direct me." It was proved that she had, previously to this time, effected insurances with various offices, all of them for a period of two years only, to the amount, in the whole, of £11,000. Miss Abercromby died suddenly on the 21st December, 1830, having by her will, dated the 13th, bequeathed the benefit of her policies to her sister, and appointed the plaintiff her sole executor. It appeared that she had executed two wills, both of which were in the possession of the plaintiff, who was proved to have stated (showing them to the

tion that he had not had a serious illness for seven years, this statement the insurer must have regarded as made on his own personal knowledge; and if in point of fact it was untrue, on the principles we have stated it must forfeit the policy, though he did not make the statement in point of fact *mala fide*, that is, with a purpose of deceiving, but only from thoughtlessness or forgetfulness, or because he had forgotten that a serious illness, which he had had, was within seven years.

"I apprehend that the conflict of authorities on the question, whether there must be fraud in a misrepresentation of a fact in order to avoid a policy, has arisen principally from a failure to distinguish between actual fraud, that is, a misstatement of a fact made with the intention of deceiving, and legal fraud, which is a misstatement of a matter within the personal knowledge of the insured, or of such a character that the insurer must have regarded it as within the personal knowledge of the insured. Such a misstatement of a matter of this character is a legal fraud, though it was not made with intent to deceive. And I apprehend the law to be that a misrepresentation of a fact made by the insured, whether such misrepresentation be an actual fraud or a legal fraud, will avoid a policy; but if there be an absence of all fraud legal or actual in the misrepresentation of a fact, such misrepresentation will not avoid a policy.

"I will now apply this law to the facts proven. . . . This defence says further that the statements and declarations in the application of the insured were found in material respects untrue in three particulars. . . . 2. 'The statement that he was in good health and of sound body was untrue.' There is no evidence to show that he was not then in good health. But the evidence does show that he was not then 'of sound body.' The evidence shows that for at least three or four months before he had this policy issued and made this statement, he had a cancer of the stomach, and that this disease continued exhibiting itself only occasionally till his death some eight months after he was insured. This representation was therefore untrue. But, as we have seen, it belongs to that class which, the insurer must have known, was not made on the personal knowledge of the insured. And this being the case, if the insured acted in perfect good faith in making the statement, and had then no suspicion that he was not 'sound of body,' such a statement, though it turned out afterwards to be untrue when the statement was made, would not forfeit the policy." — Ed.

witness) a short time after Miss Abercromby's death, that they were made "in order that if the one failed, the other might do for him." The plaintiff, as her executor, swore her personal property not to exceed £100; and it was proved that she was in fact in indigent circumstances, and without the means of paying the premiums. In the printed list of questions required by the articles of the Imperial Office to be answered by the assured, no question was stated as to insurances effected by the party with other offices. The Lord Chief Baron left it to the jury to say, first, whether the insurance was effected by the deceased *bona fide* for her own benefit, or as the agent of Wainwright; secondly, whether the false representations made by Miss Abercromby to the defendants related to a matter material to be known by them as insurers. The jury found that she effected the insurance as the plaintiff's agent, and for his benefit, and that the false representations were on material points; and a verdict was thereupon entered for the defendants.

Erle now moved for a rule *nisi* for a new trial. — Assuming that the policy was effected for the benefit of the plaintiff, still, as Miss Abercromby was of full age, and could be no party to a scheme of securing the payment of the money within the two years, the plaintiff's intention to obtain the benefit of the policy could not operate to relieve the defendants from their contract with the deceased, in whose right the plaintiff now sues as her executor. Even his expectation of her speedy death, supposing it to have existed, was no answer to an action on the policy by the party lawfully entitled to the benefit of it. The question, whether she knew that the plaintiff intended all this, was not left to the jury. [PARKE, B. She might not know the whole; but she must have known she had not funds to pay the premiums, and that she intended Wainwright to have the benefit of the insurances, if they became payable.] But where she herself, by her representative, claims the benefit of the policy, the defendants cannot set up that there was an intention that a third party should have the benefit of it. [PARKE, B. Your argument is, that any person may lawfully insure his life, for the benefit of another, whatever be the intention of that other party, and from whomsoever the funds are to come.] That is the argument: if she has the legal interest, that satisfies the statute. [LORD ABINGER, C. B. Independently of this point, the jury found that she made a false representation that it was for her sister, and also as to her applications to other offices.] It is questionable whether the defendants are at liberty to rely on representations made in answer to parol inquiries, when their articles contain stipulations only as to written inquiries and the answers to them. The policy is framed so as to be void only on a false representation in writing. [GURNEY, B. There may be many questions material to be asked, preparatory to the written contract.] The questions did not bear on the probability of the life enduring for two years.

LORD ABINGER, C. B. There may perhaps be some doubt on the

first point; but it is clear the policy was avoided by the false representations. There can therefore be no rule.

PARKE, B. From the nature of the contract, a suppression of any material fact, or a false answer to any material question, must avoid the policy; *Lindenau v. Desborough*, 3 C. & P. 350; 8 B. and C. 586; 3 Man. & Ry. 45, s. c. On the other point there may be some doubt, but it is unnecessary to give any opinion upon it.

GURNEY, B., concurred.

*Rule refused.*¹

VALTON ET AL. v. NATIONAL FUND LIFE ASSURANCE
COMPANY.

COURT OF APPEALS OF NEW YORK, 1859. 20 N. Y. 32.²

APPEAL from the Supreme Court. Action upon a policy on the life of Conrad Schumacher for the sum of \$10,000, dated May 15, 1850, issued to Schumacher. The claim of the plaintiffs to the sum insured was this: On the 30th May, 1850, Valton, Daniel Martin (who had assigned to the other plaintiff), and Schumacher, entered into articles of partnership for the purpose of carrying on a wholesale business in foreign and domestic liquors in the city of Albany. The capital stock was to be contributed by Valton and Martin. Schumacher was to transact all the outside business of the copartnership, and whenever requested by his partners, or the business should require, to make all necessary journeys at the expense of the firm. The articles referred to the policy of insurance, and provided that in case of the death of Schumacher during the continuance of the copartnership, unmarried, then the policy and money secured thereby should become the absolute property of Valton and Martin.

On the trial at the Albany Circuit before Mr. Justice WRIGHT, the plaintiffs proved the policy, and a receipt indorsed thereon by the defendant acknowledging the payment by Schumacher, August 23, 1850, of \$68.15, premium for the quarter then to ensue. For the purpose of proving the death of Schumacher in September, 1850, they introduced and read in evidence the deposition of one Frederic Oltman, taken under a commission. The defendant took an exception to it, the grounds of which are stated in the following opinion, as are also the grounds of its exceptions to the judge's refusal to dismiss the complaint and to his charge and refusals to charge.

In the written application for the policy, Schumacher was represented as a merchant. The negotiation with one Lacy, the agent of the defend-

¹ Compare *Germania Ins. Co. v. Rudwig*, 80 Ky. 223, 230-232 (1882). — ED.

² s. c. in the Supreme Court, *sub nom.* *Valton v. National Loan Fund Life Assurance Society*, 22 Barb. 9 (1854). — ED.

ant for the insurance, was commenced by Martin in the month of April, 1850. He represented that the life to be insured was that of his partner or a friend of his partner. On the 14th or 15th May, he procured from Lacy the proper papers to go before the medical examiner of the company, and upon returning with them properly filled up gave the names of himself and Valton as the only persons who could be the private referees of the assured for the purpose of answering the interrogatories propounded according to the rules of the company. Shortly after he brought Schumacher to Lacy, who then for the first time learned that Schumacher was the person to be insured. Lacy expressed surprise that so large an insurance should be wanted upon the life of a person having the appearance of Schumacher, and stated to Martin that he had seen Schumacher sweeping the street with a green apron on in front of the store occupied by Martin and Valton, and had supposed him to be their porter. He stated that he would not take so large a risk on Schumacher's life if he was only their porter. Martin replied, "Oh, it is his way; he is my partner, he likes to work." On Lacy's reiterating his disinclination to take the risk, and that he did not like the look of the thing, Martin said, "Oh, it is all right; he is the moneyed man of the concern."

The first premium on taking out the policy was handed to Lacy by Martin, as was also the subsequent one in August, which was receipted as having been paid by Schumacher.

The plaintiffs had a verdict and judgment, which having been affirmed at general term in the third district, the defendant appealed to this court.

Henry Nicholl, for the appellant.

John K. Porter, for the respondents.

GROVER, J.¹ . . . The defendants' motion to dismiss the complaint was properly denied. The grounds of the motion were that the articles of copartnership did not amount to an assignment of the policy to Valton and Martin; and that the policy, so far as the assignees were concerned, was a wager policy and void by statute, the plaintiffs showing no claim or debt against the deceased. By the articles of copartnership it was provided that in case of the death of Schumacher during its continuance, unmarried, then the said policy of insurance, and all benefit and advantage therefrom, and the money secured to be paid thereby, should become and be the absolute property of the said Gerhart Valton and Daniel Martin. This, in the happening of the contingency, vested the title to the policy absolutely in Valton and Martin as against the defendants, and under the Code authorized them to sue for the money payable thereon in their own names. The answer did not set up the defence that the policy was made in contravention of the statute against betting and gaming. This would be a sufficient answer to the last ground upon which the motion was based. There was nothing in the

¹ The omitted passages held that no error appeared in the rulings as to certain points foreign to Insurance. — ED.

evidence authorizing the judge to hold that the policy was made in violation of the statute, had the answer interposed that defence.

The judge, among other things, charged the jury that if the insured untruly represented that he was a partner of the firm of Valton, Martin & Co., or that if he untruly represented that he was the moneyed man of the firm, and either or both of such untrue representations were material to the risk, then the policy was avoided and there could be no recovery. That if Schumacher was dead in September, 1850, and his occupation that of a merchant at the time the proposals were signed, and the representations of his being a partner or the moneyed man of the firm were either not untrue or not material to the risk, then the action was *prima facie* sustained. The defendants' counsel requested the court to charge the jury that if Schumacher himself, or by Martin in his behalf, represented to the agent of the defendants that Schumacher was a partner of the firm of Martin, Valton & Co., when in fact at that time he was not such partner, and if the defendants would not have issued the policy if the representation had not been made, then the policy was void and the plaintiffs could not recover. The judge declined so to charge, and the defendants' counsel excepted. The defendants' counsel also requested the judge to charge the jury that if they found that Schumacher himself, or by Martin in his behalf, represented to the agent of the defendants that Schumacher was the moneyed man of the concern of Valton, Martin & Co., when in fact at that time he was not such, and that the defendants would not have issued the policy if the representations had not been made, then the policy is void and the plaintiffs cannot recover. The judge refused so to charge, and the defendants' counsel excepted. The charge of the judge was correct as far as given. If the representations were made and false, the falsity must have been known to Schumacher and Martin. The facts were within their knowledge, and the representations fraudulent. The requests to charge, considered in connection with the charge given, present the question whether fraudulent representations made by the assured to the insurer upon his application for a policy, though not material to the risk, yet material in the judgment of the insurer, and which induced him to take the risk, will avoid the policy. This question has not been determined by any adjudged case in this State, so far as I have been able to discover. The elementary writers hold that the policy may be avoided. (1 Arnould on Ins., § 189; 2 Duer, 681, 682, 683; 3 Kent, 282.) In *Sibbald v. Hill* (2 Dow's Parl. R. 263), it was held that when the assured fraudulently represented to the underwriter that a prior insurance by another underwriter upon the same risk had been made at a less premium than it was in fact made, the policy was vitiated. In this case it is obvious that the risk itself was not affected by the representations. Lord ELDON in his opinion says that it appeared to him settled law that if a person meaning to effect an insurance, exhibited a policy underwritten by a person of skill and judgment, knowing that this would weigh with the other party and disarm the ordinary prudence exercised

in the common transactions of life, and it turned out that this person had not in fact underwritten the policy, or had done so under such terms that he came under no obligation to pay, it appeared to him to be settled law that this would vitiate the policy. The courts in this country would say that this was a fraud; not on the ground that the misrepresentation affected the nature of the risk, but because it induced a confidence without which the party would not have acted. The principle of this case, when applied to the one under consideration, shows that the judge committed an error in refusing to charge as requested. It is clear that the circumstance of a party being engaged in commercial business, possessed of large means, might induce an insurer to make an insurance upon his life for a large amount, while were he a mere porter the risk would be rejected, although the chance of life would be as good in the latter situation as the former.

Although the judgment must be reversed for this error, yet as there will probably be another trial it is proper to add a few words upon another question presented by the case. The defendants' counsel requested the court to charge the jury that if Martin and Valton, or either of them, procured or paid for this policy for their or either of their benefit, though with the assent of Schumacher, then the policy was void, being a wager policy. The judge refused so to charge, and the defendants excepted. It is unnecessary to determine whether previous to the statute making void all wagers, bets, &c. (1 R. S. 662), an insurance effected by a party upon the life of a person in which he had no interest, was valid. Since the statute, such contract would clearly be void. Upon the trial there was no proof but that Schumacher obtained the policy for his own benefit. If he so obtained it, he had the right to dispose of it as he saw fit, and it would be no defence against his assignees that they had no interest in his life.

The judgment should be reversed, and a new trial ordered.

SELDEN and ALLEN, Js., took no part in the decision; all the other judges concurring. *Judgment reversed, and new trial ordered.*

VALTON *v.* NATIONAL LOAN FUND ASSURANCE SOCIETY.


COURT OF APPEALS OF NEW YORK, 1864. 1 Keyes, 21.¹

APPEAL from the Supreme Court.

A new trial having been ordered as reported *ante*, p. 289, the second trial was before Mr. Justice MILLER and a jury, in February, 1862.

¹ s. c. *sub nom.* Valton *v.* National Loan Fund Life Assurance Society. 4 Abbott's App. Dec. 437; and, in the Supreme Court, 17 Abb. Pr. 268 (1863). The statement in the latter report has been used in framing the statement here given; but matter not bearing on the point decided in the Court of Appeals has been omitted. The report in Keyes gives no statement. — Ed.

Dr. Barent P. Staats, called as a witness on behalf of the defendants, testified that he was their local physician in Albany in 1850; that he recollected the application for the insurance on Schumacher's life. Referring to the certificate, he said it was the one given by him; that on the morning of its date Martin called on him to know at what time he could examine his partner Schumacher. Witness appointed one o'clock of that day, at which time Martin called with Schumacher upon witness. Witness stated, that as his pay was graduated by the amount of insurance, witness asked him how much he was going to insure for. Schumacher said it was \$10,000. Witness replied to him, he must take off his coat or jacket, he must have a good indorser; it was a large amount, and he must have a good indorser for so large an amount. Witness said he meant thereby he must have a more thorough examination. Martin observed to witness he must not judge from appearances; that Schumacher was the moneyed man of the concern. The witness testified that Schumacher was dressed very common, and looked like a laboring man. The certificate of the medical examiner consisted in answers to nine questions, all of which he was requested to answer minutely.

The last and ninth one was, "Opinion on the life."  "A decided opinion, recommending the acceptance or rejection, and of the proposal." To this latter question, Dr. Staats, the medical examiner, certified as follows:—

"A good risk; I recommend acceptance." The witness further testified that he was accustomed to give an opinion on the whole case; that opinion was required to be decided. The witness was then asked by defendants' counsel the three following questions: 1. "If it had not been for the representation that Schumacher was the moneyed man of the concern, would you, from your knowledge and observation of Schumacher, have recommended the acceptance of the proposal?" 2. "Did the representation in question produce any, and if any, what effect on your mind?" 3. "Did the said representation have any influence, and if any, what, upon your subsequent action in making your certificate and report?" These questions on being put to the witness were severally objected to by plaintiffs' counsel, and excluded by the court, and defendants' counsel excepted.

The plaintiffs had a verdict and judgment, and the judgment was affirmed at general term in the third district. Thereupon the defendant company appealed to this court.

MULLIN, J. The object of a physical examination of a person proposing to insure his life in an insurance company, by a competent physician, is to ascertain whether he is laboring under, or is subject to, any diseases or defect which may have a tendency to shorten life. The inquiry involves an examination not only into the present state of the various organs and functions of the body, but into the tendency of those organs and functions to take on diseases as affected by habits of mind as well as of body, temperament, tendency to disease from hereditary

causes, and the occupation and condition in life of the subject. Of two persons of the same age and present bodily health, the one may present a risk entirely safe and proper to be taken — the other unsafe and improper to be taken. It is impossible to affix limits to the subjects into which it is not only proper but necessary for an examining surgeon to inquire, in order to arrive at a conclusion upon which he can safely advise the acceptance or rejection of a risk.

Whether I am right or wrong in these views, I entertain no doubt that in many cases a knowledge of the pecuniary circumstances of a person desiring to be insured is material to the risk as affecting, in some degree, the life; and they are a legitimate subject of inquiry for the examining physician or surgeon.

This inquiry may not be material in every case, but the surgeon alone can tell whether it was, or was not, so in a given case. It is therefore competent to ask him whether he made the inquiry, and what response was given, and how far he deemed such answer material in deciding to advise the taking of the risk.

In such cases the very point of inquiry is, whether the pecuniary circumstances were deemed by him material, and whether he would have advised the acceptance of the risk if it had not appeared that the person desiring to be insured was a man of means. This is the only inquiry by which the real importance of the inquiry and answers can be ascertained.

For these reasons I think the learned justice who tried this cause erred in rejecting the question put to Dr. Staats, as to the effect upon his mind and action in respect to said application; and the judgment should for this reason be reversed, and a new trial ordered, costs to abide the event.¹

WRIGHT, J., expressed no opinion; all the other judges concurred.

TRAILL v. BARING.

COURT OF APPEAL IN CHANCERY, 1864. 4 DeG., J. & S. 318.

THIS was an appeal by the defendants from a decree of the Vice-Chancellor Sir John Stuart, whereby his Honor directed a certain policy of reinsurance for £1,000, granted by the Reliance Mutual Life Assurance Society to the Provident Clerks' Mutual Life Assurance Association on the life of one Mrs. Lydia Taylor, to be delivered up to be cancelled with ancillary relief, and ordered the appellants to pay the costs of the suit.

¹ Compare *Higbie v. Guardian Mutual Life Ins. Co.*, 53 N. Y. 603 (1873). — ED.

The case in the court below is reported in the 4th volume of Mr. Giffard's Reports, p. 485.

The facts were as follows : —

In 1838 the International Life Assurance Society assured the life of Lydia Taylor for a very large sum of money.

In May, 1861, they, in accordance with a common practice of the London assurance offices, reassured her life with the Provident Clerks' Mutual Life Assurance Association, hereinafter called the association, for £3,000 so as thereby to diminish their own risk. The risk of the association to the International Life Assurance Society commenced on the 9th of May, 1861.

On the 10th of May, 1861, Mr. Linford, the secretary of the association, called on the secretary of the Reliance Mutual Life Assurance Society, hereinafter called the society, at the office of the society, and proposed on behalf of the association that the society should take part of their risk in Lydia Taylor's life by way of reinsurance, alleging that another office, the Victoria office, had agreed to undertake that risk to the extent of £1,000 or more, but that the association would themselves retain £1,000 of it; and proposing that the society should take the remaining £1,000. He further stated that Lydia Taylor was alleged to be in her sixty-second year; that no fresh medical examination could be had, but that from information which he had obtained the directors of the association were satisfied that the life was a first-class life, and that they had accepted the proposal and granted the assurance for £3,000 upon that footing.

This verbal proposal of the secretary of the association was entertained and accepted on the same 10th of May, 1861, by the secretary of the society in these words: "This office will join you in the risk on the life of Mrs. Lydia Taylor to the extent of £1,000."

This acceptance was confirmed on the 14th of May, and notice given to the association on the following day.

It was alleged that it was in reliance on the representations made by the secretary of the association that the association had confidence in the goodness of the life, and that they would retain £1,000 as their proportion of the risk under the assurance for £3,000 which they had granted on her life, that the proposal was accepted as a partnership risk by the society, who dispensed with the usual investigation or inquiry into the age, health, or habits of Lydia Taylor.

On the 18th of May, 1861, the society issued the policy in question in the suit as of that date to the association, and the association paid to the society the sum of £79 13s. 4d. for the first year's premium on the reinsurance. This sum was merely the amount of one-third of the premium charged by the association to the International Life Assurance Society for that society's £3,000 policy, and was not the sum which under ordinary circumstances would have been the society's premium on a £1,000 assurance of a first-class life of sixty-two. The risk on this policy commenced on the 18th of May, 1861.

On the 30th of January, 1862, Lydia Taylor died suddenly. Notice of her death was not given to the society by the association until the 21st of May following.

After her death the society discovered that the association, instead of retaining the £1,000 risk on her life which they had represented to the society they would retain, and in contravention of that representation, had on the 15th of May, 1861, assured by way of reinsurance with the Victoria office the further sum of £1,000 in addition to the £1,000 in which they had already reassured in that office; thus by reinsurance getting rid of the whole of their liability in respect of the policy granted by them to the International office. No notice of this fact was given by the association to the society prior to the 18th of May, 1861.

The reason alleged by the defendants for this departure from the earlier representations of the secretary of the association was, that at a meeting of directors held on the 15th of May, 1861, remark was made upon the large amount of reinsurance business transacted with the International Life Assurance Society during the week, and it was resolved to retain no part of the risk of the present reinsurance, the case happening, as was remarked by a director present, to be the only one then before the meeting where no fresh medical evidence could be obtained, and the Victoria being willing to take £2,000 of the risk instead of £1,000. It was also alleged that the resolution was in no sense dependent on any want of confidence in the goodness of Lydia Taylor's life existing on the part of either the individual director or the meeting.

After a correspondence between the secretaries and solicitors of the society and the association ensuing upon the announcement by the latter to the former of Lydia Taylor's death, the society finally refused to pay the £1,000 assured with them by the association; and the association consequently, in October, 1862, commenced an action on the policy against the plaintiffs in this suit.

The society was an unincorporated association, and the plaintiffs in this suit were those three of its directors who had signed the policy in question. The defendants in the suit were the trustees and secretary of the association, a body registered by the registrar of friendly societies.

The bill was filed in November, 1862, stating the facts of the case, alleging in effect that it was the custom and understanding with London assurance offices upon such reassurances as the present (in the absence of a special stipulation or statement to the contrary) that the office effecting the reinsurance should itself retain a substantial portion of the risk covered by the original assurance, and for the office with which the reinsurance was effected to dispense with the usual medical examination on their own behalf of the person whose life was assured, and with the usual inquiries as to his or her health and habits, and to rely on the retention by the office granting the original assurance of their fair portion of the risk as a guarantee of their good faith in re-insuring; and alleging further, that the society would not have effected the reinsurance if it had not been that the association were to retain

£1,000 of the £3,000 risk themselves; and praying a declaration that the £1,000 policy of assurance of the 18th of May, 1861, was fraudulently obtained and ought to be set aside and delivered up to be cancelled; and for an injunction to restrain the action and any other proceedings.

It appeared that the Victoria office had reassured the whole of the £2,000 with knowledge that the association was retaining no part of the risk, and had paid the full £2,000 so assured by them.

The general effect of the evidence in other respects sufficiently appear from the judgments of the Lords Justices and from Mr. Giffard's report of the case in the court below.

Mr. *Bacon* and Mr. *Daune*y, for the respondents.

Mr. *Malins* and Mr. *E. K. Karlsruhe*, for the appellants.

KNIGHT BRUCE, L. J. It is in my judgment a just inference from the evidence in this cause that the society represented by the plaintiffs was induced to agree to grant, did agree to grant, and did grant the re-assurance policy in question, dated the 18th of May, 1861, on the faith and in consequence of a representation made to them on the part of the assured, the society represented by the defendants, that the defendants' society would retain and remain subject, to the extent of £1,000, to the liability upon the assurance for £3,000, as to £1,000, other part of which, the assurance in question was granted.

It may be that until the 15th of May, 1861, the society represented by the defendants continued to intend to abide by that representation, but on the 15th of May, 1861, that intention was changed. The notion of retaining any portion of the liability to the £3,000 was abandoned and a different course was adopted.

If that change of intention, if that abandonment, if that different course, if that intention of not retaining any portion of the risk, had been communicated to the society represented by the plaintiffs, as it ought to have been, without delay, all might have been well. But no such thing was done, and three days after this uncommunicated change of intention the assurance was allowed to be completed. That assurance should not have been allowed to be completed, without a full and clear communication that the intention represented to exist of retaining the liability under the £3,000 policy to the extent of £1,000 had been abandoned.

In my judgment the misrepresentation was material. The representation is proved to have been an inducement, an important inducement, to the plaintiffs' society to accept the assurance, in the circumstances in which it was accepted, without more inquiry and more investigation than was then made. It appears to me, I repeat, that the plaintiffs are entitled to assert, and to be believed in asserting, that they would not have acted as they have done if they had known, as they ought to have been informed by the society represented by the defendants of, the real facts.

Accordingly, in my judgment the decree is right. The contract was

obtained by means of an untrue representation, a representation positively intended to be carried into effect at the time, but abandoned afterwards, and the abandonment not communicated.¹ . . .

TURNER, L. J. I agree.

In disposing of the case I desire, in the first place, to absolve the defendants from all imputation of any intention of actual fraud; actual fraud has not been imputed at the bar, and the circumstances of the case in my judgment entirely exclude that consideration.

But that by no means disposes of the case; for there are many states of circumstances in which there is technical fraud, in which transactions are fraudulent in the eyes of this court, or characterized by the designation of fraud, although there may be no actual moral fraud. The question really here is whether this case does or does not fall within the range of those cases in which this court holds a transaction to be fraudulent, although it may not be morally so.

The case has been dealt with by the defendants as if it were one of implied contract.

I give no opinion whether or not that view of the case would be right if the question depended wholly on the custom of assurance offices. But the case does not in my view of it in any way depend upon that question. It depends in my judgment entirely upon the representations which were made and which induced the plaintiffs to accept the burthen of the reassurance in question.

The question really is, whether, representations having been made that a liability would be retained on the part of the defendants, and that intention having been changed before the liability attached upon the plaintiffs — for there is no evidence in support of the contention at the bar to the contrary — there ought not to have been a communication of that change of intention to the plaintiffs before they undertook the liability for the £1,000 in question.

I take it to be quite clear, that if a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party making the representation, but not to the knowledge of the party to whom the representation is made, and are so altered that the alteration of the circumstances may affect the course of conduct which may be pursued by the party to whom the representation is made, it is the imperative duty of the party who has made the representation to communicate to the party to whom the representation has been made the alteration of those circumstances; and that this court will not hold the party to whom the representation has been made bound unless such a communication has been made.

Thus, suppose a man agrees to execute a deed releasing his debtor upon certain terms on the assurance that another person, also a creditor of the debtor, has agreed to do the same, and the other creditor has in fact agreed to do so at the time but has afterwards withdrawn from the

¹ Passages on costs and equitable jurisdiction have been omitted. — ED.

agreement, and the withdrawal is not communicated to the person who has agreed to give the release upon the faith of another creditor having agreed to do the same, although it is known to the person upon the faith of whose assurance he agreed to give the release; and he executes the deed. This court would not hold him bound by the deed he had executed. *Underhill v. Horwood*, 10 Ves. 225, is a case in point on such a state of circumstances; but, independently of cases, I adhere entirely and literally to the opinion expressed by Lord Cranworth in the case of *Reynell v. Sprye*, 1 DeG., M. & G. 660, and I think that the opinion is perfectly decisive upon a question of this description.

It is said here that the change of circumstances was not such as could in any way have changed the course of the plaintiffs' conduct, and the evidence of witnesses has been relied upon in support of that view. But the real question is not what the witnesses thought — not whether Mr. Ratray thought that those were circumstances which were so material as that they might change the intention of the plaintiffs — but what the plaintiffs themselves would have thought if the change of intention on the part of the defendants had been communicated to them, the plaintiffs. The argument, therefore, is entirely beside the question. Had this representation of what had occurred and of the change of intention on the part of the defendants been communicated to the plaintiffs, it is impossible to say what course the plaintiffs would have pursued — whether they would or would not have accepted the policy. They might have done so: but it is equally clear that they might not; and we cannot say whether they would or would not: but it was to them that the communication should have been made, in order that they might exercise their option upon the subject.¹ . . .

In my judgment a case of equitable jurisdiction is well proved in this case; the decree is right, and this appeal must be dismissed.²

PROVIDENT LIFE INSURANCE COMPANY v. FENNELL.

SUPREME COURT OF ILLINOIS, 1868. 49 Ill. 180.

APPEAL from the Superior Court of Chicago.

The facts in this case sufficiently appear in the opinion.

Mr. *George H. Harding*, for the appellant.

Messrs. Hervey, Anthony, & Galt, for the appellee.

Mr. Justice LAWRENCE delivered the opinion of the court:

This was a suit brought by Mary Fennell against the Provident Life Insurance Company, upon a policy issued upon the life of her deceased

¹ The omitted passage dealt with equitable jurisdiction. — ED.

² Compare *Prudential Assurance Co. v. Aetna Life Ins. Co.*, 23 Blatch. 223 (1885); S. C. 52 Conn. 576. — ED.

husband. The plaintiff had a verdict and judgment and the defendant appealed.

It is now urged for appellant, that the court erred in not permitting the defendant to give in evidence the application of deceased for the insurance, showing that his occupation at the time of the insurance was that of a switchman on a railway, and to prove in connection with this evidence that he was killed while performing the duties of a brakeman. The insurance was against death by accident. The evidence offered, if admitted, would have been immaterial. The representation was merely that the occupation of the deceased was then that of a switchman, the truth of which is not denied, and did not amount to a covenant that he would do no act not connected with such occupation, or that he would not engage in any different occupation. *N. E. M. & F. Ins. Co. v. Whitmore*, 32 Ill. 223. The policy was not against accidents occurring in the course of his occupation, but against accidents generally, and provided expressly in what particular cases the company was not to be liable, but did not provide that it would not be liable for death occurring from a cause not connected with the occupation of the assured, or that he should not change his occupation. If the company had desired to protect itself from all liability, except for accidents occurring in a particular occupation, it should have so expressly stipulated. That it did not understand its own policy as only covering so narrow a ground is evident from the fact that it did expressly guard itself against liability for death or injury incurred through war, riot, or invasion, or while the assured was in a state of intoxication, or from riding races, duelling, or fighting.

It is also objected that the court did not permit the company to prove the premium had not been fully paid. The policy acknowledged the receipt of payment, and we have decided in a case not yet reported that this statement of a policy could not be controverted.

*Judgment affirmed.*¹

VIVAR *v.* SUPREME LODGE OF KNIGHTS OF PYTHIAS.

SUPREME COURT OF NEW JERSEY, 1890. 52 N. J. L. 455.

ON contract.

For the rule, *E. Q. Keasbey*.

Contra, *J. T. Dunn* and *J. H. Backes*.

DIXON, J. This suit was brought to recover the amount due on two certificates, in terms as follows:—

“Certificate of membership. First class. \$1,000. No. 6118. Endowment Rank of the Order of Knights of Pythias.

¹ *Acc.*: Prudential Assurance Co. *v.* *Ætna Life Ins. Co.*, 23 Blatch. 223 (1885); S. C. 52 Conn. 576.—ED.

"This certifies that Brother Darius Vivar has received the Endowment Rank of the Order of Knights of Pythias in Section No. 311, and is a member in good standing in said Rank. And in consideration of the representations and declarations made in his application, bearing date of June 24, 1879, which application is made a part of this contract, and the payment of the prescribed admission fee, and in consideration of the payment hereafter to said Endowment Rank of all assessments as required, and the full compliance with all the laws governing this Rank, now in force or that may hereafter be enacted, and shall be in good standing under said laws, the said sum of one thousand dollars will be paid by the Supreme Lodge Knights of Pythias of the World, to Emily Louisa Vivar, his wife, as directed by said Brother in his application, or to such other person or persons as he may subsequently direct, by will or otherwise, and entered upon the records of the Supreme Master of Exchequer, upon due notice and proof of death and good standing in the Rank at time of death, and the surrender of this certificate; provided, however, that if at the time of the death of the said Brother Darius Vivar, there shall be less than one thousand members in this class, there shall only be paid a sum equal to one dollar for each member in good standing in this class. And it is understood and agreed that any violation of the within mentioned conditions, or the requirements of the laws in force governing this Rank, shall render this certificate, and all claims, null and void, and that the said Supreme Lodge shall not be liable for the above sum, or any part thereof.

"In witness whereof, we have hereunto subscribed our names and affixed the seal of the Supreme Lodge Knights of Pythias of the World.

"D. B. WOODRUFF,

[L. s.]

"*Supreme Chancellor.*

"JOSEPH DOWDALL,

"*Supreme Keeper of Records and Seal.*

"Issued this 5th day of July, 1879," &c.

The other certificate is in the same form, but in the second class, for \$2,000.

Darius Vivar died April 24th, 1882, and suit on these certificates was brought by Emily Louisa Vivar in July, 1888, on the trial of which action the learned justice directed a verdict for the plaintiff, and gave the defendant a rule to show cause why the verdict should not be set aside, which rule is now to be decided.¹ . . .

The next ground on which the defendant seeks a new trial is that although Vivar, in his application for membership in the Endowment Rank, in response to the question, "State definitely to whom you wish the benefit made payable and relationship to you," had answered, "To my wife, Emily Louisa Vivar," and although by the certificates sued on

¹ In reprinting the opinion, passages have been omitted to the effect that the deceased was a member in good standing at the time of his death, that the statement of relationship was not a warranty, and that a beneficiary need not have an interest in the life insured. For some of the omitted passages, see *post*, p. 410, n., and *ante*, p. 23, n. — ED.

the sums insured were made payable to "Emily Louisa Vivar, his wife," yet the trial judge rejected evidence offered by the defendant to show that, before and at the time of the plaintiff's marriage to Vivar, he had a lawful wife living, and both he and the plaintiff knew it. . . .

In order to invalidate a contract, a representation made during the negotiations must not only be wilfully untrue, but must also be material, or at least must appear to have been thought material by the party to whom it was made. To quote the language of Professor Parsons: "It is obvious that the fraud must be material to the contract or transaction which is to be avoided because of it, for if it relate to another matter, or to this only in a trivial or unimportant way, it affords no ground for the action of the court. It must therefore relate distinctly and directly to this contract, and must affect its very essence and substance. . . . Nor can we give a better rule for deciding the question (whether the fraud be material or not) than this: If the fraud be such that, had it not been practised, the contract would not have been made or the transaction completed, then it is material to it; but if it be shown or made probable that the same thing would have been done by the parties in the same way, if the fraud had not been practised, it cannot be deemed material." 2 Pars. Cont. 769. So in *Anderson v. Fitzgerald*, 4 H. L. Cas. 484, Lords Cranworth and St. Leonards both express the opinion that a wilfully false representation made in obtaining a policy of life insurance will not vitiate the contract, unless it be material or be deemed material by the insurer, or the policy declare that the mere falsity of the statement shall avoid the insurance. A similar view was announced in *Valton v. The National Fund Life Ass.*, 20 N. Y. 32, and in many other cases cited in notes to *Carter v. Boehm*, 1 Sm. Lead. Cas. *619, *641. Where the defence is, that a representation collateral to the contract was false and fraudulently made, the gist of the defence is the fraud of the plaintiff, by which the insurer was misled and induced to make the contract of insurance. *Franklin Fire Ins. Co. v. Martin*, 11 Vroom, 568, 573. If the representation made, though known by the insured to be false, did not differ from the truth in any respect which was, either in fact or in the view of the insurer, material to the contract, then the falsehood did not mislead the insurer, or induce the contract, and should not be allowed to avoid it.

Usually the materiality of a representation will be inferred from the fact that it was made pending the negotiations, in response to a specific inquiry by the insurer; but this rule is not universal; for the purpose of the inquiry must be considered, to see whether the information is sought to aid the insurer in fixing the terms on which he will contract, or with an entirely different object. Thus, if a mutual insurance company should require its premiums to be paid within a definite time after the mailing of notice addressed to the residence of the insured, and with this rule in view should require every applicant for insurance to state his residence in his application, and an applicant should give as his residence, not the truth, but the place where he ordinarily received his

mail, it would seem absurd to hold that such circumstance could invalidate the contract.

In the present case, the inquiry related merely to the payee of the money for which the insurer was to become responsible, and by the very terms of the contract subsequently made the insurer expressly left the designation of the payee to the absolute discretion of the insured, the language of the certificates being that the supreme lodge will pay the sum insured to "Emily Louisa Vivar, his wife, as directed by said Brother [Vivar] in his application, or to such other person or persons as he may subsequently direct, by will or otherwise." A similar power is given to the insured by Article IX. of the constitution of the rank. It seems manifest that a subject thus committed to the control of the insured was not material to the contract of the insurer, nor so regarded by the insurer, and that if Vivar had declared Emily Louisa Vivar to be not related to him, as the lodge now alleges the truth to have been, the contract would have been made on precisely the same terms as at present. While, therefore, the fact that the question was put might justify an inference that relationship between the payee and the member was thought material, yet the express terms of the certificates and the provisions of the constitution force the conclusion that it was not. In this respect the Endowment Rank of the Knights of Pythias differs from those benevolent societies which are organized for the benefit of members and their families solely, and with regard to which it has been properly held that the relationship of the payee is material. *Supreme Council American Legion of Honor v. Green*, 17 Atl. Rep. 1048; *American Legion of Honor v. Smith*, 18 Stew. Eq. 466. . . .

Our conclusion is that the relationship of Vivar to the plaintiff was not material to the contract, either in fact or in contemplation of the insurer, and that, therefore, the falsity of Vivar's statement regarding it could not invalidate the insurance.

The last reason urged for a new trial is that Vivar in his application misstated his age. There was, however, no testimony produced at the trial which would warrant a finding to that effect.

On the whole, we think that justice was done by the verdict, and that the rule to set it aside should be discharged.¹

¹ On the topic of this section, see also :—

Watson v. Mainwaring, 4 Taunt. 763 (1813);
Morrison v. Muspratt, 12 Moo. 231 (1827); s. c. 4 Bing. 60;
Swete v. Fairlie, 6 C. & P. 1 (1833);
Hartman v. Keystone Ins. Co., 21 Pa. 466 (1853);
Bridgman v. London Life Assurance Co., 44 U. C. Q. B. 536 (1879);
Goucher v. Northwestern Traveling Men's Association, 20 Fed. Rep. 596 (1884);
Perine v. Grand Lodge of A. O. U. W., 51 Minn. 224 (1892);
Standard Life and Accident Ins. Co. v. Martin, 133 Ind. 376 (1892);
Grand Lodge Ancient Order of United Workmen v. Belcham, 145 Ill. 308 (1893);
Mutual Life Ins. Co. v. Thomson, 94 Ky. 253 (1893);
Fidelity and Casualty Co. v. Alpert, 28 U. S. App. 393 (1895). — ED.

CHAPTER V.

WARRANTY.

SECTION I.

*Marine Insurance.*¹

JEFFERY v. LEGENDER.

KING'S BENCH, 1691. 3 Lev. 320.²

ASSUMPSIT on a policy of assurance made in the usual form ; and in the conclusion of the policy were the words usually there inserted ; viz., " Warranted to depart with convoy." And the voyage was to be from London to Naples ; and June 17 the ship departed from London with convoy ; but the 19th of June the ship and the convoy were separated by tempest ; and the ship was by the tempest driven into Foy, and the convoy into Torbay, ten leagues distant from Foy ; and the ship and the convoy continued in the said several ports till March 1, when the wind changed, and so continued till March 3, which was time enough for the convoy to have arrived at the ship ; and that the ship sailed out of Foy to go to the convoy, but before she reached the convoy she was by another tempest drove seventy leagues out to sea, the convoy remaining all this time at Torbay ; and the ship being so out at sea was taken by pirates. And upon a special verdict finding the whole matter (on the issue non-assumpsit) the question was whether the insurer should be charged. And (1) it was agreed and admitted of both sides that by the custom of merchants those words " Warranted to depart with convoy " are the words of the assured, and not of the assurer, and by them the assured is to find the convoy ; (2) it was held by the Chief Justice (HOLT) and the most part of the court that, although the words are only " to depart with convoy," yet they extend to sail with convoy throughout the whole voyage ; but (3) that this separation being by the tempest at the first, and the ship and the convoy never after meeting, and the ship sailing to meet with the convoy to go

¹ For the topics often treated as instances of implied warranty, see *post*, Chap. VI., Sect. I. — ED.

² s. c. *sub nom.* Jefferyes v. Legendra, 1 Shower, 320 ; *sub nom.* Jefferies v. Legendra, Carthew, 216, 4 Mod. 58, and Holt, 465 ; and *sub nom.* Jeffries v. Legandra, 2 Salk. 443. — ED.

with it the rest of the voyage, and being again driven away by tempest and taken by the pirates, though the convoy remained all this time at Torbay, yet this was not such a neglect in the convoy as to discharge the insurer, who might have stayed at Foy till the convoy came to him, and therefore they gave judgment for the plaintiff.¹

Thompson, King's Sergeant, for the plaintiff.

Levinz, for the defendant.

LETHULIER'S CASE.

KING'S BENCH, 1692. 2 Salk. 443.

ACTION on a policy of insurance by the defendant at London, insuring a ship from thence to the East Indies, "warranted to depart with convoy," and shows that the ship went from London to the Downs, and from thence with convoy, and was lost. After a frivolous plea and demurrer, the case stood upon the declaration; to which it was objected that here was a departure without convoy. *Et per Cur.* The clause "warranted to depart with convoy" must be construed according to the usage among merchants, — *i. e.* from such place where convoys are to be had, as the Downs, &c.² HOLT, C. J., *contra*: We take notice of the laws of merchants that are general, not of those that are particular usages. It is no part of the law of merchants to take convoy in the Downs. *Vide* Yelv. 136.

WOOLMER v. MUILMAN.

KING'S BENCH, 1763. 1 W. Bl. 427.³

ACTION on a policy of insurance, dated Sept. 23, 1762, at and from North Bergen to London, at two guineas per cent. The ship, &c.,

¹ In *Lilly v. Ewer*, 1 Doug. 72 (1779), the underwriter agreed "to return £2 per cent if the ship sailed with convoy from Gibraltar, and arrived;" and Lord MANSFIELD, C. J., for the court, said: "On the words, I was strongly of opinion that the policy meant a departure with convoy intended for the voyage. The parties could not mean a departure with convoy which might be designed to separate from the ship in a minute or two; though, when convoy for the whole of a voyage is clearly intended, an unforeseen separation is an accident to which the underwriter is liable; for the meaning of such a warranty is not that the ship and convoy must continue and arrive together." — Ed.

² Other cases on convoy are *Gordon v. Morley*, 2 Str. 1265 (1747-8); *Hibbert v. Pigou*, 3 Doug. 224 (1783); s. c. 2 Park Ins., 8th ed., 694; *Philips v. Baillie*, 3 Doug. 374 (1784); *D'Eguino v. Bewicke*, 2 H. Bl. 551 (1795); *Cohen v. Hinckley*, 1 Taunt. 249 (1808); *Warwick v. Scott*, 4 Camp. 62 (1814). — Ed.

³ s. c. 3 Burr. 1419. — Ed.

were warranted to be neutral ship and property; but in truth the plaintiffs were British subjects, having interest on board to the amount of the sum insured. The ship foundered at sea; and the defendant now refuses to pay the insurance, on account of the untrue fact warranted by the plaintiff.

Wallace, for the plaintiff, insisted that this warranty was only meant to secure the insurers against the peril of enemies, and therefore was equivalent to a warranty free from capture; and that the loss had not happened in such manner as to make the truth or falsehood of this warranty at all material.

But by Lord MANSFIELD, C. J.: The point is too clear to be argued. There was a falsehood in respect to the condition of the thing insured; therefore it was no contract.

Judgment for defendant.

HORE v. WHITMORE.

KING'S BENCH, 1778. 2 Cowp. 784.

THIS came before the court upon a rule to show cause why the verdict given for the plaintiff in this case should not be vacated, and judgment entered for the defendant, as in case of a nonsuit. The declaration stated, that upon a policy of insurance on the ship "New Westmoreland," at and from Jamaica to London, warranted to sail on or before the 26th of July, 1776, free from capture, and from all restraints and detainments of kings, princes, and people of what nation, condition, or quality soever, the said ship was preparing and ready to sail, and would have sailed on the 25th of July, on her intended voyage, if she had not been restrained by the order and command of Sir Basil Keith, the then governor of Jamaica, and detained beyond the day. That she afterwards sailed, and was captured, &c.

Mr. *Wallace*, who showed cause, objected, that the usual clause against the detention of rulers and princes being inserted in this policy, the embargo by which the ship was prevented from sailing on the day mentioned in the warranty came expressly within the meaning of it; and therefore excused the delay.

Mr. *Dunning*, *contra*, contended that the loss of the ship could in no possible respect be connected with the embargo. That the warranty was positive and express, that the ship should depart on or before the day appointed, and therefore must be complied with. And of this opinion was the court. Accordingly, the rule for the nonsuit was made absolute.

BEAN v. STUPART.

KING'S BENCH, 1778. 1 Doug. 11.

THE plaintiff insured the ship called the "Martha," at and from London to New York, the voyage to commence from a day specified; and on the margin of the policy were written these words, "Eight nine-pounders with close quarters, six six-pounders on her upper decks, thirty seamen, besides passengers." The ship sailed from the Downs on the 1st of March, and was taken on the 10th by an American privateer, and was sent, with a prize-master on board, to make the port of Boston. On the 30th of May, the plaintiff brought this action against Stupart, an underwriter on the policy; on which Stupart paid the premium into court, and pleaded the general issue. About the 6th of July, and before the trial, accounts were received that the ship had been retaken some time in May and carried into Halifax. The cause came on for trial before Lord MANSFIELD, and a special jury, at Guildhall, at the sittings after Trinity term, 18 Geo. 3. The defence set up was, that there were not thirty seamen on board the ship, according to the terms of the stipulation in the margin of the policy: and, in fact, it appeared upon the evidence that, to make up that number, the plaintiff reckoned the steward, cook, surgeon, some boys, and apprentices, and some persons described as men learning to be seamen; and that only twenty-six persons had signed the ship's articles. It also appeared that there were seven or eight passengers on board.

Bearcroft, of counsel for the defendant, contended that this was a warranty, not a representation, and that being so, it must be literally and strictly complied with. The seamen meant men trained to the occupation of mariners, either such as are called able-bodied, or at least ordinary seamen, in opposition to landmen, and could never include boys, or the steward, cook, and surgeon of a ship. That, at any rate, none but those who had signed the articles were to be considered as seamen, and then the number warranted was not complete. That, in the late case of Pawson against Ewer, 2 Cowp. 785, it had been determined that the strict words of a representation need not be fulfilled, provided the departure from them is not materially to the prejudice of the insurers, but that, in the case of a warranty, it is otherwise, that being a condition, and taken as part of the policy; and that the circumstance of the stipulation, in this instance, being written on the margin, made no sort of difference. He said the nature of the voyage, which was of a very dangerous sort, explained the condition; and the real seamen must have been meant. He also argued (though but slightly) that, whatever might be the construction of the policy, the plaintiff was not entitled to recover as for a total loss, because the ship had been retaken, and had never been *infra præsidia hostium*. Witnesses were examined to explain what is generally understood by the word "seamen,"

and it was either in proof, or admitted, that at the custom-house and Greenwich hospital boys are included in that word.

Lord MANSFIELD observed, in summing up to the jury, that the import of words must be collected from the subject to which they are applied. That if, in the present case, the insured had stipulated for thirty seamen, besides boys and landmen, then it would have been clear that the terms had not been complied with; but that, in this policy, seamen were contrasted with passengers, and, in that sense, the word seemed to include boys as well as men: but he left the construction to the jury.

The jury having found a verdict for the plaintiff as for a total loss, the defendant, in this term, obtained a rule to show cause why there should not be a new trial.

On the day for showing cause, Lord MANSFIELD, after reporting the facts as above related, and that he had left the construction of the word "seamen" to the jury, observed that he himself had thought there was little doubt on the question, after what had passed in the cause of *Pawson v. Ewer*. That the warranty might have been so worded as only to include able seamen (as if seamen had been opposed to landmen); but that, as expressed here, the contrast being with passengers, the whole of the crew or ship's company appeared to be meant. That this was the general maritime sense of the word.

Bearcroft and *Lee* argued in support of the rule for a new trial. They observed that, although the Solicitor-General who had conducted the cause for the plaintiff had not opened the stipulation in the policy expressly either as a warranty, or as a representation, but had insisted that it had been complied with, his Lordship had assumed it to be a warranty, as they said it certainly was. That being a warranty, the case of *Pawson v. Ewer* did not apply. That the sense of the word "seamen" is well understood, and the distinction between seamen and landmen or boys as fully established as that between clergymen and laymen. That a seaman is only such a person as is liable to be pressed. As to the question whether it was a total or an average loss, they cited the case of *Hamilton v. Mendez*, 2 Burr. 1198, and contended that the jury had never taken that point into their consideration.

Lord MANSFIELD. The whole argument for the defendant turns upon begging the question. There is no doubt but that this is a warranty. Its being written on the margin makes no difference. Being a warranty, there is no doubt but that the underwriters would not be liable, if it were not complied with, because it is a condition on which the contract is founded. But the question is, whether, in this warranty, the word "seamen" was used in the strict literal sense or not. If it was, the warranty has not been complied with. It is a matter of construction. Boys are reckoned seamen, not only at the custom-house, and Greenwich hospital, but in the distribution of prizes. I think the parties were not sanguine at the trial. The special jury, and the bystanders, were perfectly clear. They hardly seemed to think it a serious question in this

cause. There is scarcely now such a thing as a ship entirely manned with seamen strictly so called. Even on board the king's ships, they are satisfied with a few strict seamen, and able-bodied landmen make up the rest of the crew. I had no doubt of the sense of the word in this policy, and the jury decided it. With regard to the other question, it was stated as a forlorn hope; but certainly, when the action was brought, there was no prospect of a recapture of the ship; she was considered as totally lost in a remote part of the world. The report which afterwards prevailed of her being retaken, some months after the capture, was loose and general; no circumstances known, no account of her situation nor of what part of the cargo might be saved. In short, there is no doubt but that it was a case where the owner might abandon.

The rule discharged.

VEZIAN v. GRANT.

NISI PRIUS, 1779. 2 Park. Ins. 8th ed. 670.

ON the 8th of December, 1777, a policy was underwritten by the defendant on goods in a French ship, "Le Compte de Trebon," "at and from Martinico to Havre de Grace, with liberty to touch at Guadaloupe; warranted to sail after the 12th of January, and on or before the 1st of August, 1778." The insurance was made by the plaintiff on account of Jacques Horteloupe and Louis de Lamare of Havre de Grace, owners of the ship and cargo; at which time it was not known whether she would load at Martinico or Guadaloupe, they having goods to come from both places; the policy was therefore intended to cover the risk from both, or either of them. The ship, having finished her outward voyage at Martinico, sailed from thence on the 6th of November, 1777, for Guadaloupe, where she took in her whole loading without returning to Martinico, which the captain intended to do had he not got a complete cargo at Guadaloupe; from whence she sailed on the 26th of June, 1778, and was taken on the 3d of September. The plaintiff demanded payment of the loss from the underwriters, which being refused, he brought actions against them for the recovery thereof. This cause came on to be tried at Guildhall, before Mr. Justice BULLER, when the defendant's objections were that, according to the words of the policy, the voyage was to commence from Martinico, and not from Guadaloupe, and that the warranty of the time of sailing was not complied with, the ship having sailed from Martinico before the 12th of January, 1778, to wit, on the 6th of November, 1777. The jury, under the direction of the learned judge, were of that opinion, and accordingly found a verdict for the defendant.

PAWSON *v.* BARNEVELT.NISI PRIUS, *coram* LORD MANSFIELD, C. J., 1779.

1 Doug. 12, n. 4.

THE policy was the same as in the case of *Pawson v. Ewer*.¹ The counsel for the defendant offered to produce witnesses to prove that a written memorandum enclosed was always considered as part of the policy. But his Lordship said it was a mere question of law, and would not hear the evidence, but decided that a written paper did not become a strict warranty by being folded up in the policy.²

KENYON *v.* BERTHON.NISI PRIUS, *coram* LORD MANSFIELD, C. J., 1779. 2 Park Ins.8th ed. 665.³

IN an action on a policy of insurance it appeared that the following words were written transversely on the margin of the policy: "In port, 20th July, 1776." In fact, the ship had sailed on the 18th of July. The question was whether this marginal note was a warranty or a representation.

LORD MANSFIELD. The question is whether the ship's being in port on the 20th is part of the condition of the instrument. When it is on the face of the instrument, it is a part of the policy; so that here, if the ship was not in port, it is no contract. As to its being only in the margin, that makes no difference; it is all part of the contract when it is once signed. And though the difference of two days may not make any material difference in the risk, yet as the condition has not been complied with, the underwriter is not liable.

EDEN AND ANOTHER *v.* PARKISON.

KING'S BENCH, 1781. 2 Doug. 732.

THE plaintiffs insured the ship the "Yonge Herman Hiddinga" and her cargo, "at and from L'Orient to Rotterdam; warranted a neutral ship and neutral property." The ship being captured in the course of her voyage by some English men-of-war, the plaintiffs brought this

¹ *Ante*, p. 212. — ED.

² See *Pawson v. Watson*, *ante*, p. 212 (1778), and *Bize v. Fletcher*, *ante*, p. 216 (1779). — ED.

³ s. c. 1 Doug. 12, n. (4). — ED.

action against the defendant, one of the underwriters on the policy stating in their declaration that the defendant subscribed the policy on the 28th of November, 1780, and averring that the ship and cargo were at that time neutral property. The trial came on before Lord MANSFIELD at Guildhall, at the sittings after last Easter term, when a verdict was found for the plaintiffs, subject to the opinion of the court, on a case which set forth (as far as is material) as follows :—

The ship in question sailed from L'Orient on the voyage insured on the 11th of December, 1780, having the insured cargo on board, and both the ship and cargo were neutral property at the time of the ship's departure from L'Orient, and so continued until the 20th of December, 1780, on which day, hostilities having commenced between the English and the Dutch, the Dutch ceased to be a neutral power, and the ship and cargo ceased to be neutral property. They were taken on the 25th of December, 1780, and condemned as lawful prize in the Admiralty Court on the 19th of February, 1781.

Smith, for the plaintiffs.

Howorth, for the defendant.

For the plaintiffs it was contended that the warranty was complied with by the neutrality of the ship and cargo at the time when the voyage commenced. It is a general principle laid down by Blackstone, J., in his Commentaries, "That a warranty can only reach to things in being at the time of the warranty made, and not to things in future, — as that a horse is sound at the buying him, not that he will be sound two years hence." 3 Bl. Comm. 165. In the case of *Woolmer v. Muilman*, 3 Burr. 1419, s. c. 1 W. Bl. 427, where the warranty was in the same words as here, the judgment of the court was for the defendant, because the ship and goods were not neutral from the first. There was no fraud upon the defendant in this case. The insurer is to inform himself "of the probability of safety from the continuance of peace," as was laid down by Lord Mansfield in the case of *Carter v. Boehm*, 3 Burr. 1905, 1910; s. c. 1 W. Bl. 593, 594. If indeed the property had ceased to be neutral by the act of the party himself, the case would have been different. But he is not answerable for the consequences of a war breaking out during the voyage. To make him so, express words ought to have been used; otherwise the construction is to be in the largest and most advantageous way for the insured, according to the principle of the decision in the case of *Gordon v. Morley*, 2 Str. 1265. The plaintiffs were ready to have proved at the trial that the premium at the time of this insurance would have been the same if the warranty had been "Dutch property" instead of "neutral property."

For the defendant it was said that this was a new question, and called for peculiar attention, as it would affect a great deal of property. It is certainly a question of construction upon the face of the policy; but, both from the words and from the nature of the subject, it must be interpreted to mean a warranty coextensive with the voyage. It

is admitted by the argument on the other side that, if the neutrality had ceased before the ship sailed, the underwriters would not have been liable. But what expression of intention is there that the warranty should not extend throughout? There are no restraining words. The sense is the same as if the policy had run, "warranted neutral ship and neutral property at L'Orient, and from L'Orient to Rotterdam." If the words were to be thought equivocal, yet the nature of the thing speaks in favor of this construction. The merchant proposes to insure the ship and cargo. Upon this the underwriter requires a description of the subject-matter of the insurance. The merchant answers, "I warrant it neutral." This puts an end to all inquiry about the country, whether Dutch, Swedish, Norwegian, &c. Surely, if it had been mentioned that the property was Dutch, the underwriters would have insisted on a much higher premium; for there was at the time of the insurance an universal rumor of a war between this country and Holland. At the trial this was compared to the case of a warranty to carry a stipulated number of men, or so many guns. But those instances do not resemble this. If guns are thrown overboard to save the ship in a storm, that is a circumstance arising out of the very risk insured against, — viz. sea hazard; and if some of the crew die, it cannot be supposed that the insured meant to undertake that men should be immortal. In the case of *Lilly v. Ewer*, 1 Doug. 72, the warranty was "to sail with convoy from Gibraltar;" and because there were no restraining words it was held that the convoy must be for the whole voyage. Suppose there had been a voyage for two or three years, — as to China, &c., — it cannot be thought that the underwriters would have been satisfied if the property happened to be neutral at the commencement of the risk, and without some large addition of premium would have taken the chance of war during so long a voyage upon themselves. It is the understanding of all persons conversant with the subject that, unless there be restraining words, the warranty extends to the whole duration of the voyage. The cases cited on the other side do not apply; they prove principles which the defendant has no occasion to dispute.

Lord MANSFIELD told *Smith* he had no occasion to reply.

Lord MANSFIELD. Many points have been gone into on both sides which are not necessary for the decision of this case. For instance, there is no doubt but you may warrant a future event. But the single question here is, What is the meaning of this policy? I had not a particle of doubt at the trial, and I know the jury had none; but Mr. Lee pressed for a case, and I granted one out of respect to him. What is the case? It is an insurance upon a ship and her cargo, at and from L'Orient to Rotterdam. The insured warrant them neutral; and the defendant would have the court to add by construction, "And so shall continue during the whole voyage." The contract is not so. The insured tell the state of the ship and goods then, and the insurers take upon themselves all future events and risks from men of war, enemies, detentions of princes, &c. The parties themselves could not have

changed the nature of the property ; but they did not mean to run the risk of war. If it made a difference what country the property belonged to, the underwriters should have inquired. The risk of future war is taken by the underwriter in every policy. By an implied warranty every ship insured must be tight, stanch, and strong ; but it is sufficient if she is so at the time of her sailing. She may cease to be so in twenty-four hours after her departure, and yet the underwriter will continue liable. The case of *Lilly v. Ewer* turns quite the other way. The decision there was that the ship must sail with convoy according to the usage of the trade, — *i. e.* convoy destined to go as far as usual in that voyage. The present is the clearest case that can be. The warranty is that things stand so at the time, not that they shall continue.

WILLES and ASHHURST, JJ., of the same opinion.

BULLER, J. The case of *Lilly v. Ewer* is much against the defendant ; for it was not contended there that the ship must continue with the convoy during the whole voyage.

*The postea to be delivered to the plaintiffs.*¹

HIDE v. BRUCE.

KING'S BENCH, 1783. 3 Doug. 213.

THIS was an action upon a policy of insurance on goods, lost or not lost, at and from Leghorn to Gibraltar. There was a warranty in the policy that the ship had twenty guns. It appeared in evidence that she had twenty guns, but only twenty-five men, and that it required sixty men to man twenty guns. It was contended for the defendant that the warranty implied that there should be a proportionable number of men. A verdict was given for the plaintiff ; and a rule having been obtained for a new trial,

Wallace, A. G., and *Lee*, showed cause. There is no implied warranty as to men, nor could it be so intended, for the ship was in a foreign port, and the captain could not get as many men as he pleased. The construction contended for on the other side would make a warranty extend to implications.

Cowper, contra. This was a warranty that the ship was a ship of the force of twenty guns. Was she a ship of that force ? It is not necessary to contend that this was a warranty of guns, and also a warranty of men ; but it was a warranty of the number of guns, and a representation that she had a reasonable quantity of men in proportion to the guns. For the purposes of fighting, twenty-five men were quite useless, for seventeen or eighteen would be necessary to work the ship while in action. Yet, in consequence of this warranty of force, she is

¹ *Acc. Tyson v. Gurney*, 3 T. R. 477 (1789). — ED.

permitted to chase and go into danger, to take prizes, and to weaken herself still further. There has therefore been a misrepresentation by which the policy is avoided.

LORD MANSFIELD. A warranty makes a contingency, without which the contract is void. But a representation, if true, is not to have the same effect unless there is fraud.

WILLES, ASHHURST, and BULLER, JJ., were of the same opinion.

Rule discharged.

DE HAHN v. HARTLEY.

KING'S BENCH, 1786. 1 T. R. 343.

THIS was an action upon promises brought by the plaintiff (an underwriter) to recover back the amount of a loss which he had paid upon a policy of insurance.

Plea, the general issue.

The cause was tried before BULLER, J., at the sittings after last Easter term at Guildhall, when the jury found a special verdict; which stated,

That the defendant on the 14th June, 1779, at London, gave to one Alexander Anderson, then being an insurance broker, certain instructions in writing to cause an insurance to be made on a certain ship or vessel called the "Juno," which were in the words and figures following: "Please get £2000 insured on goods as interest may appear; slaves valued at £30 per head; comwood, £40 per ton; ivory, £20 per hundred weight; gum copal, £5 per ton; *at and from Africa to her discharging port or ports in the British West Indies warranted copper sheathed and sailed from Liverpool with 14 six-pounders* (exclusive of swivels, &c.), 50 hands or upwards, at 12, not exceeding 15 guineas. Juno — Beaver. S. Hartley and Company, June 14th, 1779."

That the said Alexander Anderson, in consequence of the said written instructions from the said defendant on the said 14th June, 1779, at London aforesaid, &c., did cause a certain writing or policy of assurance to be made on the said ship or vessel called the "Juno" in the words and figures following (reciting the policy), which was upon any kind of goods and merchandises, and also upon the body, tackle, apparel, &c., of and in the ship "Juno" at and from Africa to her port or ports of discharge in the British West Indies, at and after the rate of £15 per cent.

The verdict, after reciting two memoranda, which are not material, then proceeded to state, that in the margin of the said policy were written the words and figures following, "Sailed from Liverpool with 14 six-pounders, swivels, small arms, and 50 hands or upwards, copper sheathed."

That on the said 14th June, 1779, and not before, at London afore-

said, &c., the plaintiff underwrote the said policy for the sum of £200, and received a premium of £31 10s. 0d. as the consideration thereof.

That the said ship or vessel called the "Juno" sailed from Liverpool aforesaid on the 13th October, 1778, having then only 46 hands on board her, and arrived at Beaumaris, in the isle of Anglesea, in six hours after her sailing from Liverpool as aforesaid, with the pilot from Liverpool on board her, who did pilot her to Beaumaris on her said voyage; and that at Beaumaris aforesaid the said ship or vessel took in six hands more, and then had, and during the said voyage until the capture thereof hereinafter mentioned continued to have, 52 hands on board her.

That the said ship or vessel in the said voyage from Liverpool aforesaid to Beaumaris aforesaid, until and when she took in the said six additional hands, was equally safe as if she had had 50 hands on board her for that part of the said voyage.

That divers goods, wares, and merchandises, of the said defendant, of great value, were laden and put on board the said ship or vessel, and remained on board her until and at the time of the capture thereof hereinafter mentioned. And that on the 14th March, 1779, the said ship or vessel, while she remained on the coast of Africa, and before her sailing for her port of discharge in the British West India Islands, was, upon the high seas, with the said goods, wares, and merchandises on board her as aforesaid, met with by certain enemies of our lord the now king, and captured by them, &c., and thereby all the said goods, wares, and merchandises of the said defendant, so laden on board her as aforesaid, were wholly lost to him.

That when the said plaintiff received an account of the said loss of the said ship or vessel, he paid to the said defendant the said sum of £200 so insured by him as aforesaid, not having then had any notice that the said ship or vessel had only 46 hands on board her when she sailed from Liverpool as aforesaid. But whether upon the whole matter, &c.

Law, for the plaintiff, was stopped by the court.

Wood, for the defendant.

Admitted, that a marginal note in a policy of insurance may be a warranty; but contended that this was distinguishable from the case of *Bean v. Stupart*, 1 Doug. 11, and all the other cases on the subject. In the cases decided, it has always been a warranty of a fact relating to the voyage insured; but in the present case, that which is written in the margin has no relation whatever to the voyage, for it relates merely to the force of the ship at Liverpool, before the voyage commenced, and is totally unconnected with the risk insured. The insurance is "at and from Africa to her port of discharge in the British West Indies;" and the warranty is from Liverpool; which is antecedent to the voyage insured, and is merely a representation of the state of the ship when she set out on her voyage from Liverpool. Then if it be only a representation, it is immaterial whether complied

with or not, because it is found by the verdict that the ship was equally safe with the number of hands she had on board, as if she had had the whole number contained in the warranty. The warranty then can only relate to her being copper-sheathed: that part indeed was extremely material, because otherwise the risk would have been considerably increased; and that extended to the voyage insured: but the other part of the marginal note was merely a representation, because the manner of sailing from Liverpool was unconnected with the risk insured.

But even if the court should consider the whole as a warranty, it has been substantially complied with.

LORD MANSFIELD, C. J. There is a material distinction between a warranty and a representation. A representation may be equitably and substantially answered; but a warranty must be strictly complied with. Supposing a warranty to sail on the 1st of August, and the ship did not sail till the 2d, the warranty would not be complied with. A warranty in a policy of insurance is a condition or a contingency, and unless that be performed, there is no contract. It is perfectly immaterial for what purpose a warranty is introduced; but being inserted, the contract does not exist unless it be literally complied with. Now, in the present case, the condition was the sailing of the ship with a certain number of men; which not being complied with, the policy is void.

ASHHURST, J. The very meaning of a warranty is to preclude all questions whether it has been substantially complied with; it must be literally so.

BULLER, J. It is impossible to divide the words written in the margin in the manner which has been attempted; that that part of it which relates to the copper sheathing should be a warranty, and not the remaining part. But the whole forms one entire contract, and must be complied with throughout.

*Judgment for the plaintiff.*¹

BLACKHURST v. COCKELL.

KING'S BENCH, 1789. 3 T. R. 360.

THIS was an action on a policy of insurance on goods from the lading of them on board the ship at London to Liverpool "lost or not lost;" at the bottom of the policy was added "warranted well December 9th, 1784." At the trial at the last Guildhall sittings, before Lord KENYON, it appeared that the defendant underwrote the policy between one and

¹ In 2 T. R. 186, the reporter states that in Michaelmas Term, 1787, the judgment of the King's Bench in *De Hahn v. Hartley* was "unanimously affirmed in the Exchequer Chamber."—ED.

three o'clock in the afternoon of that day, and that the ship was lost about eight o'clock the same morning. A nonsuit was entered, with liberty for the plaintiff to move to enter the verdict for him, in case the court should be of opinion that he was entitled to recover on the above facts.

A rule to that effect having been obtained;

Erskine and *Lawes* now showed cause against it. Though in general by the words "lost or not lost" the underwriter is liable even though it should turn out that the ship was lost at the time of subscribing the policy, yet the latter words in this case were inserted in the policy for the express purpose of restraining their operation to the point of time when the policy was underwritten. And though the ship were safe on part of the day when she was warranted to be so, yet she was lost before the time when the policy was subscribed; and the day may be divided to answer the real ends of justice. *Dyer*, 345. *Sir R. Howard's Case*, *Salk.* 625. *Roe v. Hersey*, 3 *Wils.* 274; *Morris v. Pugh and Harwood*, 3 *Burr.* 1241; *Combe v. Pitt*, 3 *Burr.* 1434, and *Pugh v. Robinson*, *ante*, 1 vol. 116. But supposing the day not to be divisible in this instance, then the warranty extended to the *whole* of the day; and it was not complied with, so that either way the underwriter is not liable.

Chambre, in support of the rule, was stopped by the court.

LORD KENYON, C. J. The single question is whether the warranty at the bottom of the policy means warranted well at the time when the defendant subscribed it, or any time on that day. And we are all of opinion that, if the ship were well at any time of that day, it is sufficient; and the underwriter is consequently liable.

ASHHURST, J. This is the only way of giving effect to all the words of the policy. The underwriter insured the goods on board the ship "lost or not lost;" but the assured engaged that she was safe on some part of that day.

BULLER, J. The nature of a warranty goes a great way to determine this question. It is a matter of indifference whether the thing warranted be or be not material; but it must be literally complied with; and if it be so, that is sufficient. Here the ship was warranted safe on the 9th of December, and there was great reason for inserting those words, because they protected the underwriter against all losses before that day; to which he would otherwise have been liable, as the policy was on the goods from the lading of them on board the ship.

GROSE, J. If this were not the true construction of the warranty, one underwriter might be liable, and another not, though they both executed the same policy on the same day. *Rule absolute.*

CLAPHAM AND ANOTHER v. COLOGAN.

NISI PRIUS, *coram* LORD ELLENBOROUGH, C. J., 1813.

3 Camp. 382.

THIS was an action on a policy of insurance on goods. One count of the declaration stated the ship to be "the 'Three Sisters,' at and from Cadiz and Seville to Liverpool," and another count, "the 'Tres Hermanas,' or 'Three Sisters,' at and from Cadiz and Seville, both or either, to Liverpool."

The policy was originally filled up "on the 'Three Sisters,' at and from Cadiz and Seville to Liverpool." After it had been signed by the underwriters, the broker inserted the words "Tres Hermanas or," and "both or either." Several of the underwriters put their initials to the alteration; but the defendant refused to do so. When the broker effected the policy, he merely called the ship the "Three Sisters," without making any representation as to the country she belonged to. In point of fact, she was originally a Dane, and was purchased by the bankrupt, a merchant at Liverpool. While at Seville on the adventure in question, he changed her name to the "Tres Hermanas," manned her with a Spanish crew commanded by a Spanish captain, and put her under the Spanish flag. She was lost on the voyage home by the perils of the sea.

On the part of the underwriters, it was sworn that if the ship, instead of being English, as her name in the policy denoted, had been known to be manned with Spanish seamen, and navigated as a Spaniard, it would have made a difference of two per cent in the premium.

LORD ELLENBOROUGH, however, held, that under these circumstances the defendant was liable. The mere calling the ship by an English name, he said, could not amount to a warranty or representation that she was English; she might have been an American, or an English prize preserving her original name, or a ship built on the continent, whose name was translated into English. Suppose a ship were insured by the name of the "Mark Anthony," if there was no representation of her country, it would be too much to say, the policy would be void, should she turn out to be an Italian called "Il Marco Antonio." If the premium would be governed by the ship's nationality, the underwriters must ask for information; they must not trust to the name. No harm, therefore, could be done by inserting the "Tres Hermanas" in the policy, that being a mere translation of the "Three Sisters." So the other alteration could not vitiate the policy, being in an immaterial part. Without the words "both or either," the ship had the option of going both to Cadiz and Seville or not as it might suit the exigencies of the adventure, so that if she went to both, she took them in their proper order; and with the insertion, she still would have enjoyed the

liberty under the same limitation. The legal operation of the instrument therefore is in no degree affected.

Verdict for the plaintiffs.¹

Garrow, S. G., Park, and Puller, for the plaintiffs.

Park, Scarlett, and Campbell, for the defendant.

NELSON AND OTHERS v. SALVADOR.

NISI PRIUS, 1829. Moo. & M. 309.

ASSUMPSIT on a policy of insurance on sugars on board the ship "George" at and from Tobago, "warranted to sail on or before the 1st of August, 1827;" the time of sailing being afterwards altered by the substitution of the 10th of August for the 1st.

F. Pollock, for the plaintiffs stated to the jury, that the ship was cleared outwards on the 9th of August, that the whole of her cargo and all her passengers were on board on the morning of the 10th, and that on the afternoon of that day she prepared to leave the port. She was then moored by two anchors. One of them was weighed, some of the sails set, and the ship proceeded about thirty fathoms, by heaving in that quantity of the cable of the remaining anchor. When they were about to heave that anchor, the captain observed a very heavy swell setting into the bay, and feared to take his departure lest he should be lost in getting out. Nothing more therefore was done until the morning of the 11th, when the ship actually left the port. She was lost on her way home. The learned counsel said, that the point arising on these circumstances was quite a new one; and the question was, Whether such a warranty meant more than that the ship should be in condition, and ready to sail if the weather permitted? It cannot be required that she should actually sail, to the imminent hazard of the ship and crew; and the underwriters would have had little reason to be satisfied, if she had sailed to fulfil the warranty, and had been lost in getting out of the harbor.

The circumstances opened were then proved.

Sir *J. Scarlett*, for the defendant. Does not your Lordship think the case is over?

Lord TENTERDEN, C. J. I think so; there is no sailing here. The warranty means that the ship shall be on her voyage on the given day. If the circumstances proved amounted to a compliance with it, the ship might be detained by bad weather for a fortnight or more without un-

¹ Other cases on warranty of nationality are *Mayne v. Walter*, 3 Doug. 79 (1782); *Tyson v. Gurney*, 3 T. R. 477 (1789); *Wilson v. Backhouse*, Peake, Add. Cas. 119 (1797); *Rich v. Parker*, 7 T. R. 705 (1798); *Le Mesurier v. Vaughan*, 6 East, 382 (1805); *Mackie v. Pleasants*, 2 Binn. 363 (1810); *Lewis v. Thatcher*, 15 Mass. 431 (1819). — ED.

mooring; and in that case the risk might be materially altered. The plaintiff must be nonsuited.

His Lordship then turned to the jury, which was special, and said, — "I hope, gentlemen, you agree with me;" and several of them immediately expressed their concurrence.

*Nonsuit.*¹

F. Pollock and *R. V. Richards*, for the plaintiffs.

Sir James Scarlett and *Maule*, for the defendant.

SAWYER v. COASTERS' MUTUAL INSURANCE COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1856. 6 Gray, 221.

ASSUMPSIT on a policy of insurance dated October 19th, 1847, on the brig "Sussex," for one year from the 24th of September, 1847, at noon. The grounds of defence relied on were, 1st, A breach of the warranty contained in this clause on the face of the policy: "Said vessel not allowed to carry grain in bulk across the Atlantic;" 2d, False representations of the plaintiff's agent at the time of effecting the policy.

The case was submitted to the decision of the court upon the deposition of the plaintiff's agent, and the following facts: The "Sussex" sailed from New York on the 21st of August, 1847, with grain in bulk, bound to Ballisidore in the district of the port of Sligo, Ireland; and on the 24th and 25th of September, while passing the bar, and entering the harbor of Ballisidore, grounded and received the injuries to recover for which this action was brought.

The plaintiff's agent testified that on the 17th of September, 1847, he applied to the defendants' president in Boston for insurance on the "Sussex" from New York to Ballisidore, with a cargo of grain in bulk; but he refused to issue a policy on the brig with her cargo on board, but said he would take her when clean of her cargo; and so things remained until the plaintiff's agent saw her arrival reported, when he renewed the application, the president asked him whether she had arrived safe and was clean of her cargo, and he replied that she had, and the policy was thereupon filled out.

R. Choate & J. M. Bell, for the plaintiff. 1. The clause, "not allowed to carry grain in bulk across the Atlantic," being a warranty, is to be construed literally. 1 Arnould on Ins. 581. When the policy

¹ Other cases, on complying with a warranty as to sailing on a certain day, are *Bond v. Nutt*, 2 Cowp. 601 (1777); *Earle v. Harris*, 1 Doug. 357 (1780); *Ridsdale v. Newnham*, 3 M. & S. 456 (1815); *Moir v. Royal Exchange Assurance Co.*, 6 Taunt. 241 (1815); s. c. 1 Marsh. 570; *Lang v. Anderson*, 3 B. & C. 495 (1824); s. c. 3 D. & R. 393; *Pittegrew v. Pringle*, 3 B. & Ad. 514 (1832); *Graham v. Barras*, 5 B. & Ad. 1011 (1834); s. c. 3 N. & M. 125; *Cockrane v. Fisher*, 1 C., M. & R. 809 (Ex. Ch. 1835); s. c. *sub nom. Fisher v. Cochran*, 5 Tyr. 496. — Ed.

took effect, the vessel was entering the harbor, having almost finished her voyage, and did not afterwards cross the Atlantic with grain in bulk.

2. The representation that the vessel had arrived was substantially complied with, for she had entered the harbor; and as it does not appear that it was known to be false, or that the risk was increased after arriving at the bar by the cargo of grain in bulk, or that the defendants would have refused the risk because the vessel had not cast anchor, the plaintiff is entitled to recover. 1 Arnould on Ins. 492, 520, 522, 523.

C. W. Loring, for the defendants. 1. On the 24th of September, 1847, the vessel was carrying grain in bulk on a voyage across the Atlantic, which had not yet terminated, as she had not arrived at the wharf. *Taber v. Nye*, 12 Pick. 105. *Meigs v. Mutual Marine Ins. Co.* 2 Cush. 439. The warranty on the face of the policy was broken by carrying grain in bulk any part of a voyage across the Atlantic. 1 Arnould on Ins. 581.

2. The misrepresentation of the plaintiff's agent, that the vessel had arrived safe and was clean of her cargo, avoided the policy. *Bryant v. Ocean Ins. Co.* 22 Pick. 203. 1 Arnould on Ins. 495. *Fitzherbert v. Mather*, 1 T. R. 12. *Kemble v. Bowne*, 2 Caines, 75. *Macdowall v. Fraser*, 1 Doug. 260.

METCALF, J. The misrepresentation of the condition of the vessel at the commencement of the risk avoids this policy. She was represented as having safely arrived at Ballisidore, and having been clean of her cargo of grain in bulk, on the 24th of September, 1847. On that day, neither of these alleged facts existed. The defendants were led into error by this representation, and computed the risk on false grounds. And whenever this happens it is immaterial, as to the underwriters' liability, whether the representation be made by the assured or by his agent, and whether it be intentionally false or false from mere mistake and misapprehension of facts. 3 Kent Com. (6th ed.) 282. *Hughes on Ins.* 347. 1 Phil. Ins. § 537. *Bryant v. Ocean Ins. Co.* 22 Pick. 203. In the present case, it is not suggested that the misrepresentation was made designedly. And we need not express an opinion upon a point about which writers differ, namely, whether in such a case the policy is avoided on the ground of constructive or legal fraud, or on the ground that a positive representation as to a material fact is as essentially a part of the contract as a warranty is, and that its substantial truth is as much a condition precedent to the insurer's liability as is the literal truth of a warranty. It is sufficient for this case that the policy is avoided by misrepresentation.

We are also of opinion that the defendants' other ground of defence is well taken, that the policy does not insure the vessel, if laden with grain in bulk, on a voyage across the Atlantic. At the time of the loss for which this action is brought, the vessel was carrying grain in bulk on such a voyage.

Plaintiff nonsuit.

COGSWELL, APPELLANT, v. CHUBB AND MYERS, RESPONDENTS.

APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FIRST DEPARTMENT, 1896. 1 N. Y. App. Div. 93.

APPEAL by the plaintiff, William B. Cogswell, from a judgment of the Superior Court of the city of New York in favor of the defendants, entered in the office of the clerk of said court on the 18th day of May, 1895, upon the verdict of a jury rendered by direction of the court, and also from an order entered in the office of the clerk of said court on the 20th day of May, 1895, denying the plaintiff's motion for a new trial made upon the minutes.

Everett P. Wheeler, for the appellant.

J. Langdon Ward, for the respondents.

PATTERSON, J. The defendants in this action were underwriters on a policy of marine insurance on the steam yacht "Fieseen," the property of the plaintiff. The insurance for the term of one year, beginning April 10, 1893, was for \$21,000, at which sum the vessel was valued, and these defendants were by the terms of the policy to pay the one one-hundredth part of any loss or damage occasioned by any of the perils insured against. On the 9th of September, 1893, while in the lower New York bay and under way and in tow of another yacht, she came into collision with a steamship and was damaged to the extent of about \$16,000, and this action was brought to recover the one-hundredth part thereof. The trial resulted in a direction to the jury to find a verdict for the defendants, from the judgment entered upon which, and from an order denying a motion for a new trial, the plaintiff has appealed.

A stipulation of the policy, written in between printed portions thereof, is in the following words: "Warranted to navigate only the inland waters of the United States and Canada, and not below the Thousand Islands." It appears in the record that on the 9th day of September, 1893, the "Fieseen," before the collision referred to, went out upon the high seas, beyond the Sandy Hook and Scotland lightships, and into the open waters of the Atlantic Ocean; and that fact is set up as a breach of warranty, avoiding the policy and preventing a recovery thereon.

There does not appear to be any doubt on the evidence that the vessel, on the ninth of September, had been on the open ocean, at least ten miles off from the Sandy Hook lighthouse, to the southward and eastward, as testified by Captain Wicks of the "Electra," and she was south and southeast of the Scotland light. Captain Pressey of the "Vamoose" says the "Fieseen" raced with the boat commanded by him that day, and that the race began about two miles to the south and east of the Scotland light, and they ran about eighteen miles in varying courses. The witness Bulin says the "Fieseen" ran about ten

miles east from the Scotland lightship. Mr. Stanwood swears she went about twelve miles east-northeast directly from Sandy Hook. The effect of the whole evidence is that the vessel went out of inland waters. Such waters are canals, lakes, streams, rivers, watercourses, inlets, bays, etc., and arms of the sea between projections of land. That ordinary and accepted signification of the words "inland waters" must be considered the sense in which the parties used them in their contract of insurance, unless by agreement or understanding some other was assigned to them; and there is nothing in the record to show that a different or wider meaning was intended to be given them. Going to the open ocean and then returning was a plain breach of the warranty, the consequence of which was to avoid the policy, for, hard as the artificial rule may be, it is too firmly settled to be questioned that the breach of an express warranty, whether material to the risk or not, whether a loss happens through the breach or not, absolutely determines the policy and the assured forfeits his rights under it. (*Chase v. Hamilton Ins. Co.*, 20 N. Y. 52; *Stevens v. Commercial Mutual Ins. Co.*, 26 id. 397; *Day v. Orient Mutual Ins. Co.*, 1 Daly, 13; *Westfall v. Hudson River F. Ins. Co.*, 2 Duer, 490; 1 Phillips on Ins. 418, ¶ 762.)

It is claimed, however, on the part of the appellant, that the words "inland waters," as used in the policy, are not limited to their ordinary signification, but that a usage existed respecting the waters frequented by yachts, such as the "Fieseen," in view of which usage the policy was written, and that the warranty should be construed by that usage, and a broader meaning applied to the words, one that would include in the category of inland waters the roadstead outside of Sandy Hook and as far as the yacht went out upon the sea on the ninth of September. Evidence of usage to explain, or rather to give effect to, the meaning of the policy, is very commonly resorted to in cases of this character; and as said by Mr. Phillips (1 Phillips on Ins. 73, ¶ 119) : "The subject-matter of marine insurance and other written mercantile contracts makes it necessary to go out of the written instruments in order to interpret them, more frequently than in most other contracts." But before usage can be appealed to, there must be proof that there really is a usage; something existing, and in connection with which the underwriter is assumed to have taken the risk. All that is in evidence on the subject is, that it is customary for many yachts and other craft of large and small dimensions, whenever an international yacht race takes place, to accompany the competing boats over an ocean course. This scarcely establishes a usage of the character to qualify an express warranty. International yacht races are of infrequent occurrence. That yachts covered by insurance go upon the ocean to follow them does not appear. This policy was written April 11, 1893. It is not shown that an international yacht race was in contemplation for the year during which the policy was to run. Attending the yacht race at Newport, and the custom of yachts to assemble at

that port in the summer for the squadron races, does not establish a usage for the same reasons. All of this testimony is insufficient to prove that the parties contracted for anything other than what is expressed in the plain and accepted meaning of the words of the warranty.

The further contention is made that, the loss happening after the policy attached, and the breach of the warranty in no wise producing or contributing to the loss, but it being occasioned by independent causes, the plaintiff may recover, notwithstanding the breach. The learned counsel for the plaintiff admits that the English authorities are against this view, as they very decidedly are. The American cases of breaches of implied warranties of seaworthiness cited on the argument and in the appellant's brief do not establish a contrary rule affecting the express warranty contained in this policy.

We fail to see the pertinency of the argument made respecting lights carried by certain vessels, under the requirements of the navigation laws of the United States. That steamers plying between New York and Newport, and New York and Long Branch, and New York and Coney Island, carry the lights prescribed for vessels navigating inland waters in addition to those of ocean-going steamers is doubtless true; but they are the same lights required of coastwise steamers; and those plying between the places mentioned may be, and probably are, classed as such.

The judgment and order appealed from must be affirmed, with costs.

VAN BRUNT, P. J., BARRETT, WILLIAMS, and O'BRIEN, JJ., concurred.

*Judgment and order affirmed with costs.*¹

¹ In *Philips v. Baillie*, 3 Doug. 374, 378 (1784), Lord MANSFIELD, C. J., for the court, said: "The doctrine of warranty and representation applies only to policies, and confounds any other subject."

In *Behn v. Burness*, 3 B. & S. 751, 753 (Ex. Ch. 1863), WILLIAMS, J., for the court, said: "The question in this case is, whether the statement in the charter-party, that the ship is 'now in the port of Amsterdam,' is a 'representation' or a 'warranty,' using the latter word as synonymous with 'condition;' in which sense it has been for many years understood with respect to policies of insurance and charter-parties."

On the topic of this section, see also:—

Muller v. Thompson, 2 Camp. 610 (1811);

Colby v. Hunter, Moo. & M. 81 (1827); s. c. 3 C. & P. 7;

St. Louis Ins. Co. v. Glasgow, 8 Mo. 713 (1844);

Grant v. Ætna Ins. Co., 15 Moo. P. C. 516 (1862); s. c. 12 Lower Canada, 386;

Grant v. Equitable F. Ins. Co., 14 Lower Canada, 493 (1864);

Birrell v. Dryer, 7 App. Cas. 345 (1884);

Roddick v. Indemnity Mutual Marine Ins. Co., '95, 2 Q. B. 380 (C. A.);

General Ins. Co. v. Cory, '97, 1 Q. B. 335 (Commercial Court, 1896).—Ed.

SECTION II.

Fire Insurance.

NEWCASTLE FIRE INS. CO., APPELLANTS, v. MACMORRAN & CO., RESPONDENTS.

HOUSE OF LORDS, 1815. 3 Dow, 255.

APPEAL from the Court of Session of Scotland, Second Division.

Macmorran & Co., cotton and wool spinners, at Garschew, insured their premises with the Newcastle-upon-Tyne Fire Insurance Company. The policy was dated April 16, 1805, and contained a receipt for the premium, which was accounted for to the company by Hamilton, their agent at Glasgow, through whom the insurance had been effected. The policy was retained by Hamilton till Sept. 5, 1805, when it was delivered to the insured upon their paying the premium. The policy referred to certain printed proposals, a copy of which was, according to the practice of the office, always delivered to the person transacting the insurance, in which proposals it was stated that, where the persons insuring gave a description of the subject in order to its being insured at a lower premium, and that where there should be fraud or false swearing in stating the amount of the loss, the policy was to be of no force. Certain classes of buildings were likewise specified, according to the particulars of which the premium was to be lower or higher, and the premises in question were warranted to be of the first class, for which the lower premium only was charged. On December 7, 1805, the mill was burnt, and the insurers refusing to pay the sum claimed for the loss, the insured brought an action, regularly preceded by an arrestment *ad Fund. Jur.* before the Court of Session, concluding for payment of £1647, and interest from December 7, 1805. A condescendence having been ordered, the insurers stated two charges as the ground of their refusal to pay: first, that there was fraud and false swearing as to the amount of the loss; second, that the fire was intentional. Upon proof it appeared that there was no foundation for this latter charge; but it also appeared that, at the time of the date of the policy, the premises were of the second class, contrary to the warranty. In answer to this it was alleged that Hamilton, the agent of the Newcastle Company, had taken it for granted that the premises were of the first class, and made out the policy accordingly, without any representation on the part of the insured, and that before the policy was delivered, and the loss happened, the premises had been altered so as to bring them within the first class. It did not appear very distinctly in proof how the demand of £1647 was made up. The court below decerned

against the insurers in terms of the libel, and from this decision the Newcastle Company appealed.

Romilly and *Richardson*, for appellants.

Park and *Brougham*, for respondents.

July 8, 1815. Lord ELDON, C. This is an appeal by the Newcastle-upon-Tyne Fire Insurance Company, from a judgment of the Court of Session by which they were held liable in the payment of a sum of £1647 upon a policy of insurance, and the question is whether this judgment was right or not. The summons, which is in the nature of our declaration, stated that the Newcastle Company were indebted to the pursuers in a sum of £1647, in terms of a policy dated April 16, 1805 (your Lordships will note the date), and concluded for payment accordingly.

The policy itself was in these terms: "Whereas Mr. Hugh M'Morran and Co., &c. have paid the sum of £21 5s. 8d. to the society of the Newcastle-upon-Tyne Fire Office; and do agree to pay or cause to be paid to the said society, at their office in Newcastle-upon-Tyne, the sum of £17 17s. on the 24th day of June, 1806, and the like sum of £17 17s. yearly on the 24th day of June, during the continuance of this policy, as a premium for the insurance from loss or damage by fire, of £50 on millwright's work, including all the standing and going gear in their mill, which is used as a cotton and woollen mill, situated at Garschew as aforesaid, being in their own occupation only, and stone built and slated; £550 on clockmakers' work, carding and breaking engines, and all movable utensils in the second floor, occupied as a cotton mill; £160 on stock of cotton in the same; £600 on clockmakers' work, carding and breaking engines, and all movable utensils in the first floor, occupied as a woollen mill; and £350 on stock of wool in the same;" then followed this very material passage, "*warranted that the above mill is conformable to the first class of cotton and woollen rates delivered herewith.*"

The materiality of it consisted in this (though in one view whether it was material or not did not signify, if it was a condition precedent), that if it was of the second class, and not of the first, a larger premium ought to have been given. And then it goes on: "Now know all men by these presents, that from the day of the date hereof, until the said 24th day of June, 1806, and so from year to year so long as the said Hugh M'Morran and Co. shall duly pay, &c., the sum of £17 17s., &c., and the same shall be accepted by the trustees or acting members of the said society for the time being, the stock and fund of the said society shall be subject and liable to pay, &c., all such damage and loss as the said Hugh M'Morran and Co. shall suffer by fire, not exceeding the sum of £1700, &c." And then followed at the bottom an entry of receipt of the government duty of £2, from April 16, 1805, up to June 24, 1806. Their Lordships would observe the materiality of that, as this instrument could never have been produced in court, if it were only on account of the revenue, save as a policy of April 16, 1805, on

which as a policy so dated the demand could have been made. But whether that was so or not, the demand was made on this policy. On June 24, 1806, the premium must again be paid, and the duty to government, and whether the demand was on the policy originally entered into, or on the renewed policy, it must be on a policy liable to such a duty, and of this date.

In the appellants' case it is stated that the printed proposals formed part of the contract, and that, besides being referred to, a copy is always delivered to the party insuring; and that it is there set out, among other things, that if any "person or persons shall insure his, her, or their houses, mills, &c., and shall cause the same to be described in the policy otherwise than as they really are, so as the same shall be insured at a lower premium than proposed in the table, such insurance shall be of no force." As to their so setting it out in their printed proposals, in the case of a warranty, it is unnecessary to consider that; for if there is a warranty, the person warranting undertakes that the matter is such as he represents it; and unless it be so, whether it arises from fraud, mistake, negligence of an agent, or otherwise, then the contract is not entered into; there is in reality no contract.

Then they further state that, by another article of these proposals, it is provided "that all persons insured by this society sustaining any loss or damage by fire, are forthwith to give notice thereof at their office in Newcastle, and as soon as possible after to deliver in as particular an account of their loss or damage as the nature of the case will admit, and make proof of the same, by their oath or affirmation, according to the form practised in the said office, and by their books of accounts, or other proper vouchers, as shall be reasonably required." That they shall also procure a certificate, under the hands of the minister, &c., and others, relative to the cause of the loss; "and until such affidavit and certificate shall be made and produced, the loss-money shall not be payable; and if there appear any fraud or false-swearing, such sufferers shall be excluded from all benefit by their policies."

They further represent that in the second set of proposals for the insurance of cotton mills, &c., certain classes of buildings were specified, according to the particulars of which the premium is at a lower or higher rate.

Thus, class 1 comprehends "buildings of brick or stone, and covered with slate, tile, or metal, having stoves fixed in arches of brick or stone on the lower floors, with upright metal pipes carried to the whole height of the building, through brick flues or chimneys, or having common grates, or close or open metal stoves or coakles, standing at a distance of not more than one foot from the wall, on brick or stone hearths, surrounded with fixed fenders," I request your Lordships' particular attention to the following words, "*and not having more than two feet of pipe leading therefrom into the chimney*, and in which, or in any building adjoining thereto, although not communicating therewith, no drying stove or singeing frame shall be placed."

Class 2 comprehends “buildings of brick or stone, and covered with slate, tile, or metal, which contain any singeing frame, or any stove or stoves, having metal pipes or flues, *more than two feet in length*, and in which, or in any building adjoining thereto, although not communicating therewith, no drying stove shall be placed.”

As I understand this, very possibly misunderstand it, but it is of no consequence in my view of the case whether I do so or not; but as I understand it, the reason for requiring a higher premium for mills of the second class is that the greater length of the pipe increases the danger. If the pipe of the stove is a yard in length, for instance, the difference arises from this, that if the pipes be more than two feet, the danger is increased beyond what belongs to pipes of that length. But it is immaterial whether I misunderstand this or not; for if the mill was warranted as being of the first class, it must be such as it is warranted to be, unless there is something to oust the warranty, otherwise there is no contract.

Then this mill was burnt; and, as generally happens in these cases, the insured were very anxious to get their money, and the others were not very ready to pay. An action was then brought to compel payment, to which defences were given in. As to that defence which was the most unwelcome to hear, viz., that the premises have been wilfully set on fire, it appeared that there was no ground for it; and the Court of Session seem to have thought that there was no ground for the imputation of fraud and overvalue. It is not likely at any rate that the articles were undercharged; and it was extremely difficult to make out a case of overvalue where the books and papers were all destroyed, and when the amount of these improvements, and the value of spinning-jennies, and such articles, were to be calculated. But though one cannot help believing that enough was charged, yet it might be dangerous to say under the circumstances that that defence ought to be sustained.

But there was another very material point of defence stated, that this mill, which was warranted as being of the first class with a pipe of two feet, was in reality of the second class; and that being of the second class, whether there was fraud or not, whether the misstatement on the part of the insured arose from fraud, or from mere error or inattention, or the mistake of an agent (unless they were misled by the agent of the Newcastle Company), or from whatever other cause, the contract never had effect.

Then evidence was gone into as to whether the mill was of the first or second class. The Court of Session seems to have thought it immaterial whether it was or not. But if the mill was warranted as of the first class, and was really of the second class, the judgment of the court below was clearly erroneous; for it is a first principle in the law of insurance, on all occasions, that where a representation is material it must be complied with—if immaterial, that immateriality may be inquired into and shown; but that if there is a warranty, it is part of

the contract that the matter is such as it is represented to be. Therefore the materiality or immateriality signifies nothing. The only question is as to the mere fact. It is proposed then that the matter should stand over for a day or two in order to examine the case again for the purpose of further inquiry as to that fact; but my present impression is that the mill was not such as it was warranted to be, and that therefore all consideration of fraud or overvalue is out of the question, unless it can be effectually answered that the insured were misled by the insurers, or their agent. Then they say that the misrepresentation was owing to the agent of the Newcastle Fire Company. I cannot say, however, that they have made out that point, and it is denied on the other side, and may therefore be laid out of the question.

Then they say further that there was no effectual policy till the premium was paid, and refer to the terms of the 4th article of the printed proposals, which declares "that no insurance is considered by this office to take place till the premium be actually paid by the insured, his, her, or their agent, or agents." The premium, they say, was not paid till a considerable time after the date of the policy, that the alteration was made which brought this mill within the description of the first class of mills before the premium was paid, and that the alteration had been communicated to the agent of the company. The company deny that any such communication was made, and even if it had been made it would have been still necessary to consider how far that circumstance could alter the law as applicable to the case. But as the fact was denied, and there was no proof of it, that point may be considered as out of the question. With respect to the effect of the article referred to, the appellants contend that it did not relate to the first policy, but to the renewals of policies. But in the present case it is not necessary to consider whether it related to the first policy or any renewals of it, as they say that as between the respondents and them the premium had in point of fact been paid before the alteration took place, as the Scotch agent had accounted for it to his constituents, the Newcastle Company, before the period of the alteration, and it had therefore become a personal debt due to him from the Scotch Company. That may be considered as an answer to the argument raised upon that ground. But suppose that were entirely out of the question, we must in this case as in all others proceed *secundum allegata et probata*, according to what is alleged and proved. If they could succeed at all on this summons, it must be on a policy or contract dated April 16, 1805, and when they have founded upon that only, they cannot afterwards in that action turn round and say, though we cannot succeed on that policy, we are entitled to recover on a subsequent contract. See how the contract would be varied. This was a bilateral contract of the date of April 16, 1805, from which period to June 24, 1806, the premium was acknowledged to have been paid; and it was agreed that a certain premium should continue to be paid on June 24, *de anno in annum*. Can your Lordships convert that into a transaction commencing not in April, but in September, 1805?

Suppose the fire, after being smothered for some time in the mill, had burst out the day before the money was paid to the agent of the Newcastle Company, could that company say, "Though the premium has been paid us by our agent, and we own the receipt of the money, yet as you did not pay the agent we are not bound." Acquitting M'Morran and Co. then of all fraud in the business, the question is reduced to this: "Are you, M'Morran & Co., looking to the facts and evidence as applicable only to the policy of April, 1805, entitled to recover under this contract?"

I have said so much because I consider it as of the greatest importance that the mercantile law should be uniform all over the country, and because it is dangerous therefore to decide these questions of insurance without being sure what may be the effect of the decision and the nature of the doctrine which may result from it. If this is to be taken as a contract of April, 1805, and the premises were not of the class of which they were warranted to be, it appears to me quite clear that the respondents ought not to recover. If the Court of Session was of opinion that the danger and risk was not greater in mills of the second class than in those of the first class, though that were sworn to by five hundred witnesses, it would signify nothing. The only question is, "What is the building *de facto* that I have insured."

July 10, 1815. LORD ELDON, C. Since I had the honor of addressing your Lordships the other day on this case, I have looked again at all the papers. I repeat what I before said, and what indeed the appellants themselves have authorized me to say, that there is no ground whatever for the imputation that the mill had been wilfully set on fire. As to the question of fraud and false swearing, on the best consideration I have been able to apply to the case, though there appears a tendency to state the loss as high as it can be fairly carried, I cannot say that there is anything which amounts to fraud and falsehood. Another ground was that this summons proceeded on a policy, dated April 16, 1805, and that it contained a warranty that the building belonged to the first class, described as having the stoves not more than one foot from the wall, with pipes or flues not more than two feet in length. I stated the doctrine of warranty, and on the best consideration I have been able to give the case, I do not think that the warranty was made good. The remaining question then was whether attending to the nature of the summons the respondents could be considered as having insured of a date posterior to April, 1805, and after the alteration had taken place in the description of the building. I stated my opinion that they could not on this summons. It appears to me then that the appellants ought to be assoilzied in this action, and if the respondents have other special circumstances to allege, they may take advice whether they ought to proceed upon another summons. But I think they cannot succeed on this, and I am therefore of opinion that the judgment of the court below ought to be reversed.

Judgment accordingly.

SCOTT v. QUEBEC FIRE ASSURANCE COMPANY.

KING'S BENCH FOR THE DISTRICT OF QUEBEC, 1821.

Stuart, Low. Can. 147.

On August 21, 1820, the plaintiff insured the sum of £2,600 at the office of the Quebec Fire Assurance Company, upon a house which he inhabited in Montreal, and upon the goods and merchandise, furniture, plate, etc., which it contained, all of which were consumed by the fire on August 15, 1821, while the policy was in full force. It was proved that the fire began in an adjoining house, and spread from thence to a wooden building on the premises of the plaintiff, from which it was communicated through a doorway of the dwelling-house, *which was open although it had an iron door*, to the interior of the last-mentioned edifice, and that it broke out between eight and nine o'clock in the evening. In the policy of insurance it was stated "that the dwelling-house of the assured was built of stone and covered with tin, gables through the roof and plafond, iron doors and shutters," and for the defendants it was contended, that these words "iron shutters and doors" amounted in law to a warranty, which according to the facts above stated had not been performed.

SEWELL, C. J. The rule as to contracts in general is to give language its true effect according to the intention of the speaker or writer, as inferred from the whole expressions and the nature of the occasion to which they are applied.¹ And policies of insurance are to be construed by the same rules as other instruments, unless where by the known usage of trade certain words have acquired a peculiar sense distinct from their ordinary and popular sense.² In this case the description of the premises which was furnished by the insured is inserted in the policy, and if in point of fact it be true, as it undoubtedly is, that they were "built of stone and covered with tin," had "gables through the roof and plafond, iron doors and shutters," whether we consider these expressions in the policy as a *representation*, or as a *warranty*, is immaterial. For, in either instance, the express contract of the assured has been *substantially* and *strictly* performed,³ and being an express contract there is no room for implication: *expressum facit cessare tacitum*. The doors and windows being open in the middle of August, at half-past eight o'clock, is no proof of negligence.

Judgment for the plaintiff.

¹ 1 Ev. Poth. 59, in notis. — REP.

² Robertson v. French, 4 East, 130. — REP.

³ 3 Selw. N. P. 881. — REP.

FOWLER AND OTHERS v. ÆTNA FIRE INSURANCE
COMPANY.

SUPREME COURT OF NEW YORK, 1827. 6 Cow. 673.

ASSUMPSIT, on a policy of insurance against fire; tried at the New York Circuit, July 6th, 1826, before EDWARDS, C. Judge.

The plaintiffs, at the trial, proved a policy executed by the defendants, on the stock in trade of the plaintiffs, consisting of, &c., contained in a two-story frame house, *filled in with brick*, situate at No. 152, Chatham Street, in the city of New York. It appeared that the house No. 152, Chatham Street, was burned, with the plaintiffs' stock in trade; but that the house was a wooden building, *with hollow walls, and not filled in with brick*. That one of the conditions attached to the policy was, that if any person insuring any building or goods at the Ætna office should describe the same otherwise than as they really were, so that the same might be insured at less than the rate of premium specified in the printed proposals of the company, such insurance should be void and of no effect.

Evidence was given at the trial, on the question whether the plaintiffs had been guilty of fraud in procuring an over-valuation of the goods destroyed; and among other evidence, the judge allowed proof on the part of the plaintiffs, of their good character for integrity. This was objected to, and made one point of exception by the defendants.

The defendants insisted that the description of the goods, as being in a house *filled in with brick*, was a warranty which must be strictly complied with. The judge so considered it; but he received evidence to show that the wrong description was either a mistake of the plaintiffs, or of the agent of the defendants; and charged the jury, that if the plaintiffs made no representation of the character of the property insured, but the agent of the company took it upon himself to describe it, the plaintiffs were not bound to answer for the error. That if the plaintiffs did make the description, but not fraudulently, for the purpose of getting insurance at a reduced rate, but through mistake, still they were entitled to recover.

The defendants' counsel excepted to the decisions and charge of the judge.

Verdict for the plaintiffs for \$3,042.80.

On the bill of exceptions.

Talcott, Attorney-General, for the defendants, now moved for a new trial.

G. C. Bronson and H. Maxwell, contra.

SAVAGE, C. J.¹ . . . I think it very immaterial as regards this action, whether the error in description arose from design or mistake. The question is, did this description amount to a warranty that the property

¹ The omitted passage held evidence of character inadmissible. — Ed.

answered the description? The judge at the circuit so considered it; and it was admitted on the argument, that if the principles of marine insurance are applicable to fire insurance, it is a warranty. In the case of *Stetson v. Mass. Mutual Fire Ins. Co.* (4 Mass. Rep. 337) Sewall, Justice, lays down the law thus: "The estimate of the risk undertaken by an insurer must generally depend upon the description of it made by the insured or his agent. A mistake or omission in his representation of the risk, whether wilful or accidental, if material to the risk insured, avoids the contract." For this, he cites 1 Marsh. on Ins. 335, 339. That writer states that a warranty, being in the nature of a condition precedent, must be fulfilled by the insured, before performance can be enforced against the insurer; and whether the thing warranted was material or not, whether the breach of it proceeded from fraud, negligence, misinformation, or any other cause, the consequence is the same. (1 Marsh. 347.)

In relation to the sale of personal property, it is held that a bill of parcels is not a warranty that the goods are what they are represented to be. (2 Caines, 48, and other cases down to the 20 John. 198.) But in relation to policies of insurance, it is held that a description of a vessel is a warranty. For instance, the description of a vessel as Swedish, is a warranty of her national character. (Phil. on Ins. 125, and the cases there cited. 8 John. 237, 319.) Several cases in 2 H. Bl. 574, &c., show that the conditions attached to the policy are to be considered parcel of the instrument.

No cases have been produced to show that a description of property insured by a policy against fire is to be construed differently from a description in a marine policy. I can perceive no reason why there should be a difference. "Insurance," says Lord Mansfield, "is a contract upon speculation." (3 Burr. 1909.) "The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only; the underwriter trusts to his representation," &c. He says the insured need not state what the insurer knows; but the keeping back the true state of the property is a fraud.

In this case, the plaintiffs ought to have known the true state and condition of their house, and have truly represented it. Not having done so, they fail in their action. The property burned is not the property insured.

This is not a case in which equities should be considered. It is a sort of gambling, a speculating upon chances; and the parties must be held strictly and literally to their contract.

I think the judge misdirected the jury, and that a new trial should be granted.

*New trial granted.*¹

¹ In *Fowler v. Ætna Fire Ins. Co.*, 7 Wend. 270, 274-275 (1831), SUTHERLAND, J., for the court, said:—

"Two new trials have already been granted in this case; this is the third verdict which the plaintiffs have had in their favor. When the case first came before us, in 6 Cow. 673, we held that the description in the policy of the house which contained

the goods insured, as *a frame house filled in with brick*, amounted to a warranty that it was a house answering that description, and that the plaintiffs could not recover unless the proof strictly sustained the warranty. The well-established principle in marine insurance that a warranty is in the nature of a condition precedent and must be fulfilled or performed by the insured before performance can be enforced against the insurer, we held to be equally applicable to fire as to marine policies; we knew of no case or principle which would authorize a different rule of construction in the one case from that which the same terms had uniformly received in the other. The verdict was then set aside on account of the misdirection of the judge. He instructed the jury that if the description was made by mistake, and not fraudulently for the purpose of getting insurance at a reduced rate, the plaintiff was entitled to recover. In a case of warranty it is perfectly immaterial whether the misdescription is the result of fraud or mistake; it is a condition precedent, and no excuse can be received for the non-performance of it.

"The second verdict was set aside as being against the weight of evidence on the controlling point, whether the house in question was or was not filled in with brick.

"At the last trial the charge of the judge in the abstract was correct. It was undoubtedly competent for the plaintiffs to show that the words 'a frame house filled in with brick,' had, by the custom or usage of insurers and insured, acquired a particular technical meaning, different from that which the words might generally be understood to import. . . I still think the verdict on this point is against the weight of evidence; but after two concurring verdicts in a case where there were many witnesses, and a great deal of testimony on both sides upon a mere question of fact, . . I should not think it a discreet exercise of the power of this court again to interfere with the finding of the jury."

In *Wall v. East River Mutual Ins. Co.*, 7 N. Y. 370, 372-373 (1852), JOHNSON, J., with whom the majority of the court concurred, said:—

"The only point which it seems to me material to notice is the ruling of the judge that the description, in the policy, of the premises containing the property insured, was not a warranty that the building was occupied as a storehouse only. The insurance was \$2,000 on plaintiffs' 'stock as rope manufacturers, their own or held by them in trust or on commission, contained in the brick building with tin roof, occupied as a storehouse, situated on the northerly side of and about forty-two feet distant from the ropewalk at Bushwick, L. I.' I know of no principle of construction applicable to written agreements, which will permit us to hold a stipulation not to be a warranty in a fire policy, which we should hold to be a warranty in a marine policy. None of the cases in this State deny the identity of the rule. Ever since *Fowler v. Ætna Fire Ins. Co.*, 6 Cow. 673, and 7 Wend. 270, it has been conceded, and in the latter case is stated in terms. . . Since those cases the contest has been whether the warranties contained in the body of policies have been complied with, and whether statements not in the body of the policy but referred to in different ways were thereby constituted warranties.

"As to what constitutes a warranty in a contract of insurance, the rule is well stated by SHERMAN, J., in *Wood v. Hartford Fire Ins. Co.*, 13 Conn. 533, 544: 'Any statement or description, . . on the face of the policy, which relates to the risk is a warranty.' In the case before us, the identity of the building which contained the property insured was distinctly ascertained by other facts of the description, and the terms 'occupied as a storehouse' are not only in themselves fitly chosen to express a fact relating to the risk, but cannot be regarded as employed for any other purpose. The warranty is in terms, that the building was occupied as a storehouse. . . In point of fact, at the time when the policy was executed, the building was occupied in part for the purpose of storing hemp and in part for the purpose of preparing the hemp to be spun by machinery into rope-yarn and of spinning it. This was not occasional, but was the legitimate use to which the building was applied. It is contended on the part of the plaintiffs that the warranty is complied with because it was partly occupied as a storehouse, and that in order to make the warranty large enough to exclude another but partial use negative words were necessary, as, for instance, occupied for a storehouse 'only.' We think this position is not well founded. It would be

SNYDER v. FARMERS' INSURANCE AND LOAN
COMPANY.

SUPREME COURT OF NEW YORK, 1834. 13 Wend. 92.

THIS was an action on a *policy of insurance* against fire, tried at the Ulster Circuit in October, 1832, before the Hon. CHARLES H. RUGGLES, one of the circuit judges.

The plaintiff was insured \$4,000 on his stock of merchandise contained "in the stone building with shingle roof, occupied by himself and others, situated at, &c. *more particularly described in application and survey furnished by himself, filed No. 928, in this office,*" i. e. "the office of the defendants. The property was insured for one year, and within the term the building mentioned in the policy, with its contents of merchandise, was burnt and destroyed by fire. The defendants, upon the call of the plaintiff, and pursuant to notice for that purpose, produced the *application and survey No. 928*, mentioned in the policy; it was in these words: "Survey of a building at Bolton, &c. 56 by 35 feet, built of stone, shingled roof, one story high, garret over the whole, thick *stone partition running lengthwise through the building to the roof*; one part occupied by Alexander Snyder, the other part by Charles M'Inty as a store-room." It was proved on the part of the defendants that the gable ends of the building were of stone, that the roof was on the building lengthwise, coming down to the side walls, which rose about 5 feet above the chamber floor, and on them the eaves of the roof rested. There was a stone partition lengthwise through the store, dividing it into two apartments, one of 18, and the other of 16 feet, one of which was occupied by Snyder; this partition did not extend higher than the chamber floor, and on the partition the beams of the chamber floor rested, and there was no partition in the garret. The judge charged the jury that the *survey* was not a part of the policy so as to become a warranty; that the misdescription of the building in regard to the partition wall was not in itself a bar to the action; that it would be for the jury to determine whether there was any fraudulent misrepresentation or concealment in respect to the survey, or whether the risk or hazard was increased by the facts or circumstances in regard to which the building was misdescribed, and that if they should find either of those points in the affirmative, the verdict should be for the defendants, otherwise for the plaintiff. The jury found for the plaintiff, and assessed his damages at \$3,452. The defendants, having excepted to the charge of the judge, moved for a new trial.

J. Tallmadge, for the defendants.

N. Sickles & S. Sherwood, for the plaintiff.

strange indeed if a term which, like 'occupied,' in its own meaning [is] exclusive, needed any further qualification to give it effect. 'Occupied as a storehouse' necessarily imports not occupied for any other purpose." — Ed.

By the Court, SAVAGE, C. J. The only question in this case is, whether the *survey* furnished by the plaintiff is to have the effect of a *warranty*, or of a *representation*. This question must be considered as settled on authority in this court. It arose and was decided in *The Jefferson Ins. Co. v. Cotheal*, 7 Wendell, 72. That was an action upon a policy for \$5,000, on a steam saw-mill, built of wood, situate on the river Nantikoke, near Vienna, in the State of Maryland, as described in report No. 193. In the application for insurance, it was described as 130 feet long by 30 broad. It was in fact 132 feet long; part of it was 30 feet broad, but about 40 feet of it was 40 feet broad. The boiler and furnace were placed on the outside of the building and covered, being about 30 feet in length, 10 high and 10 wide. It was insisted that the representation made by the plaintiffs was a warranty. The Chief Justice of the Superior Court of the city of New York, before whom the cause was tried, decided that it was not a warranty, but a representation, and that the variance did not defeat the policy, unless in consequence of the variance the premises were insured at a less premium than they would have been if they had been truly described. The cause came into this court by writ of error, and the opinion of the court was given by Mr. Justice Sutherland, who examined the cases on the point, and came to the conclusion that a warranty is never to be created by construction — must appear on the face of the policy; that there may be unequivocal evidence of a stipulation, the non-compliance with which is to have the effect of avoiding the contract. The only exception to the generality of this proposition is, that the proposals and conditions attached to the policy form part of the contract. In the case of *Dow v. Whetton*, 8 Wendell, 166, the chancellor says, the policy itself is the only legal evidence of the agreement between the parties. Vice-Chancellor M'Coun has also clearly stated the difference between a warranty and a representation. The former is the affirmation of a fact asserted in the policy, and forming a condition which must be strictly complied with; the latter the statement of some collateral circumstances not embodied in the policy, though made before the contract was completed. *Callaghan v. Atlantic Ins. Co.*, 1 Edw. Ch. 64, 74. This subject has been much considered in the Superior Court of the city of New York. *Delonguemare v. Tradesmen's Ins. Co.*, 2 Hall, N. Y. Super. Ct. 589, 608, 627–8. Chief Justice Jones says, it is a general rule that a representation, to have the effect of a warranty, must be contained in the deed or policy itself. And Mr. Justice Oakley says, "In determining what shall constitute a warranty, and what shall be a representation merely, the general principle seems to be well settled that an express warranty must appear on the face of the policy, and that any instructions for insurance, unless inserted in the instrument itself, do not amount to a warranty." Again: "The insurers, having a description of the property in their possession, are presumed to insert in the policy itself as much of that description as they deem material; and by omitting any part of it, they show

that they are content to take such part as a *representation merely*, and to look to it only for estimating the risk." These cases have been referred to with approbation by Chancellor Kent, 3 Kent's Comm. 373, and are believed to be in unison with the English cases found in Cowper, 785, Dougl. 12, *n.*, and 1 Condry's Marshall, 451. It is not necessary to deny that a separate paper may by *express stipulation* be made part of the policy; but there is no such reference in the present policy as to authorize the court to give the survey the force of a warranty; indeed, from the manner of referring to it, it would seem that the defendants were satisfied to look to it only for the purpose of estimating the risk. It is not pretended that the judge did not present the question of fraud fairly before the jury. The only question which we decide now is, that the survey referred to in the policy must be considered a *representation merely*, and not a *warranty*.

*New trial denied.*¹

¹ This judgment was affirmed in the Court of Errors. Farmers' Ins. and Loan Co. v. Snyder, 16 Wend. 481 (1836).

Acc.: Commonwealth's Ins. Co. v. Monninger, 18 Ind. 352 (1862).

Contra: Sheldon v. Hartford F. Ins. Co., 22 Conn. 235 (1864).

In Burritt v. Saratoga County Mutual F. Ins. Co., 5 Hill, 188, 190-191 (1843), s. c. ante, p. 178, BRONSON, J., for the court, said:—

"In the law of insurance a representation is not a part of the contract, but is collateral to it. An express warranty is always part of the contract, and a reference in the policy to a survey or other paper will not make such paper a part of the contract, so as to change what would otherwise be a mere representation into a warranty. (Jefferson Ins. Co. v. Cotheal, 7 Wend. 72; Snyder v. Farmers' Ins. Co., 13 Wend. 92, and s. c. in error, 16 Wend. 481; Delonguemare v. Tradesmen's Ins. Co., 2 Hall, 589; 1 Marsh Ins. (Condry), 346-350, 451; 1 Phil. Ins. 346, 7, ed. of '40). But these cases admit, what no one could well deny, that the policy may so speak of another writing as to make it a part of the contract, although not actually embodied in the policy. And to that effect, see Routedge v. Burrell (1 H. Black. 254); Worsley v. Wood, (6 T. R. 710); Roberts v. Chenango Ins. Co. (3 Hill, 501). Now here, the policy not only refers to the plaintiff's written application 'for a more particular description' of the property insured, but it refers to it '*as forming a part of this policy*.' The application was thus, by express words, made part and parcel of the contract, and the two instruments must be read in the same manner as though they had been actually moulded into one.

"How then stands the question of warranty? The plaintiff was required by the 'conditions of insurance,' and by the form of application with which he was furnished, to state the 'relative situation [of the store] as to other buildings—distance from each, if less than ten rods.' To this he answered by mentioning five buildings as standing within the ten rods. Although he did not in terms say there was no other building within the ten rods, he must have intended that his answer should be received and understood by the company as affirming that fact; and as the answer is to be regarded as parcel of the contract, I find it difficult to resist the conclusion that the plaintiff has *agreed* that there were no other buildings within the ten rods than those mentioned in the application. Men are not at liberty to put a different construction upon their language when the contract is to be enforced, from that in which they intended the words should be received by the other party at the time the contract was made. I am strongly inclined to the opinion that there was a warranty; but there is another feature in the case which renders it unnecessary to settle that question."

And see Murdock v. Chenango County Mutual Ins. Co., 2 N. Y. 210 (1849); Citizens' Ins. Co. v. Hoffman, 128 Ind. 370 (1891).—ED.

WOOD AND ANOTHER v. HARTFORD FIRE INSURANCE COMPANY.

SUPREME COURT OF CONNECTICUT, 1840. 13 Conn. 533.

THIS was an action on a policy of insurance against loss or damage by fire, to the amount of \$5,000, on the one undivided half of the paper-mill owned by the plaintiffs, in Westville, in New Haven, together with one half of the machinery, gearing, &c., from Feb. 11, 1837, to Feb. 11, 1838.¹ . . .

At the time of effecting the insurance, the plaintiffs resided in the city of New York; and the premises insured were in the possession and immediate occupancy of William Buddington, the owner of the other undivided moiety, to whom the plaintiffs had, in March, 1832, given a lease for five years. At the date of the policy, the paper-mill and its machinery were in full operation, being used by Buddington in making paper, and so continued until May 23, 1837, when he discontinued the use of the machinery for the purpose of making paper; and it has not since been used for that purpose. In the month of August, 1837, Buddington, being so in possession, and having so discontinued the use of the paper-mill, introduced into the establishment, without the knowledge or consent of the plaintiffs, a pair of mill-stones for the grinding of grain. . . . After May 26, 1837, and at the time of the fire, Buddington held, claiming to be tenant of the property, by virtue of his lease from the plaintiffs, and denying the right of the plaintiffs to enter upon or use the premises; and so held against the will and consent of the plaintiffs. The risk by the use of the mill-stones was made greater than it would have been if no use had been made of the premises; but the introduction of the grist-mill machinery did not make the risk to the premises greater than if the paper-mill only had been in full operation.

A case embracing these facts was made, partly by agreement of the parties and partly by the finding of the jury, and reserved for the advice of this court as to what judgment should be rendered thereon; it being admitted, that, if for the plaintiff, it should be for the whole sum insured by the policy, and interest thereon from the time it was payable.

Baldwin and Kimberly, for the plaintiffs.

Bissell and Hungerford, for the defendants.

SHERMAN, J. It is not necessary to advert to all the points which have been discussed in this case by the learned counsel. The general rule in regard to what constitutes a warranty, in a contract of insurance, is well settled. Any statement or description, or any undertak-

¹ The statement has been shortened by omitting some facts foreign to warranty or summarized in the opinion. — Ed.

ing on the part of the insured, on the face of the policy, which relates to the risk, is a warranty. Whether this is declared to be a warranty *totidem verbis*, or is ascertained to be such, by construction, is immaterial. In either case, it is an *express* warranty, and a condition precedent. If a house be insured against fire, and is described in the policy as being "copper roofed," it is as express a warranty as if the language had been "*warranted* to be copper roofed;" and its truth is as essential to the obligation of the policy in one case as in the other. In either case, it must be strictly observed. There may often be much difficulty in ascertaining from the construction of the policy, whether a fact, quality, or circumstance specified relates to the risk, or is inserted for some other purpose, — as to show the identity of the article insured, &c. This must be settled before the rule can be applied. But when it is once ascertained that it relates to the risk, and was inserted in reference to that, it must be strictly observed and kept, or the insurance is void. The word "*warranted*" dispels all ambiguity, and supercedes the necessity of construction. If a house be insured against fire, and the language of the policy is, "*warranted*, during the policy, to be covered with thatch," the insurer will be discharged if, during the insurance, the house should be covered with wood or metal, although his risk is diminished; for a warranty excludes all argument in regard to its reasonableness, or the probable intent of the parties. "It is quite immaterial," says Marshall [on Insurance, 249], "for what purpose, or with what view, it is made; or whether the assured had any view at all in making it, — unless he can show that it has been literally fulfilled, he can derive no benefit from the policy." And he adds [page 251], that "it is also immaterial to what cause the non-compliance is attributable; for if it be not in fact complied with, though perhaps for the best of reasons, the policy is void." These positions are in conformity with numerous and high authorities, and with the reason of the rule. Parties may contract as they please. When a condition precedent is adopted, the court cannot inquire as to its wisdom or folly, but must exact its strict observance. An entry on the margin of the policy, or across the lines, or on a separate paper, expressly referred to in the policy, will be construed a warranty, if it relates to the risk; that is, if it defines, or in any respect limits, the risk assumed. It may, indeed, where the explicit language of a warranty is not adopted, be difficult to ascertain whether, on a fair construction, the clause was meant to define or limit a risk; but when this is ascertained, the insured has no right to dispense with it, or substitute in its place another risk, however advantageous to the insurer. No man can be compelled to adopt a better bargain than his own.

It is immaterial whether the non-performance or violation of the warranty be with or without the consent or fault of the insured. Its strict observance is exacted by law; and no reason or necessity will dispense with it.

The argument of the defendants is therefore conclusive if the policy

warrants this building to be and continue a paper-mill, and it was not one, at the time of the loss.

In the policy, this establishment is described as "the one undivided half of the paper-mill, which they [the insured] own at Westville, together with the half of the machinery wheels, gearing, &c.; the other half being owned by William Buddington." If this relates to the risk, it is a warranty. That it does is evident from the *memorandum* in the conditions of the policy, where "paper-mills" are enumerated among those articles which "will be insured at special rates of premium;" that is, a paper-mill is the subject of peculiar risks, and is to be insured upon special stipulations. Therefore the description of this, in the policy, as a "paper-mill," relates to the risk, and is, consequently, a warranty. It is the only subject of insurance; and if it was not a paper-mill at the time of the loss, the warranty was not kept, and the plaintiffs cannot recover, although the change may have diminished the hazard, and been effected without their knowledge, or against their will.

It is contended that the paper-mill had become converted into a grist-mill. The policy is dated in February, 1837. In the August following, the use of the paper-mill was discontinued, and a pair of mill-stones were added for grinding grain. They were located in the place previously occupied by the rag-cutter and duster, and were moved by the same gearing, and by the power of the same water-wheel. No other machinery was used for the grindstones. All remained as it was except the rag-cutter and duster, — which were dismantled, — and all the other machinery might, at any time, have been employed in making paper. It was to all intents and purposes a paper-mill, ready for use. The character of the establishment was no more altered than if a grindstone had been attached by a band to the water-wheel, and all the other machinery left at rest. The warranty was duly kept.¹ . . .

*Judgment for plaintiffs.*²

¹ A passage not bearing on warranty has been omitted. — Ed.

² See *Williams v. New England Mutual Ins. Co.*, 31 Me. 219 (1850).

Compare *Billings v. Tolland County Mutual F. Ins. Co.*, 20 Conn. 139 (1849).

In *Richards v. Protection Ins. Co.*, 30 Me. 273 (1849), the policy was upon "a stock in trade, consisting of *not hazardous* merchandise." SHEPLEY, C. J., for the majority of the court, said: —

"Four classes of hazards are named in the conditions annexed to the policy, denominated not hazardous, hazardous, extra-hazardous, and memorandum of special risks. . . .

"Insurance is proposed to be made upon goods contained in these different classes at different rates of premium. The classes of hazard and the conditions of insurance annexed to the policy form a part of the contract between the parties. That contract requires mutual good faith and fair dealing. The law presumes that the parties acted with intelligence. The defendants did not propose to insure goods of the class denominated hazardous at the premium affixed for the class denominated not hazardous. Nor did they propose to insure goods composed partly of one class and partly of the other at the rate of premium affixed to the least hazardous. This appears from the language used; for 'groceries with any hazardous articles' are enumerated in the class of hazardous. If the plaintiffs, having procured insurance on their stock in trade

KENTUCKY AND LOUISVILLE MUTUAL INS.
CO. *v.* SOUTHARD.

COURT OF APPEALS OF KENTUCKY, 1848. 8 B. Mon. 634.

ERROR to the Jefferson Circuit.

Chief Justice MARSHALL delivered the opinion of the court:—

This action of covenant was brought by Southard to recover for the destruction by fire of his dwelling-house, insured by the Kentucky and Louisville Mutual Insurance Company. The policy on which the action is founded insures the plaintiff to the amount of \$7,000, against loss by fire from the 6th day of March, 1841, to the 6th day of March, 1847, upon his “one-story brick mansion-house, situated, &c., adjoining the

consisting of not hazardous articles, could have kept a stock of goods for sale composed entirely of hazardous articles, and could have recovered for a loss of them by fire, they could do so only by compelling the defendants to become insurers, and to bear the loss for a compensation less than the one affixed to such a class of goods, and less than the one agreed upon by the parties as appropriate to such a risk. So if they could have kept goods for sale composed partly of the first and partly of the second class of risks, and could after a loss of them by fire have recovered for them, the defendants would have been compelled to bear the loss for a premium less than that for which they would have knowingly assumed the risk. The injustice in the latter case would not be so great as in the former, but a recovery would be equally unauthorized according to the terms of the contract.

“The description of the property insured in the body of the policy, when the rate of premium is thereby affected, operates as a warranty that the property is of the character and class described. And that the property is all, and not partly, of that character and class. Such a warranty is in the nature of a condition precedent, and performance of it must be shown by the person insured before he can recover upon the policy. . . .

“In the present case, the warranty that their stock in trade consisted of not hazardous merchandise has not been complied with, but violated by keeping goods for sale of a different class denominated hazardous, for the insurance of which a greater premium was required. . . .

“All the cases decided upon the effect of a stipulation contained in the body of the policy, and operating as a warranty, determine that there must be a compliance with the warranty to entitle the assured to recover. Not because any of the conditions of the policy declare that it shall be void if articles of a different class or description are kept for sale, but because one who has violated his own contract of warranty cannot enforce it against the other party to it.

“The position that the insurance in this case attached only to goods of the denomination not hazardous, and that its validity was not affected by the presence of goods of a different class, cannot be admitted. If it were, the assured might, contrary to his own stipulation to have goods of only one class, keep goods of different classes, thereby greatly enhancing the risk, and yet recover for the loss of the goods composed of the class insured. Nor can the warranty be considered as attaching to part of the goods only. It relates to their stock in trade, and not to a portion of it. Nor can the warranty upon any known principles of law or justice be considered as attaching only to the goods in the store at the time it was made, and as not operative to prevent the introduction and sale of a class of goods of a much more hazardous character. Such a warranty would be of little or no value. The premium is predicated upon the same description of risk during its continuance.” — Ed.

city of Louisville, lately occupied by James Southard, &c.; a mortgage on the building and the land on which it stands, in favor of James Burks for \$3,500. The aforesaid building is occupied as a dwelling-house." And it is provided that "if the premises aforesaid shall at any time when a fire may happen, be occupied in whole or in part for purposes more hazardous than that which exists at the date hereof, unless liberty so to occupy, &c., be expressly given in writing on this policy, every clause, article, &c., to be wholly void. Reference being had to the application of the said Southard, and survey filed, for a more particular description, and as forming part of this policy."¹ . . .

The defendants demurred to the declaration, and at the same time filed pleas 1, 2, 3, and 4, to which the plaintiff demurred. And the declaration having been adjudged good, and the pleas bad, time was given to the defendant to plead *de novo*. At a subsequent term the defendant filed pleas 5, 6, and 7; to the first of which the plaintiff replied by way of traverse, on which issue was joined; and to the two others he filed demurrers, which were sustained. The defendant then offered plea number 8, said to be in lieu of his demurrer to the declaration, which had been overruled. But the court would not allow it to be filed, and the defendant having excepted to the refusal, a trial was had upon the issue made upon the 5th plea, and a verdict and judgment were rendered for the plaintiff for \$6,804.43. The defendants' motion for a new trial was afterwards overruled, and they had brought the case to this court for revision, questioning by the assignment of errors, the correctness of the several opinions of the court in overruling the demurrer to the declaration, and in sustaining the demurrers to pleas 1, 2, 3, 4, 6, 7, and in refusing to allow plea number 8 to be filed, as well as of the opinions given during the progress of the trial, and on the motion for a new trial.

We are inclined to the opinion, that the defendants must be understood to have waived their demurrer to the declaration, and to have withdrawn their four first pleas, by taking time to plead *de novo*, and by offering new pleadings under the privilege thus allowed. But as the questions on all of the demurrers were elaborately argued here, we shall notice them all. . . .

Then as to the three first pleas, they stand upon the assumption that the application of Southard for insurance, and the survey of the building being referred to in the policy as forming a part of it, are to be taken as if they were actually inserted in it, and that every descriptive statement of the property contained in either of them, is by the law of insurance a warranty, the breach or untruth of which in any particular, whether material to the risk or not, avoids the policy.

But in the first place it is questionable whether even in the law of marine insurance, the principle which converts into a warranty every matter of fact or description relative to the property insured, which the parties have inserted in the policy, is to be applied to any such matter

¹ In reprinting the opinion, passages foreign to warranty have been omitted. — ED.

not inserted in the policy nor written upon it, though it be referred to therein as a part of the policy. For the question might still arise, for what purpose is it made a part of the policy, and why was it not inserted in it? In ordinary contracts such matter, though actually inserted in the written memorial, has not necessarily the force of a covenant or warranty. In marine insurances, it acquires the force of a warranty from the very fact of being inserted in the policy. And as the insurer may insert so much of the applicant's description or statement as he intends to have the force of a warranty, there is room for the inference that so much as is not inserted is intended to have the effect of a representation merely, and is referred to as such. The general rule is well settled that an express warranty must appear on the face of the policy, and that instructions for insurance, unless inserted in the policy itself, do not amount to a warranty. So a memorandum upon a paper attached to the policy by a wafer, or rolled up in it, when it was shown to the underwriter and executed by him, has been held not to be a warranty, but a representation merely. These positions are fully sustained by the cases stated in the notes, pages 11 and 12 of Douglas' Reports. Chancellor Walworth in *Snyder v. Farmer's Loan Company*, 16 Wend. 481, admitting that the parties might, by stipulation, insert in the policy, give the effect of a warranty to a statement of facts contained in a separate paper, maintains the opinion that (in the absence of such stipulation) the principle which converts everything in the policy into a warranty is not to be extended to anything not contained in the policy or written on the same paper. And in *Delonguemare v. The Tradesman's Insurance Company*, 2 Hall, 589, Chief Justice Jones and Judge Oakley, upon the authority of the cases just referred to and others, express the same opinion: 1 Cond. Marsh. 349, 451; 3 Kent's Com. 235; 13 Mass. Rep. 96; 3 Dow, 255.

But in the second place. Whatever might be the doctrine in case of marine policies, in making which the insurer is in general wholly dependent upon the statements of the insured, with regard to the property and the risk, it has been seriously doubted (by Chancellor Walworth, *ubi supra*), and so far as we know, has not been established by judicial decisions, whether "the principle of construing every matter of mere description contained in the body of the policy into a warranty, should be applied with the same strictness to *fire policies*, where the misdescription is most generally the mistake of the under-writer's own surveyor." And in the third place. These warranties being conditions precedent, which must be performed or be true, however immaterial, there is an obvious propriety that they should be contained in the policy which is to be kept by the insured, not only that he may be enabled to make the proper averments when he comes to declare, but that he may be fully apprised of the effect intended to be given to his statements. Since if they are considered merely as representations, it is sufficient that they were made without fraud and are substantially true in every point material to the risk.

Under these considerations we are of opinion that it is at least safe to conclude that the reference in this policy to the application and survey as a part thereof, being a part of the clause which vacates the policy if the premises should, at the time of any fire, be occupied for purposes more hazardous than at the date of the instrument, should be understood as merely identifying the description and condition of the property at that time, for the purpose and as the standard of comparison in case of fire; that no other force or effect was intended to be given to the writings referred to, than as being a description of the nature or purposes of the occupation of the building at the time; and that as the clause points expressly to the sort of variance against which it intends to guard (viz.: a more hazardous occupation), and declares expressly the consequence of such variance, these declarations should be regarded as expressing the entire scope and object of the reference, beyond which it cannot be carried without violating the apparent intention of the parties. The entire clause, including the reference to the application and the survey, was intended to secure the insurers from loss by a change in the occupancy of the premises which should increase the risk and not to bind the other party to the truth of immaterial statements not affecting the risk, nor to preclude him from changes either in the plan or occupation of the premises, unless the hazard should be thereby increased. And the written application and survey were referred to as fixing the standard of comparison, and not for the purpose of creating or evidencing any covenant or warranty on the part of the insured, as to the condition or occupation of the premises at the time the insurance was made. The only covenant or warranty on this subject is contained in that part of the policy which describes the building as a mansion situated, &c., and states that it was then occupied as a dwelling-house. The facts alleged in these pleas, that one room was occupied as a kitchen, cannot be taken as a breach of this warranty.

Since then the statements made in the survey or even in the plaintiff's application for insurance, are not warranties, these pleas do not, in alleging the untruth of those statements, show a breach of warranty, and are, therefore, insufficient on that ground, to avoid the policy or bar the action. But although the pleas allege a warranty and a breach of it, they should perhaps be deemed substantially good if they show such a misrepresentation as should avoid the policy. Considered in this view, the application and survey may be regarded as representations, and the alleged breach of warranty as an averment of the untruth of the representation. But in order to make the pleas good in this aspect, they should show not only the untruth of the representation, but its materiality. And this, in our opinion, they fail to show. . . .

Wherefore, the judgment is affirmed.¹

Guthrie and Pirtle, for plaintiffs.

Loughborough, for defendant.

¹ See *Houghton v. Manufacturers' Mutual F. Ins. Co.*, 8 Met. 114 (1844); *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452 (1853); *Elliott v. Hamilton Mutual Ins.*

Co., 13 Gray, 139 (1859); *Garcelon v. Hampden F. Ins. Co.*, 50 Me. 580 (1862); *Wilkins v. Germania F. Ins. Co.*, 57 Iowa, 529 (1881); *Eddy v. Hawkeye Ins. Co.*, 70 Iowa, 472 (1886); *Waterbury v. Dakota F. & M. Ins. Co.*, 6 Dak. 468 (1889).

In *Lindsey v. Union Mutual F. Ins. Co.*, 3 R. I. 157, 159, 160 (1855), *Bosworth, J.*, for the court, said: "There are many other interrogatories put and answered in the written application referred to, and the whole are concluded with the following express agreement: 'And the said applicant covenants and agrees with said company that the foregoing is a correct description of the property requested to be insured, as far as regards the risk and value of the same.' This concluding clause in the application itself indicates the extent of the warranty which the party making and the party receiving it understood the application to be. And being referred to in the policy and made a part of it, it is a warranty, according to its terms. The making of the application a part of the policy cannot have the effect to make the answers to the questions put and answered a warranty of a different character than that which the application represents it to be. The giving to it such effect would contradict the terms of the policy, that the application is made a part of it. The warranty is, therefore, that 'the description of the property requested to be insured is a correct description, as far as regards the risk and value.'"

In *Wilson v. Conway Fire Ins. Co.*, 4 R. I. 141, 156-158 (1856), *Ames, C. J.*, for the court, said: "Many cases were cited . . . to show that where applications or surveys were referred to and embraced in policies, every fact stated in them was a warranty. Certainly they would not be warranties if termed or treated in the policy as representations, as shown by *Catlin v. Springfield Fire Ins. Co.*, 1 Sumner, 435, 443; *Houghton v. Manufacturers' Mutual Ins. Co.*, 8 Met. 114, 120; *Jones Manufacturing Co. v. Manufacturers' Mutual F. Ins. Co.*, 8 Cush. 82, 84. And where certain answers and certain plans, surveys, or descriptions in an application, as in the one in question, are expressly made warranties in one place, and the policy declared to be on that account void, if they are not correct, in another, the implication is strong that the application is, in other respects, to be deemed not a warranty but a representation. If the insurers, by the language they employ in *their* policy, leave a matter of this sort doubtful, if they seem inclined to use ambiguous language upon such a subject, or choose to render the meaning of the policy uncertain with regard to it by inserting clauses contradictory or useless except upon the idea that they are intended to distinguish in this respect between different parts of, or different answers in, the application, it is certainly the duty of the court to construe the policy, with all its appendages, most strongly against them, and to hold the application, or so much of it as is not declared to be warranted, a representation merely. See opinion of Lord St. Leonards in *Anderson v. Fitzgerald*, 4 H. L. C. 484. In some aspects and for some purposes, such a distinction would be material; but we do not see its materiality in the case . . . now before us. . . . We are perfectly satisfied, considering that the questions falsely answered related to things in themselves material for an insurer to know, — that is, *who* occupied, *who* operated this mill, and therefore whose interests were concerned in its safety, who superintended or took care of it, — that the parties, by asking and answering questions of this character, are precluded afterwards from agitating their materiality, which they have thus settled for themselves. . . . It will be remarked, too, that if the application in all its parts in this case were not made a warranty, it was made, . . . by the express terms of the policy, 'a condition of the policy.' As no proof is necessary to prove a condition affixed by the parties to their contract to be material, since they have chosen to affix it, so none can be admitted on the other hand to prove it to be immaterial."

In *Ætna Ins. Co. v. Grube*, 6 Minn. 82, 87, 88 (1861), *Flandrau, J.*, for the court, said: —

"The parties, by appropriate words in a policy, may adopt and make part of the contract any other writing not embodied in the policy (*Burritt v. Saratoga County Mutual F. Ins. Co.*, 5 Hill, 188, 190, *per* Bronson, J.), and thus change what would otherwise have been considered representations into a warranty. The language used in this policy is incapable of misconstruction. It says, 'when a policy is made and

O'NIEL v. BUFFALO FIRE INSURANCE COMPANY.

COURT OF APPEALS OF NEW YORK, 1849. 3 N. Y. 122.

O'NIEL sued The Buffalo Fire and Marine Insurance Company, in the recorder's court of the city of Buffalo, on a fire policy, and had a verdict and judgment. The Supreme Court affirmed the judgment on error brought, and the defendants appealed to this court.

C. H. S. Williams, for appellants.

E. Cook, for respondents.

RUGGLES, J., delivered the opinion of the court.

The defendants insured the plaintiff, John O'Niel, against loss or damage by fire, to the amount of two thousand dollars, on his two-story frame building fronting on Ridout and Market streets, in the town of London, Canada West, *occupied by the Hon. George J. Goodhue, as a private dwelling*. The insurance was for one year from the 26th of April, 1847, on which day the policy bears date. The house was destroyed by fire on the 6th of December of the same year. Goodhue, who occupied the house at the date of the policy, removed from and ceased to occupy it about three weeks before the fire.

It does not appear whether the policy in question was made out according to the written application of the plaintiff, or upon a survey made by the agent of the company. If on a written application, a falsity in the description avoids the policy, according to the printed conditions annexed to it; but by the same conditions the company is responsible for the accuracy of a survey made by its own agent. Assuming that there was a written application by the plaintiff, describing the house as occupied by Goodhue, the description in the policy must be regarded as a warranty of the fact that he was the occupant at the date of the policy, and nothing more. The description imports nothing more. The defendant insists that the description warrants not only that he was the occupant at the date of the policy, but that he was to remain the occupant during the continuance of the risk. But the parties have not thought proper to express themselves to that effect. A warranty may be either affirmative, as where the insured

issued upon a survey and description of certain property, such survey and description shall be taken and deemed to be a part and portion of such policy and warranty on the part of the assured.'

"The application in this case, containing the survey and description of the property, also contained this stipulation: 'And the said applicant hereby covenants and agrees to and with said company that the foregoing is a full, just, and true exposition of all the facts and circumstances in regard to the condition, situation, and value of the property to be insured, so far as the same are known to the applicant, and material to the risk.' The warranty therefore of the statements contained in the application is not an absolute warranty that they are as stated, but only that they are true so far as the same are known to the applicant and material to the risk, which qualifies the warranty, and gives it the same effect as a representation of the facts would have." — ED.

undertakes for the truth of some positive allegation ; or promissory, as where the insured undertakes to perform some executory stipulation. Marsh. on Ins. 347. Here was an affirmative stipulation, that the house was then occupied by Goodhue, but not a promissory agreement that he should continue to occupy it. If it had been the intention of the parties to make it a condition that he should remain the occupant during the term of the insurance, it would have been easy to say so, and there is no good reason in this case for supposing the parties intended what they have not expressed.

The defendants, in support of their construction of the contract, refer us to the cases of marine policies. In those cases, if the vessel insured is described as a Swedish, American, or Spanish ship, the description is in most cases held to be a warranty, not only that the vessel is Swedish, American or Spanish, accordingly, but that her documents and papers are in conformity with her nationality, and that she is to remain and be navigated in that character, as long as the risk continues. A marine policy is a commercial contract, and it is construed according to the import of the words as they are understood among merchants. Marsh. 347. Without the proper documents and papers the ship insured would have no national character, and the possession of such papers are, therefore, a part of what is warranted ; and the continuance of that character is manifestly material to the risk, and indeed the main object of the warranty ; and for that reason it is held to be implied for the purpose of carrying out the clear intention of the parties. If a fact be in plain terms expressly warranted, its materiality to the risk is of no importance ; it becomes a condition precedent, although entirely immaterial. But where a circumstance is sought to be included by implication in the warranty, it never can be supposed that the parties intended to include it unless it be manifestly material to the risk. In the case of a marine policy where the vessel was described as a British brig, and the insurance was *against the perils of the sea only, and the risk to terminate on capture*, it was held that the description in the policy was not a warranty that the brig had a British register and other papers necessary to a national character, because it was in that case immaterial to the risk whether she had or not. Mackie v. Pleasants, 2 Binn. 363.

In the case under consideration there is nothing in the contract of insurance, or in the evidence, to show that the hazard on the house was greater when vacant than if it had been occupied by Goodhue. The rate of insurance is not usually made to depend on such a circumstance, and the continuance of Goodhue's occupation as tenant not being embraced within the words of the warranty, and not being manifestly material to the risk, cannot be brought within it by inference or implication.

The ground of complaint, so far as relates to the point under consideration, is that the house was insured as a private dwelling, occupied by Goodhue, and not as a vacant building ; but that it was suffered by

the assured to become vacant without the assent of the insurers. On this point the case of *Catlin v. The Springfield Insurance Company*, 1 Sum. 435, was a much stronger case in favor of the insurers, and yet the plaintiff recovered. The insurance was "on a dwelling-house in Vermont, owned by Hayden & Hobart of Burlington, and at present occupied by one Joel Rogers as a dwelling-house, but to be occupied hereafter as a tavern and privileged as such." The ground of defence was that the building was insured to be occupied; that when burnt it had been a long time vacant, often deserted, derelict, and was destroyed by foul means; and that had the house been occupied as insured, the loss could not have occurred from the cause which destroyed it. It was held that the words in the policy did not constitute a warranty that the house should, during the continuance of the risk, be constantly occupied as a tavern, and that the risk continued although it was vacant. And Mr. Justice Story, in delivering his opinion, said that "the doctrine had never, to his knowledge, been asserted, nor should he deem it maintainable, that a policy against fire on the house of A. in Boston, described as a dwelling-house, would be void, if the house should cease for a time to have a tenant." This objection, therefore, to the plaintiff's recovery must fail.¹ . . .

*Judgment affirmed.*²

¹ Passages foreign to warranty have been omitted. — *En.*

² *Acc.*: *Joyce v. Maine Ins. Co.*, 45 Me. 168 (1858); *Smith v. Mechanics' and Traders' F. Ins. Co.*, 32 N. Y. 399 (1865).

In *Sillem v. Thornton*, 3 E. & B. 868, 879-884 (1854), Lord CAMPBELL, C. J., for the court, said: —

"The engagement is, 'to insure from loss or damage by fire a brick building, used as a dwelling-house and store (described in the paper attached to this policy), situated,' &c., 'belonging to Messrs. Godeffroy, Sillem & Co.' 'valued at £4,000 sterling, from noon, Feb. 1, 1851, to Feb. 1, 1852, at noon.' The description, in the attached paper, must be supposed to be introduced into the body of the policy between the brackets, instead of the reference to it. . . . The following is the commencement of this description: 'Frontage on Clay Street 30 feet, on Leidesdorff Street 59½ feet, more or less. The house is composed of two stories with a basement story.' . . . The special case finds that this house was built in September, 1850, . . . and that Messrs. Godeffroy, Sillem & Co., in the month of October following, being desirous of effecting an insurance upon it, transmitted to their agents in London the description of it attached to the policy. This was a correct description of it, in all respects, as it then stood; and, on the faith of this description, the defendant signed the policy, dated Apr. 7, 1851. But in March, 1851, Messrs. Godeffroy, Sillem & Co. were desirous of adding a third story to the building. They commenced doing so on the 26th of that month, and had completed it before May 3, when the premises were consumed by a conflagration which laid in ashes almost the whole of San Francisco. . . . It was agreed in the case that the new works 'are to be taken as not having increased the hazard or probability of fire, except so far (if at all) as the increase of the area of a building by a third story may be considered by the court to have necessarily increased such hazard or probability.' We are now to consider the effect of the description of the premises insured, which has been introduced into the policy. And, in the first place, we are of opinion that it amounts to a warranty that the premises corresponded with it on the 7th April, 1851, when the policy was effected, or, at least, that the premises had not been altered by the assured in the intermediate time, so as to increase the risk of the insurer. Mr. Bramwell contended that it referred only to 31st October, 1850, the date of the certificate of the surveyors, in California, who verified its accuracy; and that, if accu-

rate at that time, the policy would not be vitiated by any alteration between that day and the date of the policy, so that, notwithstanding the alteration, the identity of the house was not destroyed. But we think that this position is wholly at variance with the effect which has hitherto been given to the description of the subject-matter insured in policies of insurance, and would utterly defeat the object for which such a description is required. It would seem revolting to common sense, if we were to hold that, as soon as Messrs. Godeffroy, Sillem & Co. had sent off the description, to be shown to an insurance office or private underwriter, they might have added several stories to the house, and removed from it all the described safe-guards against fire, and that, although the description misdescribed the actual state of the premises at the date of the policy, a fire afterwards happening, an indemnity might be claimed, for which the underwriter had received no adequate consideration. But this is the principle contended for by the assured. Not being told the exact progress which had been made in the alterations between the 26th of March and the 7th of April, we are to draw inferences from the facts stated; and we infer that, on the 7th of April, the building no longer corresponded with the description of it in the policy, and that, by the alteration, the risk of the insurer had in some degree been increased. This alone would be a bar to the present action.

"But we are further of opinion that the description in the policy amounts to a warranty that the assured would not, during the time specified in the policy, voluntarily do anything to make the condition of the building vary from this description, so as thereby to increase the risk or liability of the underwriter. In this case, the description is evidently the basis of the contract, and is furnished to the underwriter to enable him to determine whether he will agree to take the risk at all, and, if he does take it, what premium he shall demand. The assured no doubt wished him to understand that, not only such was the condition of the premises when the policy was to be effected, but, as far as depended upon them, it should not be altered so as to increase the risk during the year for which he was to be liable, if a loss should accrue. Without such an assurance and belief, the statement introduced into the policy of the existing condition of the premises would be a mere delusion. Identity might continue, and yet the quality, condition, and incidents of the subject-matter insured might be so changed as to increase tenfold the chances of loss, which, upon a just calculation, might reasonably be expected to fall upon the underwriter. Can it be successfully contended that, having done so, the assured retain a right to the indemnity for which they had stipulated upon a totally different basis? . . .

"A distinction, however, is taken in this respect between marine policies and insurances of houses against fire. It would probably be allowed that, if during war there were a policy on a merchant ship described as carrying ten guns and employed in the coal trade, and, after the policy was effected, the owner should reduce her armament to five guns, or load her with oil of vitriol, the underwriter would not be liable for a subsequent loss. But it is strenuously asserted that, if there be an insurance against fire upon a house, which is described in the policy as being of a particular specified description, and in which it is stated that the occupier carries on a certain specified trade, this being true at the date of the policy, the assured, preserving the identity of the house, may alter its construction so as to render it more exposed to fire, and may carry on in it a different and more dangerous trade, without prejudice to the right to recover for a subsequent loss by fire, the warranty extending only to the state and use of the premises at the moment when the policy was signed. This seems quite contrary to the principles on which contracts are regulated."

In *Stout v. City Fire Ins. Co.*, 12 Iowa, 371 (1861), the policy insured a mortgagee against loss by fire, for one year from October 18, 1857, "on the five-story brick building, known as the Lawrence Block, occupied for stores below, the upper portion to remain unoccupied, during the continuance of this policy." The building was consumed by fire on January 21, 1858. BALDWIN, J., for the majority of the court, said:—

"The testimony is that a portion of the lower story of the building was occupied for a dancing academy, in the month of December, 1857. Defendant claims that the language in the policy, 'occupied for stores below,' is, in law, a warranty that the

same should continue to be thus occupied, during the continuance of the policy, and that any change in the use of the rooms below was a breach of such warranty, and avoided the liability of the company. . . .

"The policy in this case contains both affirmative and executory warranties. 1st. The acceptance of the policy with the clause that the lower story of the building insured was, at the time the policy was effected, occupied for stores, was an affirmative or express warranty that the same was at the time so occupied. And if the representation was false, in other words, if the lower story was not then so occupied, whether material to the risk or not, would avoid the policy. 2d. The upper portion of this building insured, as set forth in the policy, was to remain unoccupied during the continuance of the policy. This portion is promissory or executory, and must be strictly complied with on the part of the assured, or the policy will be avoided, whether material to the risk or not. The distinction between the affirmative, or express, and promissory, or executory warranties is very perceptible in this case. The former represents that a certain fact did exist at the time the policy was effected; and the latter, that a certain thing should exist during the continuance of the policy;—both made equally material by the parties themselves, and each fatal to the assured if false or not executed. Even if it be admitted in this case as claimed by defendant, the evidence fails to show that the plaintiff had the control of the building insured; he did not stipulate that the lower story of the building should continue to be occupied for any particular purpose during the continuance of the policy. There is nothing of that kind on the face of the policy, nor is there anything in the by-laws or conditions annexed to the policy preventing a change of business, if said change does not add materially to the risk taken. The policy may be wholly avoided by the using of the building insured for the purposes that are specially prohibited in the by-laws or conditions annexed to the policy, classified as hazardous and extra-hazardous. Or it may be made void by materially increasing the risk in any other manner. The representation in the policy — 'the lower story occupied as stores' — indicates that the same was so occupied at the time the insurance was effected, and is not a continuous warranty."

In *Cumberland Valley Mutual Protection Co. v. Douglas*, 58 Pa. 419 (1868), a policy insured a building for five years from May 19, 1859. The building was burned on December 24, 1862. The application was agreed to make part of the policy, and denominated the property as "dwelling-house, Caledonia Springs Buildings." The policy stipulated that if the "premises or any part thereof shall, at any time during the continuance of this policy, be so altered, or be appropriated, applied, or used to or for the purpose of carrying on therein any trade, business, or vocation, which, according to the class of hazards or rates adopted by the company, . . . would increase the risk or hazard, . . . then and from thenceforth so long as the same shall be so appropriated, applied, or used, this policy shall cease and be of no force or effect." The policy called the property not a "dwelling-house," but a "building." *Strong, J.*, for the court, said: "There is no representation that it was an occupied dwelling-house or building at the time when the insurance was effected, and no warranty that it should be occupied during the continuance of the risk. At least there is no such express representation or warranty. But the defendants below, now plaintiffs in error, contend that the description of the property as a dwelling-house amounted to a representation that it was tenanted, or occupied when the policy issued, and an engagement that it should continue to be occupied. Interpreting the contract of the parties thus, they offered to show on the trial that the plaintiffs had abandoned the buildings as a watering-place to be kept by themselves; that for three or four summers before the fire a Mrs. Cooper occupied them and kept boarders; that some three months before the fire she left the house and it remained vacant until it was destroyed by the work of an incendiary; that the plaintiffs were notified that the house was vacant, and that the doors and windows were found open; that the defendants had no knowledge of the fact that the property was vacant, and never consented to its remaining unoccupied; and that after Mrs. Cooper left, the plaintiffs removed the most valuable part of their furniture and in so doing emptied the contents of straw beds into two of the rooms in the building. Such was the substance of the offer. It was rejected by the court, and we think correctly. It embraced two propositions,

CROCKER v. PEOPLE'S MUTUAL FIRE INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1851. 8 Cush. 79.

THIS was an action on a policy of insurance, whereby the defendants insured the plaintiff "two thousand dollars on his machine shop, a watchman kept on the premises; with the privilege to insure \$2,000 at the Fitchburg office, \$500 at the New England office, Concord."

At the trial, which was before FLETCHER, J., the only ground of defence relied on was, that there was not "a watchman kept on the premises," and that the plaintiff therefore could not recover. To meet this defence the plaintiff called a witness, who testified that on the 14th of November, 1849, he was hired to watch the building a quarter of each night, leaving it about half-past seven in the evening; that on the 28th of November he was hired to watch what was called half the night, going in at half-past five, and leaving at half-past ten o'clock, and continued to do so until the 8th of December, when the fire occurred, which destroyed the building, about one o'clock in the morning. No question was raised as to the manner in which the watch was kept. But the de-

first, to prove that the building was left unoccupied with the knowledge of the owners, and without the knowledge or consent of the insurers, and, *second*, to prove that the defendants had been guilty of negligent conduct, either by themselves or by their servants or agents, though it was not alleged that the fire was a direct consequence of the negligence. Now, it is obvious that the evidence offered to prove that the building was left unoccupied was wholly immaterial, unless it tended to show either a change in the subject insured, or a breach of a warranty, or the falsity of a representation. It did neither. I think it has never been held that the insurance of a dwelling-house implies that it is a tenanted house, much less that it implies an engagement of the assured that it shall always be occupied while the risk taken endures. Policies often contain stipulations in regard to occupancy, but they are expressed plainly, and if considered material, they are stated to be either conditions or representations. The policy in this case contains nothing of the kind. On the contrary, the 18th article of the by-laws allows the fullest liberty for changes of tenants without notice, if the property be not used for other purposes than those for which it was used when insured. And even if a building be insured as an *occupied dwelling-house*, even if application be made for a policy on an *occupied dwelling-house*, while it might amount to a false representation if the property was unoccupied at the time, it is not an assertion that it shall remain occupied. It is matter of description of the subject, rather than stipulation respecting its use. It may be that hazard of fire is greater when a dwelling-house is left untenanted. So it is greater or less in cases of tenancy by different persons; but, in the absence of express stipulation to the contrary, a change of tenants has no effect whatever on the contract of insurance if the use be not changed. It is vain to argue that no use at all is an use for other purposes than those for which the building was used when insured. This case is not to be confounded with those cases in which there have been alterations of the subject insured, and where the question has been whether the danger of loss was increased. Here the question is what was the risk assumed? Was it a dwelling-house simply that was insured, or a dwelling-house occupied? Did the policy bind the assured to any use? We think it did not, further than that when used it should be only as a dwelling-house."

See *Catlin v. Springfield Fire Ins. Co.*, 1 Sumner, 434 (1833); *Blood v. Howard F. Ins. Co.*, 12 Cush. 472 (1853). — ED.

fendants contended that employing a watchman for the times above stated was not such a compliance with the terms of the policy as would entitle the plaintiff to recover.

The plaintiff, to show that in different establishments there was a difference in the hours of keeping a watch, called two agents and managers of insurance companies, who were allowed, against the objection of the defendants, to testify that the usages of different establishments which employed watchmen varied very much, some keeping a constant watch; some only for a limited period of time, for certain specified hours; some requiring an examination to be made at a certain time after the workmen had left the building, etc.; that this was generally a subject of particular inquiry at the time of making insurance, and depended upon the stipulations made at that time; and that it was the general usage of companies, accustomed to insure large factory buildings, to put to persons applying for insurance the question, "Is there a constant watch; if not, what is your arrangement in regard to it?" to which the answers were various, as above stated.

One of the tenants, who was concerned in employing the watchman, being called as a witness for the defendants, testified that he thought it safe to be without a watchman the latter part of the night; that until the 7th of June, 1849, a watchman had been kept on the premises all night, when the time was changed to what was called a quarter watch; and that there were four separate tenants of the building, who employed about one hundred and fourteen hands. Two manufacturers testified that on their premises they employed watchmen to watch all night, from the time the workmen left till they came to work again in the morning. And two witnesses, engaged in the management of a mutual insurance company for insuring manufacturing establishments, testified that, in a large proportion of the establishments insured by them, the custom was to have a watchman enter the building before the workmen left and watch till they returned in the morning. The secretary of the defendants testified that the plaintiff, in a conversation with him about the premises, at the time of applying for this insurance, stated that there was a watch kept there, and mentioned a tank of water kept in the attic, and other facilities for extinguishing fires; and that upon this representation as to a watch, he inserted the clause in the policy upon that subject.

Upon the foregoing evidence, the presiding judge instructed the jury, that the clause in the policy on which this case turned was "a watchman kept on the premises;" that the clause did not speak of a constant watchman, but a watchman, some watchman; some watchman must therefore have been kept on the premises in order to comply with this clause. It must not have been a pretence merely, or only a colorable keeping of a watchman. But if in good faith and without fraud, a watchman was kept on the premises, and such a watchman, and for such portion of the time, or at such specified hours, as in the honest exercise of ordinary care and prudence was deemed sufficient for the safety of the building, that would be a compliance with the provision

•

of the policy; and that in order to determine whether or not a watchman was kept on the premises, in good faith and in the exercise of ordinary care and prudence, the jury might refer to the evidence in the case, as to what was common and usual in regard to keeping watchmen in other similar buildings.

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

E. Washburn, for the defendants.

G. F. Farley and *N. Wood*, for the plaintiff.

SHAW, C. J. The directions to the jury were right. The stipulation, "a watchman kept on the premises," inserted, as it is, in the body of the policy, immediately after the description of the property insured, is in the nature of a warranty, and must be substantially complied with by the assured. But the terms are not explicit as to the time and manner of keeping a watch. It does not stipulate for a constant watch. It therefore requires construction as matter of law, to determine what is meant, in this policy, by keeping a watch. It relates to a factory, to its safety against fire, and this depends upon a habit or practice, in this respect, and upon the fact whether that usage has been followed. When there is an express stipulation that a thing shall be done, but the contract is silent as to the time and manner, the law holds that it must be reasonable in this respect, having regard to the object and purpose of the stipulation, — in this case to the safety of the building. If it is done in the manner in which men of ordinary care and skill, in similar departments, manage their own affairs of like kind, this is one strong ground to hold it reasonable, and to warrant the admission of evidence of usage. What is common and usual, under given circumstances, is evidence tending to show what is reasonable.

*Judgment on the verdict.*¹

FRISBIE v. FAYETTE MUTUAL INS. CO.

SUPREME COURT OF PENNSYLVANIA, 1856. 27 Pa. 325.

ERROR to the Common Pleas of Fayette County.

This was an action of debt brought on a policy of insurance by Orton Frisbie against the Fayette County Mutual Fire Insurance Company. The policy was for \$1500 upon a stock of dry goods and groceries destroyed by fire on the night of the 14th January, 1852. The only question in this case arises on the description of the property contained in the application of the plaintiff to the company for insurance, which was copied by the secretary into the policy. That part of the appli-

¹ See *Loud v. Citizens' Mutual Ins. Co.*, 2 Gray, 221 (1854); *Rankin v. Amazon Ins. Co.*, 89 Cal. 203 (1891); *Virginia F. & M. Ins. Co. v. Buck*, 88 Va. 517 (1891). — Ed.

cation material to the case is as follows: "Application of Orton Frisbie, of Dunbar township, in the county of Fayette, for insurance against fire by the Fayette County Mutual Fire Insurance Company, for the sum of \$1500, to wit: on his stock of merchandise, to wit, \$1200 on dry goods kept in a frame plastered storehouse, 24 by 24 feet, 1½ stories high; merchandise kept on the first floor, and groceries in the store-room and cellars: said store attended by applicant and clerk; *clerk sleeps in the store*; one stove in said store-room; pipe secured by crock through ceiling, and brick chimney through roof; about 50 feet from a frame stable."

It was contended by the defendants that the words "clerk sleeps in the store" were a warranty; and that, as no clerk was sleeping in the store on the night the fire occurred, the policy was forfeited. Plaintiff contended that the words were but a representation, and did not affect the policy.

The court (GILMORE, P. J.) charged that "the words mean and are tantamount to a warranty," and that plaintiff could not recover.

This was the error assigned.

Kaine and *Howell*, for plaintiff in error.

Ewing and *Patterson*, for defendants in error.

LOWRIE, J. This suit is founded on a policy of merchandise, in a house which is thus described, "a frame plastered storehouse," &c.

For several months prior to the loss, no one slept in the store; and hence the question is, do the words, "clerk sleeps in the store," constitute a warranty for the future, or are they mere matter of description of the mode in which the building was occupied. The court below regarded them as a warranty for the future, and that position has been very skilfully maintained here, but we are not convinced.

These words have not the form of a warranty; they speak of present time and not for the future, and are placed in no connection that leads to a belief that they were intended for a future state of affairs. They stand in the midst of a description of the merchandise insured, and of the house in which they were; and when we notice, in addition, that one question in such cases always is, How is the house occupied? we cannot avoid the inclination to believe that these words were inserted as description and not as warranty.

It is said that words of warranty are always inserted in the policy, which means in the body or by reference, and representations never. But neither of these propositions is universally true, for many warranties are implied, and the description of the subject-matter insured is very commonly attended by mere representations concerning the condition of things; and these representations are often, by reference, made part of the policy, though actually written only in the application: 2 Hall, 632; 16 Wend. 481.

Whether a statement shall be taken as a warranty is a mere question of interpretation, to be ascertained in policies of insurance just as in other contracts. If it relates to a fact that we can know, judicially, to

increase the risk, as in the numerous cases of the false assumption of a neutral national character for a ship in time of war, then it is treated as a warranty. And so it is where it is apparent that the statements refer to the precautions taken to prevent fire: 8 Metc. 114: but even they are entitled to a liberal interpretation, and call only for a substantial performance according to the customs of trade and business: 1 Moody & M. 90; 1 Hall, 226; 2 id. 589; 6 Wend. 623; 25 id. 374.

Here it does not expressly appear that the clerk was to sleep in the store as a precaution against fire, and it is not otherwise obvious that that was the purpose of sleeping there. As he might need fire and candle there, it may be that his sleeping there would increase the risk, or be so regarded. It may be a mere license: 1 Sumn. C. C. R. 435. We may illustrate the impossibility of the arbitrary construction contended for by changing the sentence and making it read — clerk cooks his victuals in the store. It would hardly be insisted that he should continue to do so, for this would increase the risk. Or let it read — a tavern is kept in a part of the house. This would not be regarded as a warranty that he should continue to do so; for the by-laws show that the company regarded such a use of the house as adding to the risk.

The rule seems to be that such representations in or part of the policy are construed to be warranties when it appeared to the court that they must have had, in themselves, or in the view of the parties, a tendency to induce the company to enter into the contract on terms more favorable to the insured than without them. If the court cannot say so, then they are treated as representations, and it is left to the jury to say whether or not they are material misrepresentations, tending to mislead and actually misleading the insurers.

*Judgment reversed and new trial awarded.*¹

GARRETT, EXECUTOR OF TAYLOR, v. PROVINCIAL INS. CO.

QUEEN'S BENCH OF UPPER CANADA, 1860. 20 U. C. Q. B. 200.

THIS was an action on a policy of insurance against fire, effected by testator with the defendants upon a steam saw-mill.

A special case was stated, and the objection mainly relied upon against the plaintiff's recovery was that the insured did not comply with the following condition inserted in the policy: "The assured hereby agrees to keep twelve pails full of water on each flat of said mill during the continuance of this policy." This was written in the body of the policy, and there was no mention of it in any of the printed forms or conditions indorsed on the policy.

The affidavits put in as part of the special case showed that the

¹ See *Schmidt v. Peoria M. & F. Ins. Co.*, 41 Ill. 295 (1866). — ED.

number of buckets required by the policy were not in the mill when it was burned; but that they could have been of no use if they had been there, as the fire was not discovered until it was so far advanced as to make it impossible to enter the building.

C. S. Patterson, for the plaintiff.

Duggan, Q. C., contra.

ROBINSON, C. J., delivered the judgment of the court.

The engagement of the assured to keep twelve pails full of water on each flat of the mill during the continuance of the policy is a condition on which the insurance was effected, and is termed a promissory warranty.

The performance of it is necessary, we think, to the right to sue upon the policy; and when such a condition is not observed, the insured loses his remedy upon the policy, even though it should not appear that the failure to observe that condition occasioned the loss.

The effect of what is shown is that the defendants agreed for a certain premium to insure the mill, provided the insured would always keep in the mill, at hand, certain means of extinguishing any fire that might break out. If the insured had declined to come under that condition, the defendants might either have exacted a higher premium or declined the risk.

We think the law compels us to hold that the plaintiff lost the benefit of his policy by the failure on his part, which was proved, and is not denied.

Judgment for defendants.

TEBBETTS v. HAMILTON MUTUAL INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1861. 1 Allen, 305.

CONTRACT upon a policy of insurance. At the trial in this court, before HOAR, J., a verdict was returned for the plaintiff, and the defendants alleged exceptions. The facts are stated in the opinion.

B. F. Butler and J. W. Perry, for the defendants.

R. B. Caverly, for the plaintiff.

HOAR, J. The application upon which the policy of insurance was obtained contained this interrogatory: "What is the distance and direction of said building (*i. e.* the building containing the property to be insured) from other buildings within one hundred feet, and how are such other buildings constructed and occupied? Annex a ground-plan to the application." The answer was, "See diagram;" and a description of the neighboring property, containing these words: "East, Prescott Street." Prescott Street was laid down on the diagram. On the opposite side of Prescott Street, and within the one hundred feet, were several buildings, and among them three wooden carpenters' shops, which were neither represented on the diagram nor mentioned

in the answer. The jury found that these buildings were not material to the risk; and the question presented for our decision is, whether the omission to disclose these buildings is a bar to the plaintiff's recovery upon the policy?

The application and the by-laws of the company are expressly made a part of the policy of insurance, a copy of the by-laws being appended to it; and the defendants rely upon the stipulations which they contain. By the 6th article of the by-laws, "the application upon which a policy is founded shall be held to be a warranty on the part of the assured, and as absolutely a part of said policy and of the contract of insurance, as if it were actually incorporated therein in full."

The 13th article of the by-laws provides that, "unless the applicant for insurance shall make a correct description of and statement of all facts required, or inquired for in the application, and also all other facts material in reference to the insurance or to the risk, or to the value of the property, the policy issued thereon shall be void."

The application contains an agreement that every question shall be fully and distinctly answered; and at the end of it are these covenants, among others: "And the applicant covenants and agrees with said company that the foregoing is a correct statement and description of all the facts inquired for, or material in reference to this insurance." "The applicant further agrees that the misrepresentation or suppression of material facts shall destroy his claim for a damage or loss."

It is also stipulated in the application, that "if any interrogatories are not fully answered in writing by the applicant, it is assumed that the facts in relation to them are *most* favorable to the title and to the risk, and they are so construed in writing the policy."

It is apparent, in the first place, that the answer to the interrogatory in the application does not "make a correct description of and statement of all facts required, or inquired for in the application." The interrogatory is not in terms confined to such buildings within one hundred feet as are material to the risk. It embraces all buildings within the distance named, and inquires as to their construction and occupation. It appears, therefore, that the defendants directly required the information included in the terms of the question. Whether a jury might think it material to the risk could be of no consequence, if the defendants chose to make it a condition of the validity of the contract. Although policies of insurance are to be liberally construed, and in such a manner as to secure, if possible, the protection which they are designed to afford, it is not in the power of the court to disregard stipulations which the parties have expressly made. And if, taking the whole instrument together, it is obvious that the defendants have made the strict and literal exactness of the answers to certain questions a condition of the contract, and a warranty on the part of the insured, they cannot be deprived of the advantage thus secured. They have a legal right to say, "We choose to determine for ourselves what is or is not material; and to base our contract upon such information as the

insured is required to communicate in answer to specific interrogatories." *Davenport v. New England Ins. Co.*, 6 Cush. 340; *Miles v. Connecticut Ins. Co.*, 3 Gray, 580.

If the express warranty of the correct statement of the facts inquired for, according to the 13th article of the by-laws, were qualified by any other agreement or clause, as in the case of *Elliott v. Hamilton Ins. Co.*, 13 Gray, 139, so that we could find upon the whole instrument that the parties intended to limit the extent to which the insured should be held responsible for the accuracy of the answers given, we should gladly apply the rule of construction which that case declares. But the cases are wholly different. In that case the insured agreed that the description of the property contained in his answers was correct only so far as regarded "the condition, situation, value, title, and risk on the same." Here that agreement is omitted, and in its place is inserted the explicit and stringent covenant, that "the applicant covenants and agrees with said company that the foregoing is a correct statement and description of all the facts inquired for, or material in reference to this insurance." We think the only fair interpretation of this is, that the insured warrants that all the facts inquired for are correctly given, and all other facts material to the risk, even if not inquired for. The provision that "the misrepresentation or suppression of material facts shall destroy his claim for a damage or loss" cannot qualify the previous covenant, because it can have its full effect consistently with it. The answers might fail to give the information inquired for, and yet no material fact be misrepresented or suppressed. On the other hand, the answers might be complete and true, and material facts not embraced in the interrogatories might be incorrectly represented or purposely omitted.

The result to which we have come upon this part of the case renders it unnecessary to consider the other questions discussed in the argument which arise on the report, and some of which are of considerable difficulty. The point decided is conclusive against the plaintiff's right to recover. The verdict must be set aside, and a

*New trial granted.*¹

AURORA FIRE INS. CO. v. EDDY.

SUPREME COURT OF ILLINOIS, 1868. 49 Ill. 106.

APPEAL from the Circuit Court of De Kalb County; the Hon. THEODORE D. MURPHY, Judge, presiding.

The opinion states the case.

Mr. *S. W. Brown*, for the appellants.

Mr. *Charles Wheaton*, for the appellee.

¹ See *Murdock v. Chenango County Mutual Ins. Co.*, 2 N. Y. 210 (1849); *Graham v. Fireman's Ins. Co.*, 87 N. Y. 69 (1881). — Ed.

Mr. Chief Justice BREESE delivered the opinion of the court :

This was an action of assumpsit, on a policy of insurance of four thousand dollars on a three-story flax factory, brought by James W. Eddy against the Aurora Fire Insurance Company, and which resulted in a verdict and judgment for the plaintiff for three thousand five hundred dollars.

To reverse this judgment the defendants have appealed to this court, and several points are made, but one of which we deem important to notice.

The policy contains this clause :

“ It is expressly agreed, that the assured is to keep eight buckets filled with water on the first floor where the machinery is run, and four in the basement by the reservoir, ready for use at all times in case of fire ; also, that smoking shall be strictly prohibited in or about the building.”

The application for insurance contained a like agreement.

There was proof that some buckets were in the building, and that sometimes all of them would be above, and sometimes all below.

The court, on behalf of the plaintiff, instructed the jury that insurance policies were to be liberally construed in favor of the assured, and strictly construed against the underwriters, and that a substantial compliance with the stipulations of the policy was all that was required on the part of the assured, and if the jury believe, from the evidence, that the plaintiff substantially complied with the stipulation concerning keeping the buckets of water in the building insured, contained in the policy in this case, then that was all that was required of the assured under the stipulation, and on that point the law was with the plaintiff.

This instruction, and one refused for defendants on the same subject, is the part of the case we have considered.

As to the first branch of plaintiff's instruction, we have always understood that the rules by which a policy of insurance is to be construed, and the principles by which it is to be governed, do not differ from other mercantile contracts, but conditions and provisions in such policies are to be construed strictly against the underwriters, for the reason that they tend to narrow the range and limit the force of the principal obligation ; but this was not a condition or proviso in the policy, but an express agreement of the assured, to be construed by the same rules by which other agreements are construed. But if the underwriters have left their design or object doubtful by the use of obscure language, the construction ought to be, and will be, most unfavorable to them, but nothing of that kind is apparent here. It was an express agreement of the nature of a promissory warranty that the assured would have the number of buckets specified always filled with water and disposed upon the floors as therein stated.

Appellee has referred to some cases in which a stipulation in a policy that a watchman was kept on the premises does not require that a watchman be kept there constantly, but only at such times as men of

ordinary care and skill in like business keep a watchman on their premises. *Houghton v. Manuf. Ins. Co.*, 8 Metcalf, 122, and *Crooker v. People's Mutual Ins. Co.*, 8 Cush. 69. These cases go to the extent claimed. Those cases and *Hovey v. Amer. Mutual Ins. Co.*, 2 Duer, 554, proceed upon the ground that the spirit of the warranty was that there should be a competent night watch kept on the insured premises, and one who might be confided in for the faithful performance of such duty.

Other respectable courts have not gone quite to the extent of those cases on this point. In the case of *Glendale Woolen Co. v. The Protection Ins. Co.*, 21 Conn. 19, it was held, where one condition of the policy was there should be a watchman nights, that was a warranty by the assured, that they would keep a watchman in the mill through the hours of every night in the week, and the watchman having been absent on Sunday morning early, when the fire occurred, there could be no recovery on the policy. The court said, where there is no imperfection or ambiguity in the language of a contract, it will be considered as expressing the entire and exact meaning of the parties, and no evidence of extrinsic matters or usages will be received to vary the terms expressed. The case of *Sheldon & Co. v. The Hartford Fire Ins. Co.*, 22 ib. 235, is to the same effect.

In the review of the cases on this subject which time has enabled us to make, we have thought there was a just mean between the extremes of the different cases examined, which, when found, would establish a satisfactory rule.

Whilst this is an express agreement of these parties, and giving force and effect to the well-recognized rules for construing agreements, in which the intention of the parties is an important element, we think the court, in construing it, by the fourth instruction complained of, misled the jury.

It could not have been in the reasonable contemplation of either of these parties, that in a cold mill, where fires were not allowed in the winter season, buckets of water should be on hand at all times, for this might have been an impossibility; nor could it have been understood that the buckets should be covered up and hid from ready access by piles of flax, or stowed in an out-of-the-way place.

We think, therefore, that the jury should have been told, that, whilst from freezing, or other unavoidable causes, a literal compliance with the warranty might have been impossible, and could not have been in the contemplation of the parties, still it was incumbent on the assured to show that the required number of buckets, in good and serviceable condition, was at the places designated in the agreement ready for instant use. What was a substantial compliance was a mixed question. By the instruction we think the court should have given, as above, the attention of the jury would be fixed upon certain facts necessary to be proved, which, when proved, would hold the underwriters and show a compliance with the agreement in its spirit and intent. As given, the

instruction must have misled the jury, — it gave them too wide a discretion, — and was erroneous, and this error must reverse the judgment. *Taylor v. Beck*, 13 Ill. 386. These remarks render any notice of the defendants' instructions on the same subject unnecessary at this time.

The judgment is reversed and the cause remanded.

*Judgment reversed.*¹

FIRST NATIONAL BANK OF BALLSTON SPA, APPELLANT,
v. THE PRESIDENT AND DIRECTORS OF THE INSURANCE COMPANY OF NORTH AMERICA, RESPONDENTS.

COURT OF APPEALS OF NEW YORK, 1872. 50 N. Y. 45.

APPEAL from judgment of the General Term of the Supreme Court, affirming a judgment entered upon a nonsuit, directed upon trial at circuit. (Reported below, 5 Lans. 203.)

The action was brought to recover upon a policy of insurance issued by defendants to the Pioneer Paper Company for one year, dated 18th December, 1868, and payable to the First National Bank of Ballston, to the extent of any claim or notes the bank may hold against the company. The following was the description of the property insured: "Five hundred dollars on their stone and frame paper-mill, with slate, cement, and shingle roof, situate on the Kayaderosseras, near West Milton, in the town of Milton, Saratoga County, N. Y. Reference being had to survey No. 86, on file in this office, which is hereby made a part of this policy, and \$2,500 on fixed and movable machinery and fixtures, shafting, gearing, belting, piping, and rotary and steam boilers contained therein."

The policy provided, that "if any application, survey, plan, or description of the property herein insured is referred to in this policy, the same shall be considered a part of this contract and a warranty by the assured; and if the assured shall make any false representation as to the character, situation, or occupancy of the property, or conceal any fact material to the risk, either in a written application or otherwise, . . . this policy shall be null and void." The survey contained the following question and answer: —

"27. Watchman — Is one kept in the mill or on the premises during the night, and at all times when the mill is not in operation, or when the workmen are not present?" "Yes."

The property was destroyed by fire on the 4th of March, 1869. Other facts appear in the opinion. At the close of the testimony defendants' counsel moved for a nonsuit, which was granted.

¹ See *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213 (1870), a later stage of the principal case. — ED.

W. A. Beach, for the appellant.

A. J. Parker, for the respondents.

GROVER, J. Where a fire policy refers to a survey and declares that it shall constitute a part of the policy, the statements therein contained in regard to the situation, use, and care of the property are to be regarded and construed as warranties. (*Le Roy v. The Market Ins. Co.*, 39 N. Y. 91; *Same Case*, 45 N. Y. 80; *Ripley v. The Ætna Ins. Co.* 30 N. Y. 136.) To produce this effect, the policy must not only refer to the survey, but it must be made a part of it, otherwise the statements contained therein will be construed as representations and not as warranties. (*The Farmers' Ins. and Loan Co. v. Snyder*, 16 Wend. 481.) Failure to comply with a warranty will bar a recovery in case of loss, whether the loss was caused by such failure or not. (*Cases, supra.*) In the present case the survey is made part of the policy. In the survey the following inquiry is made: "Watchman. Is one kept in the mill or on the premises during the night and at all times when the mill is not in operation or when the workmen are not present? Ans. Yes." This statement was promissory, but the rights and duties of the parties were the same under it as though it had been affirmative. (*Ripley v. The Ætna Ins. Co., supra.*) The proof was, that upon the day previous to the destruction of the property by fire, the sheriff levied an execution against the assured upon the personal property in the mill, and excluded their employes therefrom, took the keys and locked up the building. The counsel for the appellant insists that this act of the sheriff, being an act that it was his legal duty to perform, must be regarded as the act of the law, and cites authorities showing that when performance of a contract becomes impossible by the act of God or the law, performance will be excused. The answer to this, in the present case, is that it was the default of the assured in not paying the judgment that caused the issuing and levy of the execution. The levy does not, therefore, excuse it from the obligation to perform the warranty. The counsel further insists, that as the deputy sheriff and one of the trustees of the assured remained in the office of the company, a building about two rods from the mill, during the night and until the discovery of the fire, they should be regarded as watchmen within the meaning of the policy. But the testimony failed to show that they were such, or even so regarded themselves. That shows that they looked through the building twice in the evening, the last time about eleven o'clock, and then went into the office, lay down and dozed until about four o'clock, when the deputy sheriff turned over and discovered the mill in flames, the fire being so extensive as to render all attempts to save the building and property hopeless. It is clear that these persons never undertook with the assured to act as watchmen, and consequently incurred no liability to it for negligence in the performance of the duties of such employment. In case of a recovery in the action, the defendant would have no right by subrogation to any remedy against them upon that ground. This shows that they were not watch-

men within the meaning of the warranty. The evidence shows a pretty clear case of negligence in the performance had they undertaken that duty. The sheriff remained to protect himself from liability incurred by the levy. This made him liable in case the property was stolen, but not for its destruction by fire. What Comstock stayed for, the case does not disclose. It does appear that he did not remain as watchman. That is sufficient in this case.

It appearing that there was a breach of the warranty to keep a watchman, the nonsuit was properly granted, and the judgment must be affirmed.

All concur.

Judgment affirmed.

MICKEY v. BURLINGTON INS. CO.

SUPREME COURT OF IOWA, 1872. 35 Iowa, 174.

APPEAL from Des Moines District Court.

Action upon a policy of insurance against loss by fire upon the dwelling-house and household furniture of plaintiff. By stipulations in the policy the application of plaintiff for insurance and the survey of the premises are made parts of the instrument with a warranty on the part of the assured.¹ . . .

The application of the plaintiff for insurance contained the following interrogatory and answer: "Are your chimneys, fire-places, fire-boards, stoves, and pipes all well secured, and will you engage to keep them so?" Answer, "Yes."

The special defences to the action set out in the answer and relied upon at the trial are as follows: . . . 3. Defective stove-pipes, kept by plaintiff in violation of the terms of the policy, by reason of which the property was destroyed by fire. Upon a trial to a jury there was a verdict and judgment for plaintiff. Defendant appeals.

Newman & Blake, for the appellant.

Halls & Baldwin, for the appellee.

BECK, Ch. J. The facts in regard to the cause and origin of the fire which destroyed the property insured are not contested. They are as follows: The pipe of a stove used in the house passed through the floor of an upper chamber, thence with an elbow into a flue built in the wall. This stove, not being required for use in the summer months, was usually removed. With the intention of removing it, the wife of plaintiff took down the pipe in the second-story chamber, and placed a bed over the hole in the floor through which the pipe passed, but she neglected to remove the stove. A few days after, a visitor complaining of the cold, the wife caused a fire to be built in the stove. This she

¹ In reprinting the statement of the case and the opinion of the court, passages foreign to warranty have been omitted. — ED.

did, forgetting that the pipe had been removed. The result was fire communicated to the bed, and the house was consumed. This occurred in the month of July. There is no evidence that the act of the wife causing a fire to be built in the stove was with the intention of destroying the house, but was simply done through negligence and forgetfulness.

I. It is claimed that the removal of the stove-pipe was a breach of the covenant of the application (which by its terms became a condition of the policy) to keep the stoves and pipes well secured, and that the policy is thereby defeated and recovery cannot be had thereon.

The covenant bound plaintiff to keep the pipe "well secured." He was obliged thereby to keep it in such condition, and to exercise toward it such care, as a man of ordinary prudence would exercise for the protection of his property. The defendant was protected by this covenant from the effects of defective pipes and stoves. It did not bind plaintiff to keep them always up and constantly in use. He could, if his comfort or convenience so required, remove them and dispense with their use. This would not increase the hazard of the risk, and it was therefore not in violation of the conditions of the policy. The contract was entered into with the implied assent of defendant that plaintiff should possess this right. Therefore, if in its exercise the property was lost, defendant is liable. Does the act of plaintiff come under this rule? The pipe was removed preparatory to removing the stove; the use of both was intended to be dispensed with. The stove was put in a condition not to be used. Its use was just as much intended to be dispensed with as though it had been removed to another room or into some out-of-the-way place usually set apart as the receptacle of such things when not in use. Had it been so removed, and some one, through negligence and thoughtlessness, should have kindled a fire therein, resulting in the destruction of the property, the defendant would have been liable. And this would have been so, as we shall presently see, if the act had been done by plaintiff without fraud or intention to set the house on fire; or without such gross negligence as one with ordinary prudence under no circumstances would fall into. The covenant under consideration does not bind plaintiff to keep the pipe well secured when not in use. If so, he could not take it down or remove it even temporarily. But it cannot be denied that if, during a temporary suspension of the use of the stove and pipe for the purpose of repairs or the like, a fire should occur through negligence of the character above indicated in the use of the stove, defendant would be liable for the loss. The case before us is not different in facts and principles. The use of the stove had been dispensed with, the pipe was partly removed and a negligent attempt was made to use it, from which the loss of the property resulted.

These views do not give assent to the doctrine that the covenants and warranties of plaintiff may be disregarded and not literally performed. But we simply maintain that the act of plaintiff in removing

the pipe was not covered by the warranty. As all covenants between contracting parties, the undertaking of plaintiff to keep the stoves and pipe secured must be applied to the subject and time within the contemplation of the parties. It will not be extended beyond them to the prejudice of the assured. We cannot so construe it that it will impose restrictions which are unreasonable. *Peterson v. The Mississippi Valley Ins. Co.*, 24 Iowa, 494; *Loud v. Citizens' Mutual Ins. Co.*, 2 Gray, 221; *Sayles v. North Western Ins. Co.*, 2 Curt. C. C. 610; *Turley v. North American Ins. Co.*, 25 Wend. 374; *Townsend v. North Western Ins. Co.*, 18 N. Y. 168; *Gloucester Manufacturing Co. v. Howard Fire Ins. Co.*, 5 Gray, 497; *Troy Fire Ins. Co. v. Carpenter*, 4 Wis. 20; *Gates v. Madison Ins. Co.*, 1 Seld. 469; *Hyde v. Bruce*, 3 Doug. 213; *Dobson v. Sotheby*, 1 Moody & Malkin, 90.

We conclude that plaintiff's warranty did not forbid the temporary removal of the pipe at a time the stove was not in use, such restriction not being within the contemplation of the parties. . . .

Affirmed.

MILLER, J., dissenting. I am unable to assent to the views expressed in the first paragraph of the foregoing opinion. The plain meaning of plaintiff's agreement is that the stoves and stove-pipes in the house insured were well secured, and that he would keep them so, in order to guard against damage to, or destruction of, the property insured by fire from that source, while using the stoves in his house for ordinary purposes.

The evidence shows that a stove in its usual place in the house was used in the ordinary manner by plaintiff's wife, who had authority so to do, building a fire therein to warm the room, and that *when the stove was so used* the pipe thereto was *not* "*well secured*," in consequence of which the house was destroyed by the fire communicated from the stove. This, in my opinion, is a most palpable breach of the plaintiff's agreement which releases the defendants from their obligation to pay any portion of the insurance. Upon this ground the judgment of the court below should, in my opinion, be

Reversed.

NATIONAL BANK v. INSURANCE COMPANY.

SUPREME COURT OF THE UNITED STATES, 1877. 95 U. S. 673.

ERROR to the Circuit Court of the United States for the Western District of Missouri.¹

The Hartford Fire Insurance Company issued a policy to W. D. Oldham on a building and machinery. Oldham assigned the policy to the First National Bank of Kansas City. A loss having occurred, and the insurance company having refused to pay, this action was brought.

¹ The statement has been rewritten. — ED.

The policy contained these passages: "Special reference being had to assured's application and survey, No. 1462, on file, which is his warranty and a part hereof. . . . If an application . . . is referred to in this policy, such application . . . shall be considered a part of this policy and a warranty by the assured; and if the assured, in a written or verbal application, makes any erroneous representation . . . this policy shall be void." The application required the applicant to state separately "the estimated value of personal property and of each building; . . . the value . . . being estimated by the applicant," and also to sign answers to certain questions "as a description of the premises." Among the questions were these: "What is the cash value of the buildings, aside from hand and water power? What is the cash value of the machinery?" These questions were answered thus: "\$15,000, building; \$15,000, machinery." The application ended thus: "The said applicant hereby covenants and agrees with said company that the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to the applicant, and are material to the risk." The answers were made in good faith. Yet when the policy was issued, and at the time of the fire, the cash value of the building, aside from hand and water power, was only \$8,000, and the cash value of the machinery was only \$12,000.

A jury having been waived, the Circuit Court made a special finding of the facts, substantially as hereinbefore narrated, and found as a conclusion of law that "under the provisions of the policy and application, made part thereof, . . . the answers of the assured as to the value of the property insured defeat the right to recover on the policy," and thereupon gave judgment for the company.

Mr. *John K. Cravens*, for the plaintiff in error.

Mr. *John C. Gage*, *contra*.

Mr. Justice HARLAN delivered the opinion of the court.

On behalf of the company, it is contended that, under any proper construction of the contract, the assured warranted, absolutely and without limitation, the truth of the several statements in the application, including the statement as to the value of the property. If this view be sound, the judgment of the Circuit Court must be affirmed; otherwise, it must be reversed.

Our conclusion is that the plaintiff in error, who is the beneficiary of the policy, is entitled to a judgment notwithstanding the overvaluation of the property by the assured.

The entire application having been made, by express words, a part of the policy, it is entitled to the same consideration as if it had been inserted at large in that instrument. The policy and application together, therefore, constitute the written agreement of insurance; and, in ascertaining the intention of the parties, full effect must be given to the conditions, clauses, and stipulations contained in both instruments.

Looking first into the application, we find no language which by fair

construction was notice to the assured that, in answering questions, he was assuming, or was expected to assume, the strict obligations which the law attaches to a warranty. There is no intimation anywhere in that instrument that the exact truth of the answers was a condition precedent, either to the consideration of the application or to the issuing of a policy. On the contrary, the application contains the covenant of the assured that he had in that instrument made a just, full, and true exposition of all material facts and circumstances in regard to the condition, situation, value, and risk of the property, so far as known to him. The taking of that covenant, at the threshold of the negotiations, was, in effect, an assurance that a frank statement of all such material facts as were within the knowledge of the applicant would meet the requirements of the company. It was a covenant of good faith on the part of the assured, — nothing more; and, so far as it related to the value of the property, was not broken, unless the estimates by the assured were intentionally excessive. If the case turned wholly upon the construction to be given to the application, it is quite clear that the overvaluation of the property would not defeat a recovery upon the written agreement, since the assured, by the special finding, is acquitted of any purpose to defraud the company. That is equivalent to saying that the assured did not withhold any material fact within his knowledge concerning the condition, situation, value, or risk of the property.

But the difficulty in the case arises from the peculiar wording of the policy, considering the application as a part thereof. While the assured in one part of the written agreement is made to stipulate for a warranty, and in another the policy is declared to be void if the assured “makes any erroneous representation, or omits to make known any fact material to the risk,” in still another part of the same agreement — the application — he covenants that, as to all material facts within his knowledge, respecting the condition, situation, value, and risk of the property, he has made a full, just, and true exposition. If the purpose of the company was to secure a warranty of the correctness of each statement in the application, and if the court should adopt that construction of the contract, there could be no recovery on the policy, if any one of these statements were proven to be untrue; and this although such statement may have been wholly immaterial to the risk, and was made without any intent to mislead or defraud. Such a construction, according to established doctrine, might defeat the recovery, even if the overvaluation had been so slight as not to have influenced the company in accepting the risk. But if such was the purpose of the company, why did it not stop with the express declaration of a warranty? Why did it go further, and incorporate into the policy a provision for its annulment in the event the assured should make an “erroneous representation, or omit to make known any fact material to the risk”? — language inconsistent with the law of warranty. Still further, why did the company make the application a part of the policy,

and thereby import into the contract the covenant of the assured, not that he had stated every fact material to the risk, or that his statements were literally true, but only that he had made a just, true, and full exposition of all material facts, so far as known to him?

It is the duty of the court to reconcile these clauses of the written agreement, if it be possible to do so consistently with the intention of the parties, to be collected from the terms used.

It will be observed, from an examination of the questions propounded to the assured, that, among other things, he was asked whether the building was of stone, brick, or wood; how the premises were warmed; what materials were used for lighting them; whether a watchman was kept during the night; what amount of insurance was already on the property; whether it was mortgaged, &c. These and similar questions refer to matters of which the assured had actual knowledge, or about which he might, with propriety, be required to speak with perfect accuracy. They are matters capable of precise ascertainment, and in no sense depending upon estimate, opinion, or mere probability. But his situation and duty were wholly different when required to state the cash value of his property. He was required to give its "estimated value." His answers concerning such value were, in one sense, and perhaps in every just sense, only the expression of an opinion. The ordinary test of the value of property is the price it will command in the market if offered for sale. But that test cannot, in the very nature of the case, be applied at the time application is made for insurance. Men may honestly differ about the value of property, or as to what it will bring in the market; and such differences are often very marked among those whose special business it is to buy and sell property of all kinds. The assured could do no more than estimate such value; and that, it seems, was all that he was required to do in this case. His duty was to deal fairly with the company in making such estimate. The special finding shows that he discharged that duty and observed good faith. We shall not presume that the company, after requiring the assured in his application to give the "estimated value," and then to covenant that he had stated all material facts in regard to such value, so far as known to him, and after carrying that covenant, by express words, into the written contract, intended to abandon the theory upon which it sought the contract, and make the absolute correctness of such estimated value a condition precedent to any insurance whatever. The application, with its covenant and stipulations, having been made a part of the policy, that presumption cannot be indulged without imputing to the company a purpose, by studied intricacy or an ingenious framing of the policy, to entrap the assured into incurring obligations which, perhaps, he had no thought of assuming.

Two constructions of the contract may be suggested. One is to regard the warranty expressed in the policy as limited or qualified by the terms of the application. In that view, the assured would be held as only warranting that he had stated all material facts in regard to

the condition, situation, value, and risk of the property, so far as they were known to him. This is, perhaps, the construction most consistent with the literal import of the terms used in the application and the policy. The other construction is to regard the warranty as relating only to matters of which the assured had, or should be presumed to have had, distinct, definite knowledge, and not to such matters as values, which depend upon mere opinion or probabilities. But, without adopting either of these constructions, we rest the conclusion already indicated upon the broad ground that when a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty. The company cannot justly complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself.

Wherefore, as it does not clearly appear that the parties intended that the validity of the contract of insurance should depend upon the absolute correctness of the estimates of value, and as it does appear that such estimates were made by the assured without any intention to defraud, our opinion is that the facts found do not support the judgment.

The judgment will, therefore, be reversed, and the cause remanded with directions to enter a judgment upon the special finding for the plaintiff in error; and it is

*So ordered.*¹

¹ *Acc.*: *Lee v. Howard F. Ins. Co.*, 11 Cush. 324 (1853); *Elliott v. Hamilton Mutual Ins. Co.*, 13 Gray, 139 (1859); *Rogers v. Phenix*, 121 Ind. 570 (1890); *National Bank v. Union Ins. Co.*, 88 Cal. 497 (1891); *Ætna Ins. Co. v. Simmons*, 49 Neb. 811, 836 (1896).

In *Houghton v. Manufacturers' Mutual F. Ins. Co.*, 8 Met. 114, 120 (1844), SHAW, C. J., for the court, said: "1. The court are of opinion that the policy, by the manner in which it refers in terms to the application and representations, does legally adopt and embody them as part of the contract, to the same effect as if they were recited and set forth at large in the policy. 2. That the application and the various answers contained in it, being termed 'representations' in the policy, are rather to be regarded as having the legal effect of representations than of warranties, as understood in the law of marine insurance, though partaking in some measure of the character of both. They are like representations, in requiring that the facts stated shall be substantially true and correct, and so far as they are executory, that they shall be substantially complied with; but not like warranties, in requiring an exact and literal compliance."

See *Redman v. Hartford F. Ins. Co.*, 47 Wis. 89 (1879); *Pickel v. Phenix Ins. Co.*, 119 Ind. 291, 298-299 (1889); *Waterbury v. Dakota F. & M. Ins. Co.*, 6 Dak. 408 (1889); *Phoenix Assurance Co. v. Munger Manufacturing Co.*, 92 Tex. 297 (1898). — Ed.

DOLLIVER AND OTHERS v. ST. JOSEPH FIRE AND
MARINE INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1881. 131 Mass. 39.

CONTRACT, by the assignees in bankruptcy of Abraham Day, upon a policy of insurance, dated July 9, 1875, by which the defendant insured, for one year from July 3, 1875, "Abraham Day, against loss or damage by fire, to the amount of fifteen hundred dollars: \$500 on two large frame ice-houses, \$500 on two sheds, \$250 on shed about two feet distant from the above, all used for storage of ice, and situate in rear of east side of road leading to Rockport in Gloucester, Mass. \$250 on frame shed attached to frame ice-houses." The policy contained the following provisions:—

"If an application, survey, plan, or description of the property herein insured is referred to in this policy, such application, survey, plan, or description shall be considered a part of this contract and a warranty by the assured; and any false representation by the assured of the condition, situation, or occupancy of the property, or any omission to make known every fact material to the risk, or an overvaluation, or any misrepresentation whatever, either in a written application or otherwise; or if the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon; or if the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied, and so remain without notice to, and consent of, this company, in writing; then, and in every such case, this policy is void.

"It is a part of this contract, that any person, other than the assured, who may have procured this insurance to be taken by this company, shall be deemed to be the agent of the assured named in this policy, and not of this company, under any circumstances whatever, or in any transaction relating to this insurance."¹ . . .

After the former decision, reported 128 Mass. 315, the case was tried in this court before COLT, J., who reported the case for the determination of the full court, in substance as follows:—

It was admitted that the premises insured were destroyed by fire in October, 1875, and the amount of damages chargeable to this policy was agreed upon by the parties. Day filed his petition in bankruptcy on January 24, 1876, and the assignment to the plaintiffs was dated April 3, 1876. . . .

The defendant introduced evidence tending to show that the ice-houses and the sheds, which had been built for storage of ice, had been leased in 1873 to one Webster, whose business was the cutting and

¹ In reprinting the statement and the opinion, passages as to the sufficiency of the magistrate's certificate after loss have been omitted. — ED.

selling of ice; that they were not filled with ice during the winter of 1874-5; that there may have been a few cakes of ice in them remaining over from the previous winter's crop; that the ice crop for the winter of 1874-5 failed, because there was no water in the pond adjoining the ice-houses, and that this was the only reason why the ice-houses were not filled as usual; that there was no ice at all in any of the buildings after April, 1875; that the ice-houses were not used for anything after the ice was out, and that wagons and carriages were stored in the sheds.

The defendant contended that these facts showed that the premises were not "used for the storage of ice," as stated in the policy, and that the policy was therefore void, but the judge ruled otherwise, and that the words in the policy were merely descriptive of the buildings.

The defendant introduced evidence, against the plaintiffs' objection, tending to prove that Day applied to John H. Derby, of Salem, to procure insurance for him on these premises; that Derby, who was an insurance broker, thereupon wrote and forwarded an application to Jordan, Lovett & Company, of Boston, general insurance brokers, with a letter requesting them to procure insurance; that Jordan, Lovett & Company thereupon wrote and signed an application, which they sent by one of their clerks to Henry N. Baker, the Boston agent of the defendant company; that Baker, on receiving this application, made inquiry of the clerk in regard to the risk and the occupancy of the buildings, and "bound" the risk for ten days, that the party might furnish information as to those particulars, in order to enable him to decide whether to issue a policy for the proposed term; that, in a few days, on July 9, the same clerk again called on Baker and told him there were no exposures of the buildings, and that they were then full of ice; and that on the same day Baker accepted the risk and wrote the policy declared on, made it valid by his counter-signature, and delivered it to the clerk; and it was subsequently sent to Derby, who delivered it to Day.

There was no evidence that Day had any personal knowledge of any of these proceedings; and Derby, called as a witness by the defendant, testified, on cross-examination, that Day never told him there was any ice in the buildings; that he, Derby, had passed by the buildings and had seen them, but had made no examination of them or their contents; and that he knew that, at that season of the year, they would not be likely to have much ice in them; that he had never told anybody anything inconsistent with this, and that he had had no communication or dealing with Jordan, Lovett & Company concerning this risk, except to send them the application and letter.

The judge ruled that even if the clerk of Jordan, Lovett & Company made the verbal false statement that the buildings were full of ice to Baker, and if the statement was material, and if Baker wrote and issued the policy relying upon this false statement, it would not avoid the policy; and directed the jury to return a verdict for the plaintiffs. If

either ruling was wrong, the verdict was to be set aside and a new trial granted; otherwise, judgment to be entered on the verdict.

A. S. Wheeler and *E. W. Hutchins*, for the defendant.

S. B. Ives, Jr., and *L. S. Tuckerman*, for the plaintiffs, were not called upon.

SOULE, J. . . . The statement in the policy, that the buildings were used for the storage of ice, was not a warranty that ice was there stored when the policy was written. The policy was written in midsummer, at a time when it would naturally be expected that a large part at least of the ice crop of the previous year had been exhausted. The fact that ice is produced by natural causes only in the winter season, so that the houses used for storing it will ordinarily be empty for a part of the year, indicates that the words in the policy were not intended and were not understood as warranting that ice was actually stored in the buildings at the moment of issuing the policy, but as descriptive of the business ordinarily done in them. In this sense they were operative as a part of the policy, because they prevented any liability of the defendant for loss, in case the buildings should be used during the term of the policy for a business more hazardous than that of storing ice. The case is unlike that of *Goddard v. Monitor Ins. Co.*, 108 Mass. 56, in which it was held that a policy insuring a building as a machine-shop, as represented by one applying for the insurance, when in fact the building was occupied as an organ factory, on which the risk was greater, was void, because the minds of the parties never met. There existed in that case a state of facts entirely inconsistent with that which was represented to exist, and which, if known, would have made it manifest that the building was not a machine-shop in any sense, and was a shop used for a different and more dangerous purpose. In the cases relied on by the defendant, the point was that the state of things represented as existing, or warranted to exist, did not exist. In the case at bar, the question arises on the proper interpretation of the language used, there being no doubt that, if the state of things called for by the language used did not exist, the policy was void. We are of opinion that the language, properly interpreted, described the existing state of things with accuracy, and that the policy took effect.

The representation by the clerk of the insurance broker to the agent of the defendant, that the buildings were full of ice, though false, did not vitiate the policy. The broker's clerk was not in any sense the agent of the assured, and was not the person who procured the policy. The application for the policy having been made in writing to the defendant, it had no right to rely on any verbal representations or statements made by a messenger sent by the broker to its agent, nor to assume that such statements or representations were made with the knowledge or consent of the assured. In the cases relied on by the defendant, on this branch of the case, the false representations were in writing, and referred to in the policy as representations on which the policy was based, and on the truth of which its validity

depended. The assured, by accepting the policies containing those provisions, adopted the representations made, whatever they might be, and assumed the risk of their being false. *Kibbe v. Hamilton Ins. Co.*, 11 Gray, 163. *Draper v. Charter Oak Ins. Co.*, 2 Allen, 569. In the case at bar, the assured assumed nothing which the policy did not show, beyond what was done by his authority or by his agent.

The result is that there must be *Judgment on the verdict.*¹

BURLEIGH ET AL., APPELLANTS, v. GEBHARD FIRE INS.
CO., RESPONDENT.

COURT OF APPEALS OF NEW YORK, 1882. 90 N. Y. 220.

APPEALS from orders of the General Term of the Supreme Court in the third judicial department, made February 7, 1881, which reversed judgments in favor of plaintiffs, entered upon decisions of the court on trial without a jury.

The action in each case was brought upon a policy of fire insurance issued by the defendant to plaintiffs upon certain personal property. Each policy, after a description of the property, contained this statement, "all contained in their frame storehouse with slate roof, situate, detached at least one hundred feet, on the east side of Lake Champlain, in the town of Shoreham, Vt." It appeared that there was at the time the policies were issued a small building about seventy-five feet distant from the storehouse, described as a frame building about ten by twelve feet, clapboarded and ceiled inside, and seven feet high, with a chimney but no stove; occupied sometimes as an office, and so called. It was not usually used for storage purposes. At the time of the fire it contained eighty-three kegs of powder, which had been temporarily stored therein. The court found substantially that such building was not an exposure and did not increase the risk, and refused to find to the contrary.

Samuel Hand, for appellants.

James Thomson, for respondent.

FINCH, J. We think the statement contained in the policies issued by the defendants, describing the building which contained the personal property insured as "detached at least one hundred feet," is a warranty. We cannot hold it to be a mere description of the building for the purpose of identifying the personal property insured contained within it. The phrase is not adapted to any such purpose. It adds nothing to the identity of the storehouse, already sufficiently described by its ownership and situation on the lake. In *Wall v. The East River Mut. Ins. Co.* (7 N. Y. 370), the personal property insured was de-

¹ See *Louck v. Orient Ins. Co.*, 176 Pa. 638 (1896). — ED.

scribed as "contained in the brick building with tin roof, *occupied as a storehouse*, situated on the northerly side of and about forty-two feet distant from their ropewalk at Bushwick." The court said that the identity of the building was distinctly ascertained by other facts of the description, and that the phrase "occupied as a storehouse" related to the risk and could not be otherwise applied. The language in the policies before us, as to the detached character of the building, applies fitly to the risk, and is entirely inappropriate as matter of description. We must hold therefore, what indeed was not denied in the dissenting opinion at General Term, or on the argument at our bar, that the phrase in question is not merely descriptive of identity, but relates to the character of the risk. Thus understood and appearing on the face of the policy it amounts to a warranty. (*Alexander v. Germania F. Ins. Co.*, 66 N. Y. 464; *Richards v. Protection Ins. Co.*, 30 Me. 273; *Parmelee v. Hoffman Fire Ins. Co.*, 54 N. Y. 193.) Such result is, however, disputed upon the ground that the language is that of the insurers and is vague and void for ambiguity. The argument is that to avoid a forfeiture the words used must be most strongly construed against the insurer; that the word "detached" will not be defined so as to destroy the contract; that in the sense of separate, or disengaged from, the policy does not add from what; that it may mean "detached at least one hundred feet" from "earth, sea, or sky," or from "Lake Champlain;" and that if it means from any building, it must be construed to mean any building which constitutes an exposure and increases the risk, which was not true of the office building, since the trial judge found as a fact that it did not so increase the risk. We do not think the language is so vague or ambiguous as to make the warranty void. The fair import of the words and the intent of the parties indicated by the terms of their agreement must guide the construction. (*Higgins v. Phoenix Mut. Life Ins. Co.*, 74 N. Y. 26.) It cannot be doubted that both parties perfectly understood the meaning of the phrase to be that the storehouse stood by itself as a detached or separate building and apart from other buildings at least a distance of one hundred feet. The expression, although brief, is not meaningless, but to the common understanding, and especially in connection with an insurance against fire, conveys unmistakably the idea we have expressed, and must have been so understood by each of the contracting parties. If it did not mean that, it meant nothing, and what was intended as a serious business transaction becomes an idle play with words. But the further contention, that the language must be held to mean, detached one hundred feet from any other building of such character as to constitute an exposure and increase the risk, seems to us a sensible and just construction. The brevity of the language requires that something be added to complete and elucidate the meaning. The phrase may mean detached one hundred feet from any other building whatever its size or character. This would be a rigorous and severe interpretation, most favorable to the insurer and operating harshly upon the insured. So

construed, it would make any thing which could be deemed a building, however small or insignificant, as an ice-house, or privy, or open shed, within the prescribed distance, operate as a breach of the warranty. If a construction so literal or severe is intended by the insurer, he should at least say so by apt and appropriate language, and not ask the courts to supply it by intendment. If it be granted that such small and insignificant structures were not meant, and should be treated as if they did not exist, the question would remain how small and how insignificant must they be to be disregarded, and how large and of what character to justify a conclusion of breach of the warranty, and where and upon what principles is the line to be drawn between buildings strictly such, but proper to be disregarded, and those whose presence breaks the warranty. These questions can be wisely answered in but one way. The test must be whether the building within the distance named is or is not an exposure which increases the risk. One which does not can scarcely be supposed to come within the warranty, unless such result is indicated by explicit language which will bear no other reasonable interpretation. No such language is contained in these policies, and when the courts are asked to supply a defect and complete an imperfect phrase, they should remember that the necessity is the fault of the insurer, and construe the language in view of the natural understanding of the parties, and with justice to both. Declining to hold the phrase in the policy to be meaningless and void, we are compelled to choose between two constructions; the one rigorous and hard and producing a forfeiture, and the other natural and reasonable and supporting the obligation. We have heretofore decided that in such case the latter construction is to be preferred. (*Bailey v. Homestead Fire Ins. Co.*, 80 N. Y. 21; 36 Am. Rep. 570.) We hold, therefore, that the warranty in this case was that no other building, of such size and character as to constitute an exposure and increase the risk, stood within one hundred feet of the storehouse.

Thus construed, it is apparent that the warranty was not broken. The findings of fact, taken together, show that the only building within the prescribed distance of one hundred feet was the small office. This was described as being ten by twelve feet on the ground and seven feet high; a frame building clapboarded and ceiled inside; having a chimney, but no stove in it; used sometimes as an office, and at the time of the fire containing a quantity of gunpowder, temporarily stored. The evidence showed, or at least tended to show, that this building, standing seventy-five feet from the subject of insurance, was not an exposure and did not affect the risk, and the trial court found that fact substantially, and refused to find the contrary. It follows that there was no breach of the warranty and that the General Term erred in so deciding and in reversing the judgment.

We have examined the other grounds upon which the reversal is sought to be sustained, and do not think they can be deemed sufficient for that purpose, or that they require further discussion.

The orders of the General Term should be reversed, and the judgments on trials at the circuit affirmed, with costs.

All concur, except RAPALLO, J., dissenting, and MILLER, J., not voting.

Orders reversed and judgments accordingly.

GODDARD v. EAST TEXAS FIRE INS. CO.

SUPREME COURT OF TEXAS, 1886. 67 Tex. 69.

APPEAL from Kaufman. Tried below before the Hon. Anson Rainey.

Wood & Charlton, for appellant.

Whitaker & Bonner, for appellee.

WILLIE, C. J. It is apparent from the case made by the evidence that the failure of Goddard to keep his books and inventory in an iron safe at night did not arise from any intention on his part to deprive the insurance company of evidence as to the amount of the stock, tools, and machinery he had on hand at the time of the fire. He was wholly ignorant of the existence of any clause in the policy imposing this duty upon him.

It is not made to appear that the company has been damaged in the least by reason of Goddard's default in this respect; for the value of the stock at the time the inventory was made was fully proved, and the amount of the subsequent sales — which were all for cash — could be easily ascertained from the accounts kept in the books, which were preserved and open to the inspection of the company and the court. If there has been neither fraud on the part of Goddard, nor loss to the company by reason of his non-compliance with the said clause, it cannot be said that it was material to the risk, and the policy is not avoided unless the provisions of the clause constituted a warranty. If they did, the law exacts a compliance with their terms according to their true intent and meaning, whether material or not, or whether known to be assured or not, if he had the opportunity, and it was his duty, under the circumstances, to acquaint himself with them. (*Ripley v. Ætna Insurance Company*, 30 New York, 136; *Withwell v. Insurance Company*, 49 Maine, 200; *May on Insurance*, 161; *Wood on Insurance*, sections 58, 176.)

Treating this as a case where the assured was charged with knowledge that the clause in question was attached to the policy, as it appears in the original sent up for our inspection, the question is, did this constitute it a warranty that the assured would perform the promises contained in the clause or the policy should be void?

It is a cardinal principle of insurance law, that in order to constitute any statement or promise of the insured a warranty, it must be made part of the policy, either by appearing in the body of the instrument or

by a proper reference in the policy to some other paper in which it is to be found. (Wood on Insurance, section 176, page 340.)

It is in the nature of a condition precedent, and, as such, must form part of the contract between the parties. (Wood on Insurance, section 58; Farmers' Loan, etc. Company v. Snyder, 16 Wendell, 481.)

The policy is the contract, and, if outside papers are to be imported into it, this must be done in so clear a manner as to leave no doubt of the intention of the parties. (Farmers' Loan, etc. Company v. Snyder, *supra*; Insurance Company v. Southard, 8 B. Monroe, 634.)

When there is doubt as to the intention of the parties to treat the paper as part of the policy, the courts give the benefit of the doubt to the assured, and construe the policy liberally in his favor. (Stone v. U. S. Casualty Co., 5 Vroom, 376.) This is in accord with the general rule that the language of the policy being the language of the underwriters, if susceptible of two interpretations, that must be adopted which will sustain the claim of the assured, and give him the indemnity it was his object to secure. (Cropper v. Western Ins. Co., 32 Pa. St. 351.)

The clause which appellee seeks in this case to have construed as part of the policy is not written or printed upon the same paper with the rest of that instrument, nor is it referred to in the policy as forming a part of the contract between the appellant and the insurance company. It is clear, therefore, that its conditions cannot be treated as entering into that contract if it is to be considered as a separate and detached paper. But the edge of the paper upon which the clause is printed is made, by means of mucilage, to adhere to a blank space on the face of the policy, and upon this single fact rests the whole claim of the appellee to have the clause considered as one of the warranties and conditions of that instrument. In the case of Bean v. Stupart, Douglas, 11, these words were written on the margin of a marine policy of insurance: "Thirty seamen besides passengers." These words were held by Lord Mansfield to constitute a warranty that the insured ship sailed with that number of seamen, so that the policy would be avoided if a less number of seamen manned the vessel. He gave to the words the same effect as if they had been written in the policy itself. In the subsequent case of Kenyon v. Buthen, reported in a note to Bean v. Stupart, the same principle was announced by the same judge, and the words, "in port twenty-ninth of July, 1776," written transversely on the margin of the policy, were held to constitute a warranty which if not strictly complied with to a day would avoid the policy. In the subsequent case of Pawson v. Bannent, Lord Mansfield held that though a written paper be wrapped up in the policy, when it is brought to the underwriters to subscribe, and shown to them at the time, it is not a warranty or to be considered as a part of the policy itself, but only as a representation. He held the same thing in Bize v. Fletcher, in reference to the statements in a piece of paper wafered to the policy at the time the underwriters subscribed it. The statements on the papers in

question in these two last cases were similar to those passed upon in *Bean v. Stupart* and *Kenyon v. Buthen*. In one case they related to the equipment of the ship in men and guns, and in the other, to her condition as to repairs and strength, several particulars of the intended voyage being also mentioned.

Thus a clear distinction is drawn by that eminent judge between statements and promises written in the policy itself, though upon the margin, and those detached from it, or contained in a separate piece of paper and made to adhere to the policy. In the former case they are warranties; in the latter they are at best no more than representations.

These cases are old, but we are not informed that they have ever been overruled. On the contrary, they are cited with special approbation by some of the most respectable courts of the United States, and quoted by text-writers as expressing the law of the present time. (*Ins. Co. v. Southard*, 8 B. Mon. 637; *Farmers' Loan, etc. Co. v. Snyder*, 16 Wend. 492; *May on Ins.*, 162, 163; *Wood on Ins.*, 416, 419.)

These decisions may well be supported by the principles we have already announced. The underwriters prepare the contract to suit themselves. They can exact any lawful conditions they choose to guard against fraud, negligence, want of interest, etc.; but they must do so in a manner not calculated to mislead the parties with whom they deal. They have it in their power to express their meaning in a way not to be misunderstood, or to be capable of any other construction, except that which they must know the assured will give to the language. If they do not embody their warranties in the policy itself, or import them into that instrument by a proper reference to other papers in which they are contained, and the contract is capable of an interpretation which will make them mere representations, they must expect that it will be so construed.

But without attempting to decide that there are no circumstances under which a foreign paper attached to a policy, without any reference to it made in that instrument, may form a condition of the contract and be construed as a warranty, or that this clause might not have been attached to the present policy at such place and in such a manner as to give it that effect, we are clear that the clause under consideration is not so attached to the policy as to give it any higher dignity than that of a mere representation. It is placed after a description of the property insured, and in the midst of the covenants assumed by the underwriters, and makes the policy read thus: "The East Texas Fire Insurance Company of Tyler, Texas, organized January, 1875, in consideration of eighty-four dollars and of the agreement herein contained, does insure Goddard & Corley to the amount of twelve hundred dollars: one thousand dollars on their stock of stoves and hollowware, tin, tinware, and tinner's materials, and two hundred dollars on their tools and machines, all while contained in the one-story frame shingle-roof building and shed adjoining on the east, occupied by assured and situ-

ated at No. 200, on Moore Avenue, corner of Adelaide Street, Block No. 77, Terrell, Texas. Three-fourths loss and iron safe clause. It is agreed and understood to be a condition of this insurance, that in case of any loss or damage under this policy, this company shall be liable only for three-fourths of said loss, not exceeding the sum herein insured, the other one-fourth to be borne by the assured; and in event of other insurance hereon this company to be liable only for its proportion of three-fourths of such loss or damage.

"It is understood and agreed that the assured shall keep a set of books, showing a record of his or their business, including all purchases and sales, both for cash and on credit, as well as a copy of his or their last inventory, warranted to be kept in an iron safe at night, against all such immediate or proximate loss or damage by the assured as may occur by fire to the property above specified, but not exceeding the interest of the assured in the property and except as hereinafter provided," etc., setting forth the time the policy is to last, how the damage is to be estimated, the date at which the loss is to be paid, etc.

The policy then concludes by reciting the terms, conditions, and warranties upon which it is given. It will be seen that the clause in question is inserted in the midst of a sentence with which it has no proper connection; a sentence which purports to contain the promises made on the part of the insurance company, and not those entered into by Goddard & Corley. It is therefore not only out of place, but, taken in connection with its context, is devoid of meaning. Not only so, but the policy expressly names the conditions and terms upon which it is executed, and the warranties which the assured is obligated to make good and perform, and yet no warranty or condition of the kind stated in the clause in question is found among them.

Now there are some other principles of insurance law applicable to the state of case made by the policy as we have recited it. The first of these is: "Words purporting to be a condition upon which the policy was issued must be set forth in such a place, and in such manner in the policy, as leaves no doubt they were so intended; and words inserted promiscuously therein, having no connection with other conditions of the policy, although the word *condition* is used, will not be treated as a condition of the policy." Wood on Fire Insurance, sections 59, 60. See also May on Insurance, 170.

This principle is well illustrated by the case of *Kingsley v. New England Mutual Fire Insurance Company*, 8 Cush. 393. There the words "on condition that the applicant take all risks from cotton waste," inserted between the statement of the sum insured on the property and the description of its location, were held not to constitute a condition or warranty. The present case is much stronger than the one cited. There the words were written on the face of the policy; here they are printed on a slip and attached to it. There, though wrongly located, they do not interfere materially with the sense of the sentence in which they are embodied; here they do. There the word

"condition" is expressly used in connection with the clause; here it is not. Moreover, whilst it is used in the preceding sentence fixing the liability of the company at three-fourths the value of the property destroyed, it is omitted in the iron-safe clause altogether. This must have been done through design, and the design must have been to prevent the latter clause from being construed as a condition. However this may be, the policy is brought fully within the principle of law just announced, and the clause under decision must be held not to be a warranty.

There is still another rule of law applicable to this policy, which is that, when an instrument of this character is inconsistent or ambiguous in its provisions, it must be construed most favorably for the assured. (Wood on Fire Ins., sec. 59 and notes; *Hoffman v. Ætna Ins. Co.*, 32 N. Y. 405; *Ætna Ins. Co. v. Jackson, Ously & Co.*, 16 B. Mon. 242; *May on Ins.*, 183, 184.) The inconsistencies and ambiguities of this policy have already been made apparent. In the first part it recites certain undertakings assumed by the assured; and then in the latter part, which is held to be the most binding portion of such a contract, it sets forth specifically what are the terms of the policy which are to be considered conditions and warranties. To take the most favorable view for the appellee, the policy leaves it doubtful whether the promises exacted of the assured in the first part of the instrument are to be super-added as warranties to those enumerated in the last part, or whether the latter are to be considered the only warranties, leaving the former to be treated as representations. In such case, as we have seen, the doubt must be resolved in favor of the assured. The makers of the policy could have made their meaning clear by including the iron-safe clause in the body of the policy at its proper place; but they have chosen to place it where its meaning and construction is obscured, and they must abide the consequences. We are of opinion that the court below should have held the clause in question to have been no more than a representation, and as it was not pleaded as such by the appellee, and the proof did not show any fraud committed by the appellant, or injury suffered by the company by reason of its not having been literally fulfilled, judgment should have been rendered for the appellant for the full amount claimed by him; the court having found that three-fourths of the value of the property lost was at least equal to the amount for which it was insured.

For the error of the court below in the matter stated, its judgment will be reversed; and this court, proceeding to render such judgment as should have been rendered below, orders and adjudgeth that the appellant recover of the appellee the sum of twelve hundred dollars, with interest thereon from November 30, 1885, and all costs of this, and of the lower court.

Reversed and remanded.

HOSFORD v. GERMANIA FIRE INS. CO.

SUPREME COURT OF THE UNITED STATES, 1888. 127 U. S. 399.

ERROR to the Circuit Court of the United States for the District of Nebraska.

This was an action by Hosford and Gagnon on a policy of insurance, dated May 14, 1883, by which the Germania Fire Insurance Company and the Hanover Fire Insurance Company, severally and not jointly, and as if by separate policies, insured the plaintiffs against loss by fire for a year from that date, each one-half of the sum of \$8,000, payable in sixty days after notice and proof of loss, upon their flour-mill, elevator, and machinery, in the town of Rulo and State of Nebraska; "special reference being had to assured application No. 20,157, which is hereby made a part of this policy and a warranty on the part of the assured;" "loss, if any, payable to Israel May, mortgagee, as his interest may appear." The policy contained these provisions:

"The application, survey, plan, or description of the property herein insured shall be considered a part of the contract and a warranty by the assured; and any false representation by the assured of the condition, situation, or occupancy of the property, or any omission to make known every fact material to the risk, or any overvaluation, or any misrepresentation whatever, either in a written application or otherwise," shall render the policy void.

"If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, or be encumbered by any lien, whether by deed of trust, mortgage, or otherwise, or if the building insured stands on leased ground, it must be so represented to the companies and so expressed in the written part of this policy; otherwise, this policy shall be void."

The application was of the same date as the policy, and was signed by the assured, and contained a great number of printed questions and written answers, and so much of it as is material to be stated was as follows:

"The applicant will answer particularly the following questions, and sign the same, as descriptive of the premises, and forming a part of the contract of insurance and a warranty on his part:

"What material is used for lubricating or oiling the bearings and machinery? Tallow, lard, and machine oils.

"Will you agree to use only lard and tallow, or sperm and lard oils for lubricating? Lard and tallow, or lard and machine oils.

"Is the machinery regularly oiled, and by whom? Yes, by regular attendant.

"Will you agree to keep all the bearings and machinery properly supplied with oil? Yes.

"Is smoking or drinking of spirituous liquors allowed on the premises? No.

"Is there any encumbrance on the property? Yes.

"If mortgaged, state the amount. \$3,000."

"The subscriber hereby covenants and agrees to and with the said companies that the same is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risks of the property to be insured, and said answers are considered the basis on which insurance is to be effected, and the same is understood as incorporated in and forming a part and parcel of the policy; and further covenants and agrees that if the situation or circumstances affecting the risk shall be so altered or changed during the time of any policy of insurance which may be fixed upon the application, or any renewal of said policy, as to render the risk more hazardous, [he] will notify the officers of said companies, or their general agent, forthwith of such alteration."

The case was tried by a jury, who returned a special verdict, finding the value of the property insured and its loss by fire on August 1, 1883, and so much of the rest of which as is material to be stated was as follows:

"The plaintiffs forbade smoking to go on in the mill, but smoking was done on the grinding floor." "One of them himself smoked upon and in the mill."

"At the time of the application there was due Israel May on his notes and mortgage on said premises the sum of \$3,079.45." "There were taxes of the county and State on said premises for several years prior to the issue of the policy, which were delinquent and unpaid, and still remain unpaid, amounting to the sum of \$329.40 on May 14, 1883."

On July 2, 1885, the Circuit Court gave judgment for the defendants. The plaintiffs brought the case to this court by writ of error, with a certificate of division of opinion between the Circuit Judge and the District Judge upon the following questions:

"1st. Whether the plaintiffs or the defendants, insurance companies, are entitled in law to recover judgment on said verdict and special findings of the jury returned in said cause.

"2d. Whether the fact that delinquent taxes on the mill, to the amount of \$329.40, were due and unpaid at the time the application for insurance on the property destroyed was made, and that fact was not disclosed by the applicants to the insurers, will defeat the plaintiffs' right to recover.

"3d. Whether the fact that smoking was done in the mill, the proprietor of the mill being one that smoked, notwithstanding the plaintiffs had stated in their application for insurance that smoking was forbid therein, will defeat their right to recover, the fire that destroyed the property not having originated from that cause."

Mr. *T. M. Marquett* and Mr. *Isham Reavis*, for plaintiffs in error.

Mr. *Samuel Shellabarger* (with whom was Mr. *J. M. Wilson* on the brief), for defendants in error.

Mr. Justice GRAY, after stating the case as above reported, delivered the opinion of the court.¹ . . .

The whole scope of that clause of the policy, which requires the interest of the assured, if "other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured," or if "encumbered by any lien, whether by deed of trust, mortgage, or otherwise," to be so represented by the assured and so expressed in the policy, is to ascertain whether his interest comes within either of these two descriptions, and not to call for information as to the nature or amount of any encumbrances. It is therefore fully satisfied by the statements in the application that there is an encumbrance on the property, and what the amount of mortgage is, and by the expression in the policy making the insurance payable to a mortgagee. *Williams v. Roger Williams Ins. Co.*, 107 Mass. 377.

By the terms of this policy, and of the application made part thereof, the answers to the questions in the application are doubtless warranties, to be strictly complied with. But this court is unanimously of opinion that, so far as regards either of the matters presented for its decision in the present case, these answers are direct, full, and true.

The only questions put as to encumbrances are, first, the general one, "Is there any encumbrance on the property?" which is truly answered, "Yes;" and, second, the particular one, "If mortgaged, state the amount," in answer to which the assured states the principal sum due on the mortgage. The effect of omitting to include the additional sum due for less than half a year's interest is not presented by the certificate of division. The insurers having put no question as to the nature or the amount of encumbrances, otherwise than by mortgage, cannot object that no information was given upon that subject. *Phoenix Ins. Co. v. Raddin*, 120 U. S. 183. There was, therefore, no breach of warranty in not disclosing the lien for unpaid taxes, independently of the question whether such a lien was an encumbrance, within the meaning of this contract; and this case does not require a decision of that question.

As to smoking, the only question put in the application, and answered in the negative, is whether smoking is "allowed on the premises," — which looks only to the rule established upon the subject at the time of the application, and not to the question whether that rule may be kept or broken in the future. This appears by the language of the question, as well as by the circumstance that it is not, as other interrogatories as to existing precautions against fire are, followed up by compelling the assured to agree that they will continue to observe the same precautions. The jury having found that the assured forbade smoking in the

¹ A passage foreign to warranty has been omitted. — ED.

mill, the mere fact that other persons, or even one of the assured, did afterwards smoke there, was not sufficient to avoid the policy.

The two cases, cited by the defendants from the Illinois Reports, contain no adjudication to the contrary. The point decided in each was that smoking by workmen in the mill did not avoid the policy, and the remark of the judge delivering the opinion, that in such a case the assured undertakes that he will not himself do the act, was *obiter dictum*. *Ins. Co. of North America v. McDowell*, 50 Illinois, 120, 131; *Aurora Ins. Co. v. Eddy*, 55 Illinois, 213, 219.

*Judgment reversed, and case remanded to the Circuit Court, with directions to render judgment for the plaintiff's upon the special verdict.*¹

BARNARD v. FABER.

COURT OF APPEAL, 1892. '93, 1 Q. B. 340.

ACTION upon a policy of insurance against fire.

At the trial before WRIGHT, J., without a jury, it appeared that the plaintiff, having insured against loss or damage by fire the furniture and other effects in Barnard's Palace of Varieties and the Bell Tavern, Portsmouth, with the Union Assurance Society for sums amounting to £800, and with the Glasgow and London Insurance Company, Limited, for sums amounting to £700, effected a Lloyd's fire policy thereon for £1000 at 25s. per cent premium. The policy covered the whole of the furniture and effects as one interest, and contained the following clause: "Warranted to be on same rate, terms, and identical interest as Union Insurance Company £800, and Glasgow and London £700, and to follow their settlements. The North British and Mercantile have £2500, and London and Lancashire £2000 on building and fixtures."

The policy was subscribed by the defendant and other underwriters. The property described in the policy having been destroyed or damaged by fire to the amount of £1500, the plaintiff brought this action against the defendant for payment of his proportion of the loss.

The substantial defence to the action was that there had been a breach of the warranty in the Lloyd's policy, more especially with regard to the policy of the Union Company, inasmuch as the rate, terms, and interest in that policy were not "identical" with those in the Lloyd's policy, the rate or premium in the Union policy being 31s. 6d. instead of 25s., and the "interest" insured being different, the sum insured by the Union policy being split up into separate sums on sepa-

¹ Compare *Glendale Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19 (1851).

See *Gilliat v. Pawtucket Mutual F. Ins. Co.*, 8 R. I. 282, 293-294 (1866); *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213 (1870).—ED.

rate "interests," or, in other words, upon separate sets of chattels; the wording of the policies being also different.

The learned judge directed judgment to be entered for the plaintiff.

The defendant appealed.

1892. Dec. 10. *Finlay*, Q. C., and *T. W. Chitty*, for the defendant. The expression "warranted" in the policy subscribed by the defendant had the effect of making the clause in which it occurred a condition precedent to the existence of any obligation on the defendant's part; and there was a breach of such condition which avoided the policy. [They cited *Behn v. Burness*, 3 B. & S. 751; *Thomson v. Weems*, 9 App. Cas. 671; *Sillem v. Thornton*, 3 E. & B. 868; *Anderson v. Fitzgerald*, 4 H. L. C. 484; *Newcastle, &c. Co. v. Macmorran*, 3 Dow. 255, at p. 262.]

Cohen, Q. C., and *Wood Hill*, for the plaintiff. The expression "warranted" had no greater effect than that of making the clause a collateral stipulation, the non-performance of which did not avoid the policy, but only added something not necessarily involved in the contract itself, and gave rise to a right of action, counter-claim, set-off, or reduction in the amount payable.

LINDLEY, L. J. I cannot agree with the view taken by the learned judge of the construction of this document. The real question is, what is the object of the insertion of this clause of warranty? The policy is a fire policy on certain property at 25s. per cent. It is subscribed by the defendant and other underwriters, and we find this clause in it: "Warranted to be on same rate, terms, and identical interest as Union Insurance Company £800, and Glasgow and London £700, and to follow their settlements." Then two other companies have insured the buildings and fixtures. This is not a policy on buildings and fixtures, as I understand it.

It appears to me that the clause can have only one object, and that is this: "We will insure provided we are satisfied that the Union and the Glasgow have insured at the same rate, the same terms, and the same interest." I do not profess to understand what the word "terms" means: I suppose it means terms as to risk; it cannot mean terms which are immaterial for the purpose of the contract. It seems to me that what was contemplated was the risk. What, I apprehend, the underwriters mean is this: "Satisfy us that these two offices have insured the same risk, the same interest, at the same rate, and we will effect this insurance." I cannot myself think that the term "warranted" is important; for I should construe this policy in precisely the same way whether the word was in or not. I do not think the policy is made plainer by the introduction of that word. I look upon part of the clause as a condition precedent. The insurance is "to be on the same rate, terms, and interest" as the two companies which are named. I regard that part as a condition precedent to the incurring of any liability at all. The remainder of the clause is a condition subsequent.

Now, unless the clause is so read, in what position would the underwriters find themselves? They would then find that they had come under an obligation, and that they were thrown back upon a cross-action against the insured. Did either the plaintiff or the underwriters mean that? Was that the object of inserting such a clause? When you have a clause which is consistent with the ordinary habits of men if you interpret it one way, and which is utterly inconsistent with their ordinary habits if you interpret it another, I prefer the former interpretation, that is, supposing the language admits of a double interpretation. I cannot help thinking that the more one looks at this document, the more plainly it appears that the bargain entered into by the underwriters was this: "We will not insure except upon the terms that these two companies have done—upon the same rate, upon the same terms, whatever they may be, and on the same interest." I think, therefore, that the learned judge has arrived at a wrong decision, and that the defendant's contention is right. Judgment must, therefore, be entered for the defendant, with costs both here and below.

BOWEN, L. J. I am entirely of the same opinion, and I confess that the matter appears to me to be quite clear. I do not mean to say that the words of this clause of warranty are happily chosen, but I think the true meaning of the clause is really transparent. The object of this clause is to have other companies or underwriters in the same boat as regards the particular interest and the risk to be covered; and the clause is one which is intended unquestionably for the protection of the underwriters. When you have arrived at that, it seems to me you have arrived at half the journey's end, because there can be no adequate protection to underwriters if you relegate them to a cross-action. The clause is intended to protect them against having to pay, not to give them a right to bring an action against the man insuring with them. But the way in which the clause is inserted seems to me to lead to precisely the same conclusion, and to guide one to the same end. The policy is one which, of course, is signed by the underwriters; it is not signed by the person who is insuring with them; and it is expressed in this way: "Warranted to be on same rate, terms, and identical interest as" the two other companies. Now, the words "warranted to be" must mean "guaranteed to be," or "promised to be;" and this document, signed as it is by the underwriters, must mean: "It is a term of our promise that there shall be a guarantee or promise of the other side"; and the guarantee or promise of the other side is then expressed. There are to be the same rate, the same terms, the identical interest, as in the case of the two other companies. It is, therefore, a term of this policy that there should be this promise; and if this promise is one which goes to the root of the whole engagement and transaction, then it becomes, according to the ordinary principles of ordinary law, a condition,—either a condition precedent, or, if the condition is one which cannot be construed as a condition precedent and must be a condition subsequent, then it becomes a condition sub-

sequent. That arises from the materiality of the promise which is assumed to be made, and the making of which is to be a term of the engagement or transaction into which the underwriter has entered. When you have got as far as that, it is clear that it is the term as regards the risk which is material. A term as regards the risk must be a condition. Then let us look at what the particular words are — the “same rate and identical interest.” The “same rate and identical interest” are, obviously, words so material to the transaction that we can only construe them as creating a condition precedent. With regard to the word “terms,” it is not necessary for us to decide, or to explain exactly what it means. I do not myself doubt that there is a limitation which can be put upon it — a limitation to be derived from the character of the document, from the nature of the transaction, and from the nature of the stipulation itself, which reduces within defined and reasonable limits that which otherwise might be vague, impracticable, and illimitable. But when you regard the words which alone we have to look at for the purposes of this appeal, the “same rate and identical interest” as the insurance companies, I do not doubt for a moment that it is a condition without which the contract is not to be binding.

With regard to the words “to follow their settlements,” that is a condition subsequent, as my brother has said.

The true construction of the document is, in my opinion, that which I have stated; and the opposite view is one which, to my mind, never could be adopted in business, for this reason, that I do not believe that there is an underwriter in the world of any substantial position who would put his hand to a policy in which a term directly affecting the risk was to be enforced only by a cross-action brought on the part of the underwriter against the insured after the loss. The point turns on the materiality of this promise. It is because the promise is so material to the consideration of the risk that it seems to me to become a condition.

A. L. SMITH, L. J. I am of the same opinion, and have but little to add. My brother Wright evidently had considerable difficulties and doubts upon the point, and I think the decision at which he eventually arrived was wrong.

The question is — whether this clause contains a promise which goes to the root of the transaction, or whether it is merely a collateral stipulation the non-performance of which did not avoid the defendant's obligation, but only gave him a cause of action. We must look to the business of the matter in construing this clause, and I quite agree with what has fallen from Lindley, L. J., that it is immaterial whether the word “warranted” is in the clause or not. For the purposes of my judgment I strike that word out. The question is, what is the promise? Now, to state it as shortly as I can, in my judgment there is an agreement in this policy between the underwriter and the assured that the underwriter shall insure provided that only the same risk which the other two offices have undertaken is placed upon him — the reason be-

ing that he knows those offices, and the risk they have undertaken he is content to abide by. If, however, the other two offices have not undertaken the same risk as that underwritten by the defendant, then, it being a condition of this policy that those two offices should have undertaken the same risk, there is no liability on the part of the underwriter if this is not so.

I am of opinion that this clause constitutes a condition and not a collateral agreement, and that the defence is a good one.

*Appeal allowed.*¹

¹ On the topic of this section, see also:—

Mayall v. Mitford, 6 Ad. & E. 670 (1837);
 Gates v. Madison County Mutual Ins. Co., 2 N. Y. 43 (1848); s. c. at a later stage, 5 N. Y. 469 (1851);
 Wilson v. Herkimer County Mutual Ins. Co., 6 N. Y. 53 (1851);
 Daniels v. Hudson River F. Ins. Co., 12 Cush. 416 (1853);
 Washington Mutual Ins. Co. v. Merchants and Manufacturers' Mutual Ins. Co., 5 Ohio St. 450 (1856);
 Ripley v. Ætna Ins. Co., 30 N. Y. 136 (1864);
 Carter v. Humboldt F. Ins. Co., 17 Iowa, 456 (1864);
 Poor v. Humboldt Ins. Co., 125 Mass. 274 (1878);
 Wheeler v. Watertown F. Ins. Co., 131 Mass. 1 (1881);
 Martin v. State Ins. Co., 44 N. J. L. 485, 490-495 (1882);
 Bennett v. Agricultural Ins. Co., 51 Conn. 504 (1884);
 Rankin v. Amazon Ins. Co., 89 Cal. 203 (1891);
 Virginia F. & M. Ins. Co. v. Morgan, 90 Va. 290 (1893);
 King Brick Mfg. Co. v. Phoenix Ins. Co., 164 Mass. 291 (1895);
 Southern Ins. Co. v. Parker, 61 Ark. 207 (1895).
 Goldman v. North British Mercantile Ins. Co., 48 La. Ann. 223 (1896). — ED.

SECTION III.

*Life Insurance.*¹

ROSS v. BRADSHAW.

NISI PRIUS, 1761. 2 Park Ins. (8th ed.) 933.²

IN an action on a policy made on the life of Sir James Ross for one year from October, 1759, to October, 1760, *warranted in good health at the time of making the policy*; the fact was, that Sir James had received a wound at the battle of La Feldt, in the year 1747, in his loins, which had occasioned a partial relaxation or palsy, so that he could not retain his urine or *fæces*, and which was not mentioned to the insurer. Sir James died of a malignant fever within the time of the insurance. All the physicians and surgeons, who were examined for the plaintiff, swore that the wound had no sort of connection with the fever; and that the want of retention was not a disorder, which shortened life, but he might, notwithstanding that, have lived to the common age of man; and the surgeons who opened him said that his intestines were all sound. There was one physician examined for the defendant, who said the want of retention was paralytic; but being asked to explain, he said it was only a local palsy, arising from the wound, but did not affect life; but on the whole he did not look upon him as a good life.

LORD MANSFIELD. The question of fraud cannot exist in this case. When a man makes insurance upon a life generally, without any representation of the state of the life insured, the insurer takes all the risk, unless there was some fraud in the person insuring, either by his suppressing some circumstances, which he knew, or by alleging what was false. But if the person insuring knew no more than the insurer, the latter takes the risk. In this case there is a warranty, and wherever that is the case it must at all events be proved, that the party was a good life, which makes the question on a warranty much larger than that on fraud. Here it is proved that there was no representation at all as to the state of life, nor any question asked about it, nor was it necessary. Where an insurance is upon a representation, every material circumstance should be mentioned, such as age, way of life, &c. But where there is a warranty, then nothing need be told; but it must in general be proved, if litigated, *that the life was, in fact, a good one*,

¹ In addition to warranties properly so called, here have been placed conditions expressly avoiding the contract because of misstatements in the application. — ED.

² s. c. 1 W. Bl. 312. — ED.

and so it may be, though we have a particular infirmity. The only question is, "Whether he was in a reasonable good state of health, and such a life as ought to be insured on common terms?"

The jury, upon this direction, without going out of court, found a verdict for the plaintiff.

WILLIS v. POOLE.

Nisi Prius, 1780. 2 Park Ins. (8th ed.) 934.

It was an action on a policy on the life of Sir Simeon Stuart, Bart., from the 1st of April, 1779, to the 1st of April, 1780, and during the life of Eliza Edgly Ewer. This policy contained a warranty that Sir Simeon was about fifty-seven years of age, *and in good health on the 11th of May, 1779*, and that Mrs. Ewer was about seventy-eight years of age. The defendant at the trial admitted, that Sir Simeon and Mrs. Ewer were of the respective ages mentioned in the warranty; that he died before the 1st of April, 1780, and that she was living. Two questions were intended to have been made: 1st, As to the plaintiff's interest; 2nd, On the warranty of health. The former was disposed of by the plaintiff having proved a judgment debt. As to the latter it appeared in evidence, that although Sir Simeon was troubled with spasms and cramps from violent fits of the gout, he was in as good health, when the policy was underwritten, as he had been for a long time before. It was also proved by the broker, who effected the policy, that the underwriters were told that Sir Simeon was subject to the gout. Dr. Heberden and other gentlemen of the faculty were examined, who proved that spasms and convulsions were symptoms incident to the gout.

LORD MANSFIELD. The imperfection of language is such that we have not words for every different idea; and the real intention of parties must be found out by the subject-matter. By the present policy, the life is warranted, to some of the underwriters *in health*, to others *in good health*; and yet there was no difference intended in point of fact. *Such a warranty can never mean that a man has not the seeds of disorder.* We are all born with the seeds of mortality in us. A man, subject to the gout, is a life capable of being insured, if he has no sickness at the time to make it an unequal contract.

*There was a verdict for the plaintiff.*¹

¹ Other cases on good health are: *Grattan v. Metropolitan L. Ins. Co.*, 92 N. Y. 274 (1883); *Brown v. Metropolitan L. Ins. Co.*, 65 Mich. 306 (1887); *Maine Benefit Assn. v. Parks*, 81 Me. 79 (1888). — ED.

ANDERSON, PLAINTIFF IN ERROR, v. FITZGERALD,
DEFENDANT IN ERROR.

HOUSE OF LORDS, 1853. 4 H. L. C. 484.¹

THIS was a writ of error on a judgment of the Court of Exchequer Chamber in Ireland. The original action, brought by Anne Fitzgerald, administratrix of Patrick Fitzgerald, against Samuel Anderson, as one of the directors of the United Kingdom Life Assurance Company, was *assumpsit* upon a life insurance policy of which the following are the only passages bearing on the questions taken to the higher courts:—

“Whereas Patrick Fitzgerald, of Kilrush, in the county of Clare, Ireland, nurseryman, is desirous of making an assurance with the United Kingdom Life Assurance Company in the sum of £450 upon his own life, and hath warranted, and doth warrant, that his name, residence, and profession, business or occupation, is as above stated, and that his age will not exceed fifty-two years on his next birthday, . . . and that he has a sound and good constitution, and is now in a good state of health. . . .

“Know all men by these presents, that if the said Patrick Fitzgerald shall die . . . the funds and property of the said company shall be subject and liable to pay . . . unto his executors, administrators, or assigns the sum of £450 hereby assured.

“Provided always that in case the said Patrick Fitzgerald shall die upon the high seas, . . . or shall kill or destroy himself, or cause his own death, whether *felo de se* or otherwise, or die by duelling or by the hand of justice, or if anything so warranted as aforesaid shall not be true, or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or shall not have been fully and fairly disclosed and communicated to the said company, or if any fraud shall have been practised upon said company, or any false statements made to them in or about the obtaining or effecting of this insurance, this policy shall be null and void.”

The defendant pleaded *non assumpsit* and certain special pleas.

At the trial it appeared that before obtaining the insurance Patrick Fitzgerald had signed a proposal containing twenty-seven questions and answers. The only passages bearing on the questions taken to the higher courts are these:—

“21st. — Did any of the party’s near relations die of consumption or any other pulmonary complaint? — No.

“22nd. — Has the party’s life been accepted or refused at any office ;

¹ The statement has been rewritten, largely upon the basis of the report in the Irish Exchequer Chamber, 1 Irish Common Law, 251 (1851). — Ed.

and if accepted, was it at the usual premium or with what addition? — No. . . .

“I hereby agree that the particulars mentioned in the above proposal . . . shall form the basis of the contract between the assured and the company; and if there be any fraudulent concealment or untrue allegation contained therein, or any circumstance material to this insurance shall not have been fully communicated to the said company, or there shall be any fraud or misstatement, all money which shall have been paid on account of this insurance shall become forfeited, and the policy be void.”

There was evidence tending to show that several of the statements in the proposal were false; amongst others the statement that the applicant had not been insured at any other office, and the statement as to the health of the members of the family, it being proved that two of the applicant's sisters had died of consumption at the ages of sixty-five and sixty-seven respectively.

The defendant's counsel called on the judge to direct the jurors that if, previous to the making of the policy, any false statement was made to the company in or about the obtaining or effecting of the said insurance, though the jury should believe that the same was not material to the insurance, they should find a verdict for the defendant. The defendant's counsel also called on the judge to direct the jurors to similar effect specifically with reference to the answers numbered 21 and 22 respectively. The judge refused to give any of these instructions; and he directed the jurymen that they “must not only be satisfied that the various false statements relied on by the defendants were false in fact, and were made in and about effecting the policy, but also that such false statements were material to the insurance, before they could find their verdict for the defendant;” and he gave similar instructions specifically as to answers 21 and 22 respectively. Exceptions were taken to these charges and refusals to charge. These exceptions related to the first issue; and there were also exceptions relating to the other issues. The verdict was for the plaintiff. The exceptions were argued in the Court of Exchequer, when the Lord Chief Baron expressed an opinion that they ought to be allowed, but Mr. Baron Richards and Mr. Baron Lefroy being of a different opinion, judgment was ordered to be entered for the plaintiff. A writ of error was brought in the Court of Exchequer Chamber, where, by a majority of seven to three, the judgment of the court below was affirmed. The present writ of error was then brought.

The judges were summoned, and Mr. Baron Parke, Mr. Baron Alderson, Mr. Justice Coleridge, Mr. Justice Wightman, Mr. Justice Erle, Mr. Justice Cresswell, Mr. Baron Platt, Mr. Justice Talfourd, Mr. Justice Williams, Mr. Baron Martin, and Mr. Justice Crompton attended.

Sir *F. Kelly* and Mr. *Bovill*, for the plaintiff in error.

Mr. *Napier* and Mr. *Fitzgerald*, for the defendant in error.

The LORD CHANCELLOR,¹ having stated the pleadings and evidence, said :² . . . Now in order to get that information which shall enable the House satisfactorily to decide the whole of this case, I propose to put to the learned judges these two questions : —

1. Was it necessary for the plaintiff in error to prove on the trial that the answers given by Fitzgerald to questions 21 and 22, contained in the particulars, dated Kilrush, 17th June, 1846, or either of them, were or was material as well as false? And secondly,

2. If it was necessary for the plaintiff in error to prove the materiality as well as the falsehood of the answers, or either of them, are the exceptions, so far as they relate to the ruling of the learned judge on the issues joined on the second and third pleas, or is either of them, sustainable?

The judges asked time to consider the questions.

Ordered.

MR. BARON PARKE. Your Lordships have proposed two questions for the consideration of those of her Majesty's judges who heard the argument of this case at your Lordships' bar.³ . . .

The answers referred to by your Lordships were given to two questions put to the assured, Fitzgerald: the first, whether any of the party's near relatives died of consumption or other pulmonary complaint? and, secondly, whether the party's life had been accepted or refused at any other office, and if accepted, whether at the usual premium, or with what addition? To both, the assured answered in the negative. At the end of the list of questions the assured subscribed a declaration to the effect that the particulars should form the basis of the contract between the assured and the company, and that if there should be any fraudulent concealment or untrue allegation contained therein, or any circumstance material to the insurance should not have been fully communicated to the company, or if there should be any fraud or misstatement, all the money paid on account of the insurance should be forfeited, and the policy should be void.

The first question then submitted to us is, Whether it was necessary for the plaintiff in error to prove on the trial that the above answers, or either of them, were or was material, as well as false? We are all of opinion that it was not.

This question does not appear to us to turn upon the well-known distinction between warranties and representations laid down by Lord Mansfield, nor upon the point whether the declaration above mentioned was either a part of the contract binding between the parties independent of the policy, or meant to be referred to by it. The proviso is clearly a part of the express contract between the parties, and on the non-compliance with the condition stated in the proviso, the policy is unquestionably void.

¹ Lord CRANWORTH. — ED.

² The omitted passage stated the exceptions taken. — ED.

³ Here, and throughout the remainder of the case, the report has been abbreviated by omitting passages not essential to an understanding of the decision. — ED.

The case therefore resolves itself, in our view of it, as it does in that of most of the Irish judges, simply into a question of the construction of the proviso itself; and it is upon questions of that nature that different minds are apt to differ in their conclusions, however disposed to adopt the established rules for the construction of written instruments.

By that proviso it is stipulated, first, that if the assured should die on the high seas (with certain exceptions), or should kill himself, or die by duelling, &c., or if anything warranted as before mentioned (and there were several express warranties before stated) should not be true, or if any circumstance material to that insurance should not have been truly stated or should have been misrepresented or concealed, or should not have been fully and fairly disclosed and communicated to the company, the policy should be void. Thus far the condition applies only to material matters; but it proceeds to declare, obviously with a view of extending the protection to the office still further, that if any fraud shall have been practised on the company, or any false statements made to the company in or about the obtaining or effecting of that insurance, the policy shall be null and void. The latter words probably override the former, and the fraud, as well as the false statement, in order to avoid the policy, must be made in or about the obtaining or effecting of that insurance. These words, no doubt, must be understood not to include a false statement of matters to the disparagement of the applicant for insurance, and tending to render his life less insurable; such a construction would be clearly absurd, and in no way reconcilable with the manifest object of the proviso. The words, however, will clearly include all frauds or false statements made in order to obtain the policy, whether in matters material or not; a consistent construction will thus be given to the whole. The proviso, in the first place, provides for the violation of the special matters mentioned in the commencement of it. Next, it requires every material fact not to be misrepresented or concealed, but to be fully and fairly declared. But it goes further. In the anxiety of the company to protect itself by every precaution, it prohibits any fraud or falsehood whatever to be used in obtaining the insurance. It includes all frauds for that purpose, though not made by concealment or misrepresentation, by word or writing, of material facts, such as fraud in false personation, or in the disguise of the diseases of the applicant; and, lastly, it prohibits every false statement whatever, whether in matters actually material or immaterial, and leaves no room for dispute whether the particular matter to which it related was material or not (which in the case of a dispute a jury would have to decide), leaving the company to determine entirely for itself what matters it deems material and what not.

This seems to us to be the obvious ordinary sense of the words used, and there is no reason from the context to give any other than the ordinary sense to them, though they are to be construed as the words of the assurers, and most strongly against them if there is any ambiguity in them. There is no ambiguity in them in this respect. A

doubt possibly may exist whether the word "false" is to be understood in the sense of false in point of fact, or morally false, though, I believe, most of us think that it is not to be limited to moral falsehood; but there seems to us to be no doubt that if the statements are false, in whatever sense we understand that word, being used in effecting the insurance, this proviso operates. There then appear to us to be only two questions for the jury on this part of the policy: Were the statements false? Were they made in obtaining or effecting the policy? Whether they are material or not is not a necessary part of the inquiry. It has seemed to two eminent members of the Irish Bench, Mr. Justice Moore and the then Lord Chief Justice Blackburne, that the materiality of the question was involved in the inquiry whether it was used by the assured to induce the company to effect the policy. We do not agree with that reasoning. It is true that the materiality of these statements may be sometimes evidence of the purpose with which they were made, and may tend to show that they were made with the object of obtaining the policy, because if immaterial they would not be likely to effect it; but the materiality is not a necessary condition to bring them within the scope of the proviso, if it can be shown that the statements were made in obtaining the policy and for the purpose of effecting it; and here the terms of the particulars and the subjoined declaration preclude all doubt upon that question; for the truth of the answers is, in the strongest terms, made essential to the validity of the policy.

We therefore answer your Lordships' first question in the negative, notwithstanding the ability shown by the judges who have expressed their opinion, that the materiality of the answers was a necessary part of the proof.

With respect to the second question proposed by your Lordships, we answer, that the exceptions, on the issue joined on the second and third pleas, are not sustained, and that on a formal ground. . . .

The LORD CHANCELLOR. . . . The plea upon which the question arises is the old plea of *non assumpsit*, for I need hardly remind your Lordships that the "new rules" of pleading adopted in this country do not extend to Ireland.

Now, among the particulars constituting that paper which Fitzgerald signed, and which he agreed should be the basis of the contract between him and the company, there were two questions to which he was called upon to make an answer, and which he did answer. . . . Striking out all the other articles from those particulars, the result therefore is, that Fitzgerald agrees that the basis of the contract between him and the company shall be that he truly represents to the company that none of his near relations died of consumption, or any other pulmonary complaint, and that his life had never been accepted or refused at any other office. . . .

Although the learned Chief Justice Blackburne came to a conclusion different from that at which the learned judges now advising your Lordships have arrived, and in which I concur, and in which I am about to

propose to your Lordships to concur, yet I think he very distinctly states (and the other learned judges forming the majority concurred with him) the point on which the question turned. He says: "The plaintiff in error contends that it is sufficient to ascertain, simply in the terms of the policy, that the false statement was made in or about obtaining it; and that when this is done, the words of the condition are so comprehensive and stringent, that the question is solved and the policy avoided, whether the statement was material or immaterial; in other words, that we are to read the clause as if it had contained those very words. I admit if this be the meaning of the words, — if this be so clearly expressed as not to admit of any other rational construction, — we must give them the operation contended for. But is this so? It is obvious, that to maintain a defence founded upon this provision of the policy, proof must be made, — first, of the false statement of some matter of fact; and, secondly, that it occurred on the occasion of effecting the policy. The judge and jury must inquire into both, and decide both." Up to this point I entirely concur with the learned judge; he puts the case very distinctly and clearly. He then goes on thus: "What could answer this inquiry, or be said, with any propriety of language, to come within such terms, but a misstatement used by the assured to induce the company to contract, and how could it have done so if it had been utterly immaterial?" Now there, my Lords, I differ from the learned judge. The company stipulates this, that the assured shall contract with the company that he warrants certain things to be correct, and further stipulates that if he should make to the company any untrue statement in and about effecting the policy, such untrue statement shall avoid the policy; and then the company says that it will not contract with him till he shall answer certain questions which are made the basis of the contract. Among those questions are these two: "Have any of your relations died of pulmonary complaints? Has an insurance on your life been accepted or refused at any other office?" The stipulation is, that if he shall not answer these questions accurately, the policy shall be void. That is the interpretation of the contract, which, taking together the policy and the particulars required to be subscribed, appears to me irresistible. The requirement is extremely reasonable. That we need not speculate on; but the reason for making such a stipulation is obvious, and is explained by this very case. Whether certain statements are or are not material, where parties are entering into a contract of life assurance, is a matter upon which there must be a divided opinion. Nothing, therefore, can be more reasonable than that the parties entering into that contract should determine for themselves what they think to be material, and if they choose to do so, and to stipulate that unless the assured shall answer a certain question accurately, the policy or contract which they are entering into shall be void, it is perfectly open to them to do so, and his false answer will then avoid the policy.

Now it appears to me, my Lords, that that is precisely what has been

done here. The parties entering into the insurance have so stipulated. "The basis of our contract shall be your answering truly these two questions." There were a great many others; but, putting those aside, they say the basis of the contract between us shall be that you shall answer truly those two questions, and if you do not answer them truly, the policy shall be void. But then, when the trial comes as to whether the plaintiff has made out his right under that policy, the question is, whether the direction to the jury ought not to have been, "You are to ascertain whether what was then stated was untrue, was false; whatever interpretation may be given to the word 'false,' if it was false, there is no question as to whether it was material or not, the parties having stipulated that if it was false the policy shall be void." The question for the jury to decide was simply whether it was false or not. In that narrow compass the whole case lies.

The learned judges who decided that the direction actually given was good, proceeded upon the well-known rule of law, that there is a great distinction between that which amounts to what is called a warranty and that which is merely a representation inducing a party to enter into a contract. Thus, if a person effecting a policy of insurance says, "I warrant such and such things which are here stated," and that is part of the contract, then, whether they are material or not is quite unimportant, — the party must adhere to his warranty, whether material or immaterial. But if the party makes no warranty at all, but simply makes a certain statement, if that statement has been made *bonâ fide*, unless it is material, it does not signify whether it is false or not false. Indeed, whether made *bonâ fide* or not, if it is not material, the untruth is quite unimportant. If the man on entering into the policy had said that he arrived at Dublin three days previously, whereas he had only arrived that morning, and such statement did not form part of the contract, then, though false, it would be quite immaterial. If there is no fraud in a representation of that sort, it is perfectly clear that it cannot affect the contract; and even if material, but there is no fraud in it, and it forms no part of the contract, it cannot vitiate the right of the party to recover.

There are several cases, which are collected together in the 1st Vol. of Douglas,¹ in which this principle is well illustrated. But, my Lords, it appears to me that that principle has no application to a case where it is part of the contract, as it is here, that if a particular statement is untrue, then the contract shall be at an end. That distinction appears to me to have been overlooked by the learned judges, and that oversight has been the ground of that which I must consider to be the erroneous conclusion at which they arrived.

My Lords, it is within this narrow compass that the case lies. We had the advantage of the assistance of eleven of the learned judges of this country. They all took the same view of the case, and they were

¹ *Bean v. Stupart*, Dougl. 11, and the cases there collected in the notes; see also Dougl. 284. — *REP.*

all of opinion that the learned judges in Ireland committed an error in supposing that the doctrine of representation, as distinguished from warranty, was applicable to the present case where the representation is itself included in the contract. They thought that the conclusion at which the learned judges in Ireland arrived was erroneous. My Lords, in that view of the case I entirely concur. I shall therefore think it my duty to move your Lordships that judgment be given for the plaintiff in error.

LORD BROUGHAM. My Lords, I entirely agree with my noble and learned friend, that this case really lies in a very narrow compass. It depends entirely upon the construction which we are to put upon these words in the policy, "or any false statement made to them," the insurers, "in or about the obtaining or effecting of this insurance." . . .

The truth of the statement, it being part of the contract, not its materiality, was in issue. I am therefore of opinion, with my noble and learned friend, that in this case we ought to give judgment for the plaintiff in error.

LORD ST. LEONARDS. . . . In some cases, and it is so in the present, the companies take care to go beyond the law, and to protect themselves by a stipulation that a statement, which is not a warranty but a representation, if made contrary to the fact, shall avoid the policy. . . .

I think that . . . the learned judge ought not to have told the jurors that their verdict ought to be for the plaintiff . . . unless they were of opinion that the statements were both false and material. . . .

I entirely agree with the motion of my noble and learned friend as to what should be done in this case.

*Ordered and adjudged that the judgment given in the Court of Exchequer Chamber in Ireland . . . be . . . reversed; and that the judgment given in the . . . Court of Exchequer in Ireland be . . . reversed; and that the verdict . . . be . . . vacated; . . . and . . . that the said Court of Exchequer in Ireland do award a venire facias de novo. . . .*¹

WILKINSON v. CONNECTICUT MUTUAL LIFE INS. CO.

SUPREME COURT OF IOWA, 1870. 30 Iowa, 119.²

APPEAL from Lee District Court. The action was upon a policy insuring the life of Malinda Jane Wilkinson, the wife of the plaintiff.

¹ Acc.: *Miles v. Connecticut Mutual L. Ins. Co.*, 3 Gray, 580 (1854); *Campbell v. New England Mutual L. Ins. Co.*, 98 Mass. 381, 401-406 (1869); *Day v. Mutual Benefit L. Ins. Co.*, 1 McArthur, 41 (1873); *Foot v. Aetna L. Ins. Co.*, 61 N. Y. 571 (1875). See *Conover v. Massachusetts Mutual L. Ins. Co.*, 3 Dillon, 217 (1874). — Ed.

² The statement has been rewritten on the basis of facts contained in the opinion. In reprinting the opinion, the facts have been omitted, and so have passages bearing on some points as to evidence. — Ed.

The defendants pleaded the falsity of certain answers in the application, and fraud in obtaining the policy. The policy stated that it was issued "upon the faith of the statements in the application," with a stipulation that if they "shall be found in any respect untrue" the policy shall be void. The main contest was upon the answer to the following question in the application signed by the plaintiff and his wife on Sept. 14, 1866. "14. Has the party ever met with any accidental or serious personal injury; if so, what was it? — No." The defendant asked an instruction that this answer was a warranty, and that if it was untrue, whether intentionally so or not, the jury must find for the defendant. The court refused, and gave instructions substantially that "it was the duty of plaintiff and wife to answer each and every question truthfully, and if they did not do so *on every material matter or question*, then plaintiff cannot recover;" and again, "the answers to each and every question in the application *must be substantially true, and any misstatement of facts in the application upon any material matter inquired of*, whether intentional or not, would avoid the policy." The jury were not required by the court or parties to return a general verdict. They were required to find specifically as to eight questions, the first five being asked at the request of the defendant, and the last three being asked on the court's own motion. Among the questions and findings were these: —

"3. Did Malinda Jane Wilkinson, prior to September 14, 1866, meet with *any* accidental personal injury? *Ans.* Yes.

"4. Did Malinda Jane Wilkinson, prior to September 14, 1866, meet with *any serious* personal injury? *Ans.* No.

"5. Did Malinda Jane Wilkinson, on or about the year 1862, fall at a considerable height from a tree, and was she sick for a time in consequence? *Ans.* Yes.

"6. If the jury find that Malinda Jane Wilkinson did at any time meet with an accidental personal injury by falling from a tree or otherwise, as inquired of in questions Nos. 3, 4, and 5, they will answer further the following questions: —

"Was that injury only temporary, and did it pass off soon? *Ans.* Yes.

"7. Was said injury (if any) to such an extent as to exert or cause any permanent disease or influence upon the subsequent health of the said Malinda Jane Wilkinson? *Ans.* No.

"8. Was the injury the said Malinda Jane Wilkinson received from the fall from the tree (if she did so fall) simply temporary, and did it pass off entirely in a few days, without in any manner injuring her subsequent health or longevity? *Ans.* Yes."

The defendant moved for judgment in its favor on the answers returned by the jury, claiming it on the answers 3 and 5, and insisting that the answers 6, 7, and 8 were immaterial. This motion was overruled, and judgment was rendered for the plaintiff. The defendant appealed.

COLE, C. J. . . . If the cause had been submitted to the jury for a general verdict upon these instructions, without more, and they had found for plaintiff, it would be our clear duty to reverse. Under the terms of the policy in this case, the answers to the questions contained in the application became warranties, not that they were *substantially true* as to the *material matters*, but that they were true in every particular, although, in the opinion of the jury, such particular, wherein they were untrue, may not have been material to the risk. See Angell on Fire and Life Insurance, § 140, *et seq.*, and § 307 *et seq.*; Everett v. Desborough, 5 Bing. 503; 3 Kent's Com. 288; Miles *et al.* v. Conn. Mut. Life Ins. Co., 3 Gray, 580; Stout v. The Fire Ins. Co. of New Haven, 12 Iowa, 383; and cases cited by appellant's counsel. . . .

It will be observed that the jury found specific and independent facts, having no connection or relation whatever to any proposition of law, and hence no prejudice could have resulted to defendant by reason of the refusal to give proper, or the giving of improper, general instructions to the jury, as before referred to. The single question presented is, whether the answers to the last three questions so neutralize and override the answers 3 and 5 as to entitle the plaintiff to a judgment? Without such last three answers, it is reasonably clear that the defendant would be entitled to judgment upon answers 3 and 5. In other words, the real question is upon the construction of question 14 in the application, to wit: Has the party ever met with any accidental or serious personal injury, and if so, what was it?

The defendant claims that if the insured "ever met with *any accidental . . . injury*," that will bar a recovery, because the application is a warranty that she never did. In this construction we do not concur. The language of the question is to have a reasonable construction, in view of the purposes for which the question was asked. It must have reference to such an accidental injury as probably would or might possibly have influenced the subsequent health or longevity of the insured. It could not refer, and could not be understood, by any person reading the question for a personal answer to refer, to a simple burn upon the hand or arm, in infancy; to a cut upon the thumb or finger, in youth; to a stumble and falling, or the sprain of a joint, in a more advanced age. The idea is, that such a construction is to be put by the courts upon the language as an ordinary person of common understanding would put upon it when addressed to him for answer. The strict construction of hypercriticism of the language, which would make the word "any" an indefinite term, so as to include all injuries, even the most trifling, would bring a just reproach upon the courts, the law, the defendant itself and its business. The language of the question must have a fair construction, and in the words of our statute (Rev. § 3994) "that sense is to prevail against either party in which he had reason to suppose the other understood it."

This construction is not only in accord with reason and justice, but it has the support of the authorities in like cases. Thus, in Chattuck

v. Shaw, 1 Moody & Rob. 498, where the insured declared that "he had not been afflicted with nor subject to fits," Lord Abinger, C. B., held this to mean, not that he never accidentally had had a fit, but that he was not a person habitually or constitutionally afflicted with fits; a person liable to fits from some peculiarity of temperament, either natural or contracted from some cause during life. And the policy was held not to be vitiated by the circumstance that, in consequence of a fall, the person whose life was insured had, several years before the date of the policy, two epileptic fits within a short interval, which the jury were satisfied had never recurred.¹ . . . See also *Watson v. Mainwaring*, 4 Taunt. 763; *Angell on Fire and Life Ins.*, § 310, *et seq.* In this case the defendant having admitted the policy, death, and proof of loss, it was not error to render judgment for plaintiff on the special verdict. . . .

*Affirmed.*²

JEFFRIES v. LIFE INSURANCE CO.

SUPREME COURT OF THE UNITED STATES, 1874. 22 Wall. 47.³

ERROR to the Circuit Court for the Eastern District of Missouri.

The action was brought by Jeffries, as administrator of Kennedy, upon a policy of insurance issued in pursuance of an application signed by Kennedy.

The policy said:—

"This policy is issued by the company, and accepted by the insured and the holder thereof, on the following *express conditions and agreements, which are part of this contract of insurance*: 1st, That the statements and declarations made in the application for this policy, and on the faith of which it is issued, are in all respects true, and without the suppression of any fact relating to the health or circumstances of the assured, *affecting the interests of said company*. . . . 6th, That in case of the violation of the foregoing conditions, or any of them, . . . this policy shall become null and void."

The declaration contained the policy at large, and the plea recited the foregoing conditions and set forth the breaches of the first condition which are summarized in the opinion. A demurrer to the plea was overruled, and judgment was entered for the company. Thereupon this writ of error was taken.

Messrs. *T. W. Crews* and *J. S. Laurie*, for the administrator, plaintiff in error.

Messrs. *A. M. Thayer* and *J. La Due*, *contra*.

¹ Here was stated *Ross v. Bradshaw*, *ante*, p. 231 (1761). — ED.

² See *Insurance Co. v. Wilkinson*, 13 Wall. 222 (1871); *Home Mutual L. Assn. v. Gillespie*, 110 Pa. 84 (1885); *Bancroft v. Home Benefit Assn.*, 120 N. Y. 14 (1890); *Standard L. & A. Ins. Co. v. Martin*, 133 Ind. 376, 384-386 (1892). — ED.

³ The statement has been rewritten. — ED.

Mr. Justice HUNT delivered the opinion of the court.

The contention in opposition to the judgment is this: that the plea does not aver that the false statements made by the assured were material to the risk assumed. Is that averment necessary to make the plea a good one?

It is contended, also, that the false answers in the present case were not to the injury of the company, that they presented the applicant's case in a less favorable light to himself than if he had answered truly. Thus, to the inquiry are you married or single, when he falsely answered that he was single, he made himself a less eligible candidate for insurances than if he had truly stated that he was a married man: that although he deceived the company, and caused it to enter into a contract that it did not intend to make, it was deceived to its advantage, and made a more favorable bargain than was supposed.

This is bad morality and bad law. No one may do evil that good may come. No man is justified in the utterance of a falsehood. It is an equal offence in morals, whether committed for his own benefit or that of another. The fallacy of this position as a legal proposition will appear in what we shall presently say of the contract made between the parties.

We are to observe, first, the averment of the plea: That Kennedy, in and by his application for the policy of insurance, in answer to a question asked of him by the company, whether he was "*married or single*"? made the false statement that he was "*single*," knowing it to be untrue; that in reply to a further question therein asked of him by the company, whether "*any application had been made to any other company? If so, when?*" answered, "*No;*" whereas, in fact, *at the time of making such false statement, he well knew that he had previously made application for such insurance, and been insured in the sum of \$10,000 by another company.*

We are to observe, secondly, the averment that the statements and declarations made in the application for said policy, and on the faith of which it is issued, *are in all respects true*, and without the suppression of any fact relating to the health or circumstances of the insured affecting the interests of the company.

We are to observe, also, that other clause of the policy, in which it is declared that this policy is made by the company and accepted by the insured, upon the express condition and agreement that such statements and declarations are in all respects true. This applies to all and to each one of such statements. In other words, if the statements are not true, it is agreed that no policy is made by the company, and no policy is accepted by the insured.

The proposition at the foundation of this point is this, that the statements and declarations made in the policy shall be true.

This stipulation is not expressed to be made as to important or material statements only, or to those supposed to be material, but as to all statements. The statements need not come up to the degree of

warranties. They need not be representations even, if this term conveys an idea of an affirmation having any technical character. Statements and declarations is the expression; what the applicant states and what the applicant declares. Nothing can be more simple. If he makes any statement in the application, it must be true. If he makes any declaration in the application, it must be true. A faithful performance of this agreement is made an express condition to the existence of a liability on the part of the company.

There is no place for the argument either that the false statement was not material to the risk, or that it was a positive advantage to the company to be deceived by it.

It is the distinct agreement of the parties, that the company shall not be deceived to its injury or to its benefit. The right of an individual or a corporation to make an unwise bargain is as complete as that to make a wise bargain. The right to make contracts carries with it the right to determine what is prudent and wise, what is unwise and imprudent, and upon that point the judgment of the individual is subject to that of no other tribunal.

The case in hand affords a good illustration of this principle. The company deems it wise and prudent that the applicant should inform them truly whether he has made any other application to have his life insured. So material does it deem this information, that it stipulates that its liability shall depend upon the truth of the answer. The same is true of its inquiry whether the party is married or single. The company fixes this estimate of its importance. The applicant agrees that it is thus important by accepting this test. It would be a violation of the legal rights of the company to take from it its acknowledged power, thus to make its opinion the standard of what is material, and to leave that point to the determination of a jury. The jury may say, as the counsel here argues, that it is immaterial whether the applicant answers truly, if he answers one way, viz., that he is single, or that he has not made an application for insurance. Whether a question is material depends upon the question itself. The information received may be immaterial. But if under any circumstances it can produce a reply which will influence the action of the company, the question cannot be deemed immaterial. Insurance companies sometimes insist that individuals largely insured upon their lives, who are embarrassed in their affairs, resort to self-destruction, being willing to end a wretched existence if they can thereby bestow comfort upon their families. The juror would be likely to repudiate such a theory, on the ground that nothing can compensate a man for the loss of his life. The juror may be right and the company may be wrong. But the company has expressly provided that their judgment, and not the judgment of the juror, shall govern. Their right thus to contract, and the duty of the court to give effect to such contracts, cannot be denied.¹ . . .

¹ Here the opinion stated *Anderson v. Fitzgerald*, ante, p. 391 (1853), and cited *Cazenove v. British Equitable Ass. Co.*, 6 C. B. N. s. 437 (1859), s. c. affirmed in the Exchequer Chamber, 6 Jur. N. s. 826 (1860). — Ed.

Many cases may be found which hold, that where false answers are made to inquiries which do not relate to the risk, the policy is not necessarily avoided unless they influenced the mind of the company, and that whether they are material is for the determination of the jury. But we know of no respectable authority which so holds, where it is expressly covenanted as a condition of liability that the statements and declarations made in the application are true, and when the truth of such statements forms the basis of the contract.

The counsel for the insured insists that policies of insurance are hedged about with so many qualifications and conditions, that questions are propounded with so much ingenuity and in such detail, that they operate as a snare, and that justice is sacrificed to forms. We are not called upon to deny this statement. The present, however, is not such a case. The want of honesty was on the part of the applicant. The attempt was to deceive the company. It is a case, so far as we can discover, in which law and justice point to the same result, to wit, the exemption of the company.

Judgment affirmed.

Justices CLIFFORD and MILLER dissenting.

BUELL v. CONNECTICUT MUTUAL L. INS. CO.

CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT
OF OHIO, 1876. 2 Flippin, 9.¹

HEARD on demurrer to second defence.

The facts appear fully in the opinion.

R. P. & H. C. Ranney, for demurrer.

Bishop & Adams, *contra*.

WALKER, J. This suit is founded upon a policy of insurance upon the life of Jephtha C. Buell, for the benefit of his wife, the plaintiff.

The defendant, as a second defence to the action, sets up in its answer that in the declaration made at the time of the application for insurance, among other things, the plaintiff says: "And I do hereby agree that the answers given to the following questions and the accompanying statements, and this declaration shall be the basis and form part of the contract or policy between me and said company; and if the same be not in all respects true and correctly stated, the said policy shall be void."

That among the questions in said declaration above referred to, was the following question: "Has father, mother, brother, or sister of the party died, or been afflicted with consumption, or any disease of the lungs, or insanity? If so, state full particulars of each case." That

¹ S. C. 5 Ins. L. J. 274, and 5 Bigelow's L. & A. Ins. Rep. 473. — ED.

the answer to the above question given by the plaintiff was as follows: "No. Father died from exposure in water; age 58. Mother living; age about 50." That the policy issued upon said declaration and questions and answers, and sued upon, contains the following conditions, to wit: "And it is also understood and agreed to be the true intent and meaning hereof, that if the proposals, answers, and declaration made by the said Anna M. Buell, and bearing date the 19th day of March, 1866, and which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect untrue, then, in such case, this policy shall be null and void." The defendant avers that the said answer above stated was not in all respects true and correctly stated, but was incorrect and untrue in this, the father of said Jephtha C. did not die at the age of 58, but he died before he was of the age of 30 years. Wherefore the defendant says said policy was and is void and of no effect, and said plaintiff is not entitled to recover any amount against the defendant.

To this answer the plaintiff files her demurrer, alleging as reason therefor that all of said statements and allegations are redundant and irrelevant, and constitute no defence to the plaintiff's action. The demurrer admits that the answer to the question as stated in respect to the age of the father at the time of his death was untrue and incorrect. That being the fact, does it constitute a defence to this action?

Statements in the application for insurance in the declaration, or answers to the questions are either *warranties* or *representations*. If warranties, then materiality, or want of materiality, as to the risk has nothing to do with the contract. The only question is, were they untrue, and if so the policy is void. But if representations, then to avoid the policy they must be *substantially* and *materially* untrue, or made for the purpose of fraud.¹ . . .

But I am referred to the case *Jeffries, Administrator of Kennedy, deceased, v. Economical Life Ins. Co.*, 22 Wall. 47, recently decided by the Supreme Court of the United States as decisive of the question made upon this demurrer. In that case there were two questions asked the insured: 1. Whether he was married or single? The answer to which was that he was single. 2. Had any application been made to any other company, and if so, when? The answer to which was "No." The answers to both questions were alleged to be untrue. The court held that the answers to these questions constituted a part of the contract, and if untrue, whether they were material to the risk or not, would avoid the policy. The court did not seem to put this upon the ground alone that the answers constituted warranties, but that they formed a part of the contract and were expressly made so by the parties, and the court would not inquire as to the materiality, because the parties had themselves deemed them material. How did they become

¹ Here were quoted *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 464 (1853); and *Campbell v. New England Mutual L. Ins. Co.*, 98 Mass. 381 (1867). — ED.

material? It will be observed that both of these answers were direct responses to the questions, and that by the direct form of the questions the answers necessarily became a part of the contract. How is it in that respect in the case before us?

The falsity complained of in the answer consists only in reference to the age at which the father died. This certainly was not inquired of in the question, unless we are to find it in that part of it which reads: "If so, state full particulars of each case." This part of the question was evidently intended to reach simply the particulars of the death, or affliction of the near relatives, to ascertain the character and nature of the disease — its extent, whether produced from recent causes or hereditary in the family, in order to determine whether Buell was a proper subject to insure. It is exceedingly doubtful whether the question is really definite enough to require the answer to state whether the father was dead at all, if he did not die of consumption, or disease of the lungs, or insanity. I think the question fairly means, not whether the father, etc., had died of *any disease*, or *from any cause*, but whether he had died of, or been afflicted with consumption, or any disease of the lungs, or insanity. This being the fair import of the question, "No" was a complete answer to it, and the remainder of the answer was uncalled for and not responsive to the question. But suppose that be so, defendant claims that it is nevertheless an answer of some sort and therefore an important part of the contract. The reply to that is, that the declaration which relates to the answers to questions to be made by plaintiff, and which it was agreed should be made part of the contract, must be construed to, and does mean, such answers as are responsive to the questions and such as may be called for by the defendant; and that it does not cover such answers as may be volunteered and irrelevant, and that amount to mere representations.

In the light of the cases in 98 Mass., and 2 O. S. R., I may be allowed to say that not all the statements in the application or writing are to be regarded as warranties, but some may be regarded as mere representations. I do not think the case of *Jeffries v. Economical Insurance Company* is at all at variance with this construction. In that case the questions directly called for the answers, and the asking and the answers constituted the mutual agreement of the parties. In this case the age of the father was not called for, and is only voluntarily given by the plaintiff, and the mutual agreement cannot arise as it did in that case, so as to say the parties themselves settled the question of materiality.

I believe the true rule in relation to the question of what amounts to a *warranty*, or what amounts only to *representation*, in the answers to questions in this class of applications, is: Where the answers are responsive to direct questions asked by the insurance company, they are to be regarded as warranties, and where they are not so responsive, but volunteered without being called for, they should be construed to be mere representations. The part of the answer in question in this

case in reference to the age of the father at death, being a mere representation, does not constitute a defence unless it appears to have been material as well as false.

The demurrer is therefore sustained.¹

AMERICAN POPULAR LIFE INSURANCE COMPANY, PLAINTIFFS IN ERROR, v. DAY, EXECUTOR, DEFENDANT IN ERROR.

COURT OF ERRORS AND APPEALS OF NEW JERSEY, 1876.

39 N. J. L. 89.

IN error to the Supreme Court.²

For the plaintiffs in error, *George E. Sibley*, of New York, and *T. N. McCarter*.

For the defendant in error, *W. J. Magie* and *Cortlandt Parker*.

The opinion of the court was delivered by

THE CHANCELLOR.³ The defendant in error brought an action of *assumpsit* in the Supreme Court, on a policy of insurance issued by the plaintiffs in error to the testator, Frederick Day, upon his own life. The company pleaded the general issue and five special pleas, which latter were, on motion, stricken out. The trial of the issue resulted in a verdict against the company and judgment thereon. The company insist that the form of the action was erroneous; that the order striking out the pleas was illegal, and that there was error in the exclusion, on the trial, of evidence offered in their behalf, and in the admission of evidence on behalf of the executor, and in the refusal of the judge to charge as requested by their counsel.⁴ . . .

The errors assigned upon the striking out of the special pleas, and that assigned upon the refusal of the judge at the circuit to charge as requested by the company's counsel, may be considered together. The pleas were stricken out on the ground that the alleged misrepresentations therein set up in avoidance of the liability of the company under the policy were not therein stated to have been material and intentionally or fraudulently made, and the refusal to charge, just referred to, was on a request to charge that, under the terms of the policy and the application for insurance, the statements and representations made by the insured became part of the contract, and that their falsity was a defence to the action, whether the untruth was intentional or not. When application was first made by the testator for the insurance, the

¹ *Acc. v. Commercial Mutual Accident Co. v. Bates*, 176 Ill. 194 (1898). — ED.

² The reporter's statement has been omitted. — ED.

³ HON. THEODORE RUNYON. — ED.

⁴ The omitted passage dealt with the form of action. — ED.

agent of the company through whom it was made wrote down in pencil, on a paper intended as a proposal for insurance, the testator's answers to certain printed questions thereon, relative to subjects on which the company deemed it proper, according to their regulations, to have answers in that connection. This paper was not signed by the testator. Afterwards, another like paper, containing like questions, with answers by the testator, and signed by him, was delivered to the company as an application for the insurance. Both these papers contained these words: "And I hereby further agree that the preceding answers given to the annexed questions, and the accompanying statements, together with the statements made to the examining physician, shall be the basis and form part of the contract or policy between me and the said company, and if the same be not in all respects true and correctly stated, the said policy shall be void, according to the terms thereof."

The policy declared that the insurance was "in consideration of the representations made" to the company, and of the premiums paid and to be paid. It further stated that it was issued and accepted by the insured upon certain express conditions therein stated, among which was the following: "Fraud or intentional misrepresentation vitiates the policy." No reference, except as above stated, was made to the proposal or application, or either of them, or the matters therein contained, or to any statements or representations by the insured. The counsel of the company insist that the statements contained in the proposal and application were, by virtue of the agreement above quoted, therein contained made part of the policy, and that they were therefore in fact warranties or conditions, on the truth of which the liability of the company was based, and that therefore the question of their materiality, or of the knowledge of the testator that they were untrue, or of his intention in making them, was not involved.

Whether the statements in question are warranties, or conditions, or representations merely, will depend on whether they in fact are incorporated into the policy. "It is," said Lord Ellenborough, in *Robertson v. French*, 4 East, 130, 135, "a question of construction in every case, whether a policy is so worded as to make the accuracy of a *bona fide* statement a condition precedent, and the rules of construction are the same in policies as in other written contracts." "In order to make any statements binding as warranties," says Bunyon, "they must appear upon the face of the instrument itself by which the contract of insurance is effected; they must either be expressly set out or by inference incorporated in the policy. If they are not so, they are not warranties, but representations." Bunyon on Life Assur., 34. See also May on Ins., § 159.¹ . . .

When, in *Pawson v. Watson*, Cowp. 785, Lord Mansfield was asked, in behalf of the underwriters, "whether it was the opinion of the court that, to make written instructions valid and binding as a warranty,

¹ Here were stated *Wheelton v. Hardisty*, 8 E. & B. 232 (Ex. Ch. 1858), and *Anderson v. Fitzgerald*, ante, p. 391 (1853). — Ed.

they must be inserted in the policy," he answered that that was "most undoubtedly" the opinion of the court.

To hold that the statements of the proposal and the application, notwithstanding the agreement therein above quoted, are not incorporated into the policy, and therefore are not warranties or conditions of insurance, is but to apply the rule that where the parties to an agreement have reduced their contract to writing, that writing, at law, determines what the contract is, and evidence cannot be received to contradict, add to, subtract from, or vary the terms of the writing. The policy in this case is the agreement for insurance, and it must be held to contain the agreement, and all the agreement, of the parties to it. Though the proposal and application contain an agreement on the part of the insured that the answers to the questions annexed to them and the accompanying statements, together with the statements made to the examining physician, shall be the basis and form part of the contract or policy between the insured and the company, yet the policy does not directly or indirectly so declare, and it will be assumed that all previous negotiations have been superseded, and that the policy alone expresses the contract of the parties.

But it is urged on the part of the company that, inasmuch as the policy declares that the insurance is in consideration of the representations made to the company in the application for the policy, this is sufficient to give the representations the character of conditions or warranties. It is to be observed that the policy refers to the representations as representations only, giving them no higher or more important character. Almost all contracts of insurance are based on confidence in representations, in respect to the subject of the insurance, and the consequences of falsehood in those representations are well understood. The expression under consideration, therefore, has no particular significance. It cannot have the effect of changing the character of the representations in the application and elevating them to the importance of warranties or conditions of insurance. *Campbell v. N. E. Mutual Ins. Co.*, 98 Mass. 381; *Price v. Phoenix Mutual Life Ins. Co.*, 17 Minn. 497. There was no error in striking out the special pleas. They were based on the erroneous assumption that the representations in the proposal and application were warranties or conditions of insurance. For the same reason, there was no error in the refusal to charge.¹ . . .

There is no error in the record. The judgment of the Supreme Court should be affirmed.²

¹ Here followed passages foreign to warranty. — Ed.

² In *Glutting v. Metropolitan L. Ins. Co.*, 50 N. J. L. 287 (1888), *Dixon, J.*, for the court, said: —

"The policy declared that the company became bound, in consideration of the representations and agreement in the application for the policy, that the application was a part of the contract, and that if the representations in the application were not true the policy should be void.

"In the application Jacob Glutting, the applicant, declared and warranted that the representations and answers made therein were strictly and wholly true, that

ÆTNA LIFE INS. CO., PLAINTIFF IN ERROR, v. FRANCE.

SUPREME COURT OF THE UNITED STATES, 1876. 94 U. S. 561.

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania.

The facts are stated in the opinion of the court.

Mr. *Samuel C. Perkins*, for the plaintiff in error.

Mr. *Nathan H. Sharpless*, *contra*.

they should form the basis and become part of the contract of insurance (if one were issued), and that any untrue answers should render the policy null and void. . . .

"The legal effect of the foregoing stipulations was to render the statements in the application, with regard to the subject of insurance, warranties, and to annul the contract of insurance if any of those statements was shown to be untrue."

In *Vivar v. Supreme Lodge of Knights of Pythias*, 52 N. J. L. 455, 465-466 (1890), s. c. *ante*, p. 300, *Dixon, J.*, for the court (at the point where, *ante*, p. 302, line 4, an omission is indicated), said:—

"The defendant, while admitting that the plaintiff is the person intended by the contract, yet insists that her being *Vivar's* lawful wife was made a condition of the obligation, that as a part of the contract *Vivar* warranted the existence of such relationship.

"By the terms of the certificates the application forms part of the contract; nevertheless, the statements contained in it are not necessarily, for that reason, warranties. In order to have the force of a warranty, the statement must indeed constitute part of the contract; but, whether even such a statement should be deemed a warranty, depends upon the just construction of the entire agreement. Courts do not favor warranties by construction, and hence parties will not be held to have entered into the contract of warranty, unless they clearly appear to have intended it. If the contract refers to statements contained in another paper for some other purpose than to give them the force and effect of warranties,—for instance, if it refers to them as 'representations,'—or if the purpose be doubtful, such reference will not convert the statements into warranties. Of themselves, statements in the application are mere representations, and they will not become conditions or warranties, unless the parties plainly evince an intention to make them such, either by so denominating them or by declaring the validity of the contract to depend upon their literal truth. *May, Ins.*, §§ 158-165; *American Pop. Life Ins. Co. v. Day*, 10 *Vroom*, 89. Even calling the statements warranties will not make them such, when other terms in the contract indicate a different understanding. *Fitch v. American Pop. Life Ins. Co.*, 59 N. Y. 557; *Anders v. Knights of Honor*, 22 *Vroom*, 175.

"Under these rules, the statements in the application now before us are not warranties. The certificates do not so designate them, but, on the contrary, style them 'representations,' and, in making them part of the contract, must be deemed to incorporate them as representations. Nor is there in the contract any provision to the effect that, if they be false or untrue or inaccurate, the insurance will be void. The clause at the end of the certificates, 'that any violation of the within mentioned conditions . . . shall render the certificate, and all claims, null and void,' must be understood as referring to matters which, by other parts of the contract, are made conditions, and cannot of itself create a condition out of what had been before mentioned as a representation only. The trial court, therefore, properly held that the statement concerning the relationship between *Vivar* and the plaintiff was not a warranty.

"It remains, however, to determine what effect it should have upon the contract if considered as a representation, untrue to the knowledge of the insured, for to that extent was the defendant's offer of proof."—*Ed.*

Mr. Justice BRADLEY delivered the opinion of the court.

This action was brought by David France and Lucetta P., his wife, to recover the amount of a policy of insurance for \$10,000, issued by the Ætna Life Insurance Company on the life of Andrew J. Chew, of Philadelphia, dated September 13, 1865, and payable to the said Lucetta, who was Chew's sister.¹ . . .

The policy, amongst other things, contained the following stipulation :

"And it is also understood and agreed to be the true intent and meaning hereof, that if the proposal, answers, and declaration made by the said Andrew J. Chew, and bearing date the thirteenth day of September, 1865, and which are hereby made part and parcel of this policy as fully as if herein recited, and upon the faith of which this agreement is made, shall be found in any respect false or fraudulent, then and in such case this policy shall be null and void."

The trial resulted in a verdict and judgment for the plaintiffs. The defendant sued out this writ of error.

Numerous exceptions were taken, on which errors are assigned here ; but they are all reducible to two heads, or grounds of defence, viz. : 1. Want of insurable interest in Lucetta P. France ; 2. Misrepresentation and breach of warranty as to the age and health of said Chew. It is insisted that the rulings and charge of the court below on these points were erroneous. . . .

The other exceptions relate to alleged misrepresentations by Chew in the proposal for insurance. The policy makes the proposal and the answers to the questions therein a part of the contract, and declares that if they shall be found in any respect false or fraudulent, the policy itself shall be void. Among the questions are the following, with the answers given to each respectively : —

"4. Place and date of birth of the party whose life is to be insured?"

Ans. 'Born in New Jersey, in 1835.'

"5. Age and next birthday?" *Ans.* 'Thirty years, October 28, as near as I can recollect.'

"11. Has the party ever had any of the following diseases ; if so, how long and to what extent : palsy, spitting of blood, consumption, asthma, bronchitis, diseases of the lungs, . . . rupture, convulsions, etc.?" *Ans.* 'None.'

"12. Is the party subject to habitual cough, dyspepsia, etc.?" *Ans.* 'No.'

"13. Has the party had, during the last seven years, any severe disease? If so, state the particulars and the name of the attending physician." *Ans.* 'No.'

The answers were followed by this qualification: "The above is as near correct as I remember."

The defendant offered evidence tending to show that Chew, at the time of the application, would have been thirty-five or thirty-seven years old at his next birthday, instead of thirty, and that he was born October

¹ In reprinting the opinion, passages foreign to warranty have been omitted. — Ed.

28, 1828; and that he had been ruptured from infancy, and so continued up to the date of the application, and wore a truss; and that he had had consumption or some disease of the lungs; and that he was subject to habitual cough and dyspepsia; and had been attended by physicians for severe disease within seven years; and that he knew all of these matters at the time of the application. Counter evidence was given on the part of the plaintiffs. Among the proofs of death was an affidavit of the widow of Chew, stating that he was born October 28, 1828, which defendant relied on as to the point of age. Mrs. France denied all knowledge of the papers received by defendant as proof of loss, except her own affidavit; and as to the alleged rupture, called, amongst others, Dr. Lewis, as an expert, and proposed to him the question, whether the existence of a reducible rupture in a subject of life assurance, in his opinion, appreciably increased the risk of the underwriters? The question was objected to, but allowed.

The defendant asked the court to charge, that if any of the answers were untrue, in whole or in part, the verdict must be for the defendant. The court charged that the truth or falsehood of the answers materially affected the risk, but added: —

“But the answers here are qualified by the words appended at the foot of the application, ‘The above is as near correct as I remember,’ which are applicable to all the statements made by the assured. He must be understood, therefore, as stipulating only for the integrity and approximate accuracy of his answers, and not for their absolute verity. Without this qualification, substantial error in any of his answers would avoid the policy, irrespective of his motive, because he warranted their truth; with it, the plaintiffs’ right to recover will not be defeated, unless it appears that some one of the answers was consciously incorrect.

“To avoid the policy, then, the jury must be satisfied that the answers, or some of them, were untrue in any respect materially affecting the risk, and that the assured knew of their incorrectness.”

And, in particular, as to Chew’s representation of his age, the court charged, “that if he knew, or had reason to believe, that the year of his birth, as stated in the answer, did not correctly indicate his age, the policy is void, and the plaintiffs are not entitled to recover.”

We think the qualification made by the court was entirely justified by the form in which the answers were given. If the company was not satisfied with the qualified answer of the applicant, they should have rejected his application. Having accepted it, they were bound by it.

As to the diseases inquired about, the court charged substantially to the same effect; namely, that the answers called for were material, and if untrue, and Chew knew or had reason to believe them so, the policy was void. As to the alleged rupture, in particular, the court said: —

“If, however, it appears that the rupture had been completely reduced, so that its effects had entirely passed away, and it had ceased to affect his health or impair his capacity to take fatiguing and prolonged exercise, the jury will determine whether the answer is untrue

as nearly as he could remember. On the other hand, if the rupture had not been cured, it is hardly presumable that he could have forgotten it at the time of the application; and if the jury so find, it was his duty to disclose the fact that he had been afflicted with this disease, and his negative answer will avoid the policy."

And so of the rest. We think the charge was a fair one, and gave the defendant the full benefit of any falsity contained in the answers given by the applicant. Under the charge as given, we do not see how the evidence of the physician, even if irrelevant, could injure the defendant.

Other points were raised, but it is unnecessary to discuss them. From a careful examination of the whole case, as presented, we are satisfied that there is no error in the record. *Judgment affirmed.*¹

KNECHT v. MUTUAL LIFE INSURANCE CO. OF NEW YORK.

SUPREME COURT OF PENNSYLVANIA, 1879. 90 Pa. 118.

ERROR to the Court of Common Pleas of Northampton County.²

An amicable action of assumpsit was brought by the administrator of A. S. Knecht, upon a policy of life insurance written by the Mutual Life Insurance Company, in 1868. A case was stated for the opinion of the court; and the court, MEYERS, P. J., having entered judgment for the defendant, the plaintiff took this writ.

Edward J. Foz, for plaintiff in error.

H. Green, for defendant in error.

PAXSON, J. It is not alleged that in his application for insurance the insured made any false representation of an existing fact. What he did declare was, "that he is not now afflicted with any disease or disorder, and that he does not now, *nor will he*, practise any pernicious habit that obviously tends to the shortening of life." The case stated sets forth, "That at the times of making the aforesaid application for insurance, the said Abram F. Fangboner was of correct and temperate habits; that some years after the issuing of said policy he became addicted to the use of intoxicating drinks, from the immoderate use of which he was attacked with delirium tremens, from which he died." The policy issued in pursuance of said application contained this provision: "If any of the statements or declarations made in the application for this policy, upon the faith of which this policy is issued,

¹ Compare *Ætna Life Ins. Co. v. France*, 91 U. S. 510 (1875).

See *Fowkes v. Manchester and London L. Assurance and Loan Assn.*, 3 B. & S. 917 (1863); *Washington L. Insurance Co. v. Haney*, 10 Kan. 525 (1873); *Fitch v. American Popular L. Ins. Co.*, 59 N. Y. 557 (1875). — ED.

² The reporter's statement has been omitted. — ED.

shall be found in any respect untrue, then and in every such case this policy shall be null and void." It is unnecessary to discuss the question as to whether the declarations of the insured as to existing facts in his application constitute a warranty. The authorities are by no means uniform upon this point. Our own recent case of the Washington Life Insurance Co. v. Schaible, 1 W. N. C. 369, holds that they do not constitute such warranty. Where, however, the policy has been issued upon the faith of such representations, and they are false in point of fact, the better opinion seems to be that the policy is avoided. And this is so even where the false statement is to a matter not material to the risk: *Jeffries v. The Life Insurance Co.*, 22 Wallace, 47. In such case the agreement is that if the statements are false, there is no insurance; no policy is made by the company, and no policy is accepted by the insured. In the case in hand the policy attached. There was nothing to avoid it *ab initio*. Were the mere declarations by the insured in his application, as to his future intentions, and his failure to carry out his declarations, or to comply with his intentions as to his future conduct, sufficient to work subsequent forfeiture of the policy? In no part of the application did the assured covenant that he would not practise any pernicious habit. Nor did he promise, agree, or warrant, not to do so. He *declared* that he would not. To declare is to state, to assert, to publish, to utter, to announce, to announce clearly some opinion or resolution; while to promise is to agree, "to pledge one's self, to engage, to assure or make sure, to pledge by contract." — Worcester. There is no clause in the policy which provides that if the assured shall practise any pernicious habit tending to shorten life, the policy shall *ipso facto* become void. There is only the stipulation that, "if any of the statements or declarations made in the application . . . shall be found in any respect untrue, this policy shall be null and void." This evidently referred to a state of things existing at the time the policy was issued. As to such matters, as I have already said, there was no untrue statement. But the assured declared, as a matter of intention, that he *would not* practise any pernicious habit. Was this declaration of future intention false? There is no allegation, much less proof, that it was so. The assured might well have intended to adhere to his declaration in the most perfect good faith, yet in a moment of temptation have been overcome by this insidious enemy. In the absence of any clause in the policy avoiding it in case the assured should practise any such habit, and of any covenant or warranty on his part that he would not do so, we do not think his mere declaration to that effect in the application sufficient to avoid the policy.

*The judgment is reversed, and judgment is now entered in favor of the plaintiff and against the defendant for the sum of \$1500, with interest from June 26th, 1876.*¹

TRUNKEY, J., dissented.

¹ *Contra*: *Holterhoff v. Mutual Benefit L. Ins. Co.*, 3 American Law Record, 272 (Cincinnati Superior Court, General Term, 1874), s. c. 3 Ins. L. J. 854, and 4 Bigelow's

KNIGHT v. MUTUAL LIFE INSURANCE COMPANY OF
NEW YORK.

SUPREME COURT OF PENNSYLVANIA, 1881. 9 Weekly Notes of Cases, 501.

ERROR to the Common Pleas No. 4, of Philadelphia County.

Assumpsit by W. A. Knight against the above-named company, upon a paid-up policy for \$3500 issued upon the life of W. P. Beatty.

The material facts of this case were as follows: In 1866 W. P. Beatty insured his life in the defendant company for \$10,000. Before the policy was issued, the applicant filed an application with the company, which contained, *inter alia*, the following questions: Are your habits of life correct and temperate? Have they always been so? Both these questions were answered in the affirmative. The following declaration, signed by the insured, was appended to the declaration as a part thereof:—

“And it is hereby expressly stipulated and agreed that the above application and this declaration shall form the basis of the contract between the above-named persons and the said The Mutual Life Insurance Company of New York, and that if any misrepresentations or fraudulent and untrue answers have been made, or if any facts which should have been stated to the company have been suppressed therein, or if any violation of the covenants, conditions, or restrictions of the policy (should one be issued), shall occur, or any omission or neglect to pay any of the premiums on or before the days on which they shall fall due shall take place, that then in either event the said policy shall become and be null and void, and all moneys which shall have been paid, and also all dividends which may have accrued thereon, shall be forfeited to the said company for its sole use and benefit. And the said William Penn Beatty further declares that he is not now afflicted with any disease or disorder, and that he does not now nor will he practise any pernicious habit that obviously tends to the shortening of life.”

In 1871 Beatty allowed his policy to lapse, and on May 19, 1871, took from the company a new paid-up policy (the one in suit) for \$3500. Before this policy issued, he signed a declaration, whereby he agreed that the said declaration and his application for the original policy should be part of his contract with the company. This declaration contained, *inter alia*, the following terms:—

“And I do hereby declare that the several answers given by me, or in my behalf, to the questions on pages 1, 2, and 3, of the original ap-

L. & A. Ins Reports, 395; Schultz v. Mutual L. Ins. Co., 6 Fed. R. 672 (U. S. C. C., S. D. N. Y. 1881).

See Supreme Council of Royal Templars v. Curd, 111 Ill. 284 (1884); and Commercial Mutual Accident Co. v. Bates, 176 Ill. 194 (1898).—ED.

plication for a policy of life insurance, which was dated Feb. 21, 1866, and signed by the above-named, and which this is intended to replace, were true and correct when made; and I guarantee that he does not and will not practise any bad or vicious habit that tends to the shortening of life.”¹ . . .

Beatty subsequently failed and made an assignment, owing the plaintiff Knight a large sum. The policy in suit was sold at public sale after due notice by the assignee, and bought by the plaintiff for \$1510. On Feb. 9, 1878, Beatty died; and, the company declining to pay the policy, this suit was brought.

The defendant pleaded specially (1) that the insured had given false answers to the questions in his original application, and (2 and 3) that he had violated his declaration and guaranty that he did not and would not practise any pernicious habit obviously tending to shorten life, wherefore, by the terms of the policy, it was null and void. The plaintiff filed two replications to each plea, one traversing the fact of intemperance. . . .

On the trial, before ELCOCK, J., . . . the court charged the jury, *inter alia*, as follows: The insured warranted that he would not contract any pernicious habit obviously tending to shorten life; the guaranty is the same as a warranty; and if the jury believe that afterwards the insured practised the pernicious habit of intemperance, the policy became null and void.

Verdict and judgment for defendant, whereupon the plaintiff took this writ, assigning for error, *inter alia*, . . . the charge of the court as above set forth.

E. D. McLoughlin (with him *W. K. Shryock*), for plaintiff in error.

W. W. Porter (with him *W. A. Porter*), for defendants in error.

THE COURT. . . . We agree in opinion with the learned judge below, that the word “guaranty” means “warrant,” and in this respect the case is distinguishable from *Knecht v. Ins. Co.*, 7 W. N. C. 297.

*Judgment affirmed.*²

¹ In reprinting the statement and the opinion, passages dealing with estoppel have been omitted. — ED.

² See *Ballantyne v. Mutual L. Ins. Co.*, 17 Victorian L. R. 520 (1891). — ED.

THOMSON, APPELLANT, v. WEEMS AND OTHERS,
RESPONDENTS.HOUSE OF LORDS, 1884. 9 App. Cas. 671.¹APPEAL from the Second Division of the Court of Session, Scotland.²

The question was whether the appellant, as manager of and as representing the Standard Life Assurance Company, was bound to pay to the respondents £1,500, the amount of a policy of insurance on the life of William Weems. The policy was executed on Nov. 25, 1881. After reciting that William Weems, "having subscribed or caused to be subscribed and deposited at the office of the said company in Edinburgh a declaration, bearing date the 9th of November, 1881, which is hereby declared to be the basis of this assurance," the policy proceeded to promise the amount in question, with this proviso, among others: "Provided also, that if anything averred in the declaration hereinbefore referred to shall be untrue, this policy shall be void, and all moneys received by the said company in respect thereof shall belong to the said company for their own benefit." The declaration referred to was on a printed form, beginning thus: "The person whose life is proposed for assurance will also answer the following questions," and containing numerous printed questions and manuscript answers, among others these: "7. (1) Are you temperate in your habits? (2) and have you always been strictly temperate? — (1) Temperate. (2) Yes."

The declaration closed thus: "I . . . do hereby declare that I am at present in good health, not being afflicted with any disease or disorder tending to shorten life; that the foregoing statements of my age, health, and other particulars are true; . . . and that I have not withheld any circumstance tending to render an assurance of my life more than usually hazardous. And I . . . do hereby agree that this declaration shall be the basis of the contract between me and the Standard Life Assurance Company; and that if any untrue averment has been made, or any information necessary to be made known to the company has been withheld, all sums which shall have been paid to the said company . . . shall be forfeited, and the assurance be absolutely null and void," signed, "William Weems."

Weems died on July 29, 1882. The company declined to pay. Thereupon the firm of J. & W. Weems, for whose behoof the policy had been entered into, and Alexander Wylie, the sole surviving partner,

¹ s. c., *sub nom.* Standard Life Assurance Co. v. Weems, 11 Court of Session Cases, Fourth Series, 48 (House of Lords). — ED.

² The statement has been rewritten, chiefly with the aid of Lord BLACKBURN'S opinion.

In the Second Division of the Court of Session, the case is reported, *sub nom.* Weems v. Standard Life Assurance Co., 11 Court of Session Cases, Fourth Series, 658 (1884). — ED.

and Robert Reid, to whom the policy had been assigned as security, brought an action.

The defender stated, among other defences: "3. The statements made, as above recited, by the said William Weems, were, at the time of their being made, and to his knowledge, false. In point of fact the said William Weems was at that time a person of intemperate habits, and he had been so for some time. His health was affected by said habits. His death, which occurred shortly after, was the result of them. . . . 4. The false answers above set forth were made knowingly and fraudulently by the said William Weems, in order to conceal the risks attaching to an insurance on his life from the company, and induce them to grant him a policy, which they would not have done had they been aware of the true state of the facts."

The pursuers made the following answer: "It is denied that the answers made by Mr. Weems . . . were false, or at least that they were made by him in the knowledge that they were false, and with a fraudulent intention."

The Lord Ordinary, Lord FRASER, pronounced an interlocutor, finding, *inter alia*, "that the said William Weems did not make any untrue statements in the said declaration, and that therefore the policy is not void. Therefore decerns against the defender."

The defender reclaimed, whereupon the Second Division of the Court of Session (Lord RUTHERFURD CLARK dissenting) pronounced an interlocutor adhering to the Lord Ordinary's decision.

Against these interlocutors, an appeal was taken to the House of Lords.

The Solicitor-General for Scotland (Asher, Q. C.), and *Webster*, Q. C., contended that the decision of the court below was erroneous.

The Lord Advocate (Balfour, Q. C.), and *James Reid*, for the respondents.

LORD BLACKBURN.¹ . . . I take it that what your Lordships have to do is to determine on the whole evidence whether the statement was or was not "untrue," within the meaning of that word, as used in the policy, and declaration incorporated in it. I think that to a great degree depends on the construction of the whole contract.

Those whose business it is to insure lives calculate on the average rate of mortality, and charge a premium which on that ordinary average will prevent their being losers. There are some expressions used by the judges in the Court of Session in the case of *Hutchison*, Feb. 21, 1845; 7 Court Sess. Cas. 2nd Series, at p. 473, which would seem to lay it down, at least when it is the party's own life that is assured, that it is illegal, or at least so absurd that no one would make such a contract, to engage that if the life is such that the risk is of the ordinary kind, the insurer shall be bound, but that if there is a disease tending to shorten life, such as to make it not the ordinary risk, the insurer shall not be bound, whether the assured knew it or not. I

¹ After stating the case. — ED.

cannot agree to this; it seems to me a very reasonable stipulation on the part of the insurer, and that it is not at all absurd or improper on the part of the assured to assent to such being a term of the contract. It is seldom that a derangement of one important function can have gone so far as to amount to disease without some symptoms having developed themselves, but the insurers have a right if they please to take a warranty against such disease, whether latent or not, and it has very long been the course of business to insert a warranty to that effect.

If there was no more than a warranty to that effect, if it was disproved, the risk would never have attached, the premiums therefore would never have become due, and might, if paid, be recovered back as money paid without consideration. But it became usual, I do not know when, but at least for the last fifty years, to insert a term in the contract, that if the statements were untrue the premiums should be forfeited.

That, no doubt, is a hard bargain for the assured if he has innocently warranted what was not accurate, but if he has warranted it, "untruth," without any moral guilt, avoids the insurance; and in *Duckett v. Williams*, 2 C. & M. 348, in 1834, it was held, on reasoning to my mind irresistible, that in a declaration substantially as far as regards this point the same as this, what was untrue so as to have the effect of avoiding the insurance was also untrue so as to cause the forfeiture of the premium.¹ . . .

It is competent to the contracting parties, if both agree to it and sufficiently express their intention so to agree, to make the actual existence of anything a condition precedent to the inception of any contract; and if they do so the non-existence of that thing is a good defence. And it is not of any importance whether the existence of that thing was or was not material; the parties would not have made it a part of the contract if they had not thought it material, and they have a right to determine for themselves what they shall deem material.

In policies of marine insurance I think it is settled by authority that any statement of a fact bearing upon the risk introduced into the written policy is, by whatever words and in whatever place, to be construed as a warranty, and, *prima facie*, at least that the compliance with that warranty is a condition precedent to the attaching of the risk. I think that on the balance of authority the general principles of insurance law apply to all insurances, whether marine, life, or fire; see *per* Lord Eldon, C., in a Scotch appeal on a fire insurance. *Newcastle Fire Insurance Co. v. Macmorran & Co.*, July 10, 1815, 3 Dow. at p. 262. No question arises on that in the present case, but I do not think that this rule as to the construction of marine policies is also

¹ Here followed comments on *Anderson v. FitzGerald*, *ante*, p. 391 (1853); *Life Association v. Foster*, 11 Court of Session Cases, Third Series, 351 (1873); and *Scottish Life Assurance Co. v. Buist*, 4 Court of Session Cases, Fourth Series, 1076 (1877).—ED.

applicable to the construction of life policies. But I think when we look at the terms of this contract, and see that it is expressly said in the policy, as well as in the declaration itself, that the declaration shall be the basis of the policy, that it is hardly possible to avoid the conclusion that the truth of the particulars (which, I think, include his statement that he was of temperate habits) is warranted.

The Lord Advocate argued very powerfully that the truth of that statement involved questions of degree and of opinion, and therefore could not, he argued, be warranted. But the most familiar instance of a warranty (implied in every voyage policy) is that of seaworthiness, involving in it questions of degree and opinion to quite as great an extent as a warranty of temperate habits. I think, therefore, whilst I agree that the burthen is on the insurers, and that they must prove drinking carried on before the date of the declaration, 9th of November, 1881, to such an extent as to amount to intemperance, and so often and continuously as to amount to habits of intemperance, they are not obliged to prove anything more.

The object of the insurance company was to know that the life to be insured was not merely not rendered already diseased by drinking, but that his habits were so temperate that there was no unusual risk that he should become a drunkard, and they took the warranty that they might safely dispense with any further inquiry on that point. I think, therefore, that, such being the object of warranty, we must take into account the normal habits of people in the class and in the locality where the person assured lives. I think gentlemen in the last century drank habitually a great deal more than they do now, and I do not think a gentleman then would properly have been held to be of intemperate habits (within the meaning of such a policy) though he drank so much habitually that, if a gentleman now did so, the insurers would reasonably dread that he would drink more; and then he would not be held of temperate habits within the meaning of such a policy. And I think it is fair, so far as the evidence enables us, to take into account the normal habits of the town councillors of Johnstone; the evidence does not satisfy me that they, as a general rule, drank as freely as the assured did. He, some months after the policy was made, was elected provost, and then he seems to have pulled up. That, as it was after the declaration, is only material as far as it throws light on what had been the case before. And, on the 29th of July, 1882, eight months after the policy was granted, he died. Now the cause of death was, in one sense, immaterial. If the policy was avoided, the insurance company would not have been liable though he had been killed in a railway accident, but that would have afforded no evidence as to the state of his habits. But the doctor who attended him in his last illness certified that the cause of his death was hepatitis, chronic, four months, congestion of the brain, four days. Dr. Colligan, who certified this, is himself dead; that, according to the Scotch law of evidence, takes his statements out of the rule as to hearsay evidence,

though, in weighing them, we must remember that he is not subject to cross-examination.

Now chronic hepatitis is a disease of the liver, which is generally, in this climate, produced by excessive drinking over a considerable period; and if it is established that the assured had, as early as March, 1882, really begun to suffer from such a disease, it adds greatly to the force of that evidence which tends to show he had been in the habit of drinking too much for some time before November, 1881. I do not know that either class of evidence by itself would have in my mind satisfied the burthen, which was on the appellant; taken together, they do. I must therefore advise your Lordships to reverse the interlocutors complained of, with costs.

LORD WATSON.¹ . . . I entertain no doubt that, according to the law of Scotland, the declaration of the assured taken in connection with the policy itself, in his proposal to the company, constitutes an express warranty that the answer made by him to the seventh question was true. In other words, it is an express and essential condition of the contract, that the policy shall be null and void in the event of the averment by the assured as to his habits, implied in his answer to that question, proving to be false. The doctrine of warranty, as applied to such stipulations in a contract of assurance, is the same in the law of Scotland as in that of England. I am aware that some Scotch judges have in times past objected to the use of the word "warranty" as having no definite significance in the law of Scotland; but in order to show that such a remark is no longer well founded, I need only refer to the observations made by the Lord President (Ingليس) and Lord Mure in *Scottish Life Assurance Society v. Buist*, 13 July, 1877; 4 Court Sess. Cas. 4th Series, at p. 1078, and to the opinion of the judges of the First Division in *Life Association v. Foster*, 31 Jan. 1873; 11 Court Sess. Cas. 3rd Series, p. 351.

Notwithstanding that the warranty is express, there still remains for consideration what must be held to be the subject-matter of the warranty. That is a point to be determined in each case, according to the just construction of the question and answer taken *per se* and without reference to the warranty given. In the present case, the seventh question proceeds from the company, being printed on a form of proposal issued by them for the use of persons who may be desirous of effecting an assurance. The question must, in my opinion, be interpreted according to the ordinary and natural meaning of the words used, if that meaning be plain and unequivocal, and there be nothing in the context to qualify it. On the other hand, if the words used are ambiguous, they must be construed *contra proferentes*, and in favor of the assured. For my own part, I can discern no ambiguity in the language of question seven. I agree with Lord Rutherford Clark, that the import of the answer is precisely the same as if the deceased had affirmed: "first, that he was temperate in his habits; and

¹ After stating the case. — ED.

secondly, that he had always been strictly so." In its plain and ordinary sense, that statement is an averment of fact and not a mere assertion of the opinion or belief entertained by the assured with regard to that fact. It then appears to me that whatever may be the import of the word "temperate" (which is a separate matter), the assured must be held to have warranted, not that the assertion was true according to his sincere conviction, but true in point of fact; and consequently, that in order to establish a breach of warranty it is not necessary for the appellant to prove that the assertion was morally false.¹ . . .

An ingenious argument was addressed to your Lordships by the respondents' counsel, for the purpose of showing that the seventh question, from its very nature, involved only matter of opinion and not of fact, and consequently that any reply to it must be treated as an expression of opinion, and not as an assertion of fact. It appeared to me that their argument, which turned upon a very fine-drawn distinction between what were termed matters of pure fact and matters of opinion, had really no practical bearing upon the case before us. There are facts innumerable which can only be ascertained by the test of opinion, but they are not the less facts in a legal, whatever they may be in a metaphysical, sense. It appears to me to be in vain to contend that the character of a man's habits, temperate or intemperate, is matter of opinion and not of fact. The second branch of the fourth question in the proposal submitted by the deceased, furnishes an apt illustration of that which in the ordinary sense is matter of mere opinion as distinguished from matter of fact. It runs thus: "Do you consider yourself of a sound constitution?" That is a query which obviously relates, not to the soundness of the assured's constitution, but to his own opinion on the subject; and in that respect it presents a marked contrast to the terms of the seventh question.² . . .

I believe it to be useless to attempt a precise definition of what constitutes "temperate habits," or "temperance," in the sense in which these expressions are ordinarily employed. Men differ so much in their capacity for imbibing strong drinks that quantity affords no test; what one man might take without exceeding the bounds of moderation, another could not take without committing excess. In judging of a man's sobriety, his position in life, and the habits of the class to which he belongs must, in my opinion, always be taken into account; because it is the custom of men, engaged in certain lines of business, to take what is called refreshment, without any imputation of excess, at times when a similar indulgence on the part of men not so engaged would

¹ Here were discussed *Scottish Life Assurance Co. v. Buist*, 4 Court of Session Cases, Fourth Series, 1076, 1078 (1877); and *Anderson v. FitzGerald*, *ante*, p. 391, (1853).—Ed.

² Here were discussed *Hutchison v. National Loan Fund*, 7 Court of Session Cases, Second Series, 467 (1845); *Life Association v. Foster*, 11 Court of Session Cases, Third Series, 351 (1873); and *Insurance Company v. Foley*, 105 U.S. 350 (1881).—Ed.

be, to say the least, suspicious. But I do not think that the habits of a particular locality ought to be taken into account, or that a man, who would be generally regarded as of intemperate habits, ought to escape from that imputation because he is no worse than his neighbours. In the present case the evidence clearly establishes that the assured was a most able and estimable man; but that circumstance is not of much weight, because able and estimable men are not necessarily exempt from social failings. I shall not dwell upon the details of the proof of the import of which I take very much the same view which is clearly and succinctly expressed in the opinion of Lord Rutherford Clark. It seems to me to be the fair result of the evidence, that the assured was in the habit of taking more drink than was good for him: that he was frequently affected with drink on occasions when all except himself were sober; that his indulgence to excess had become so apparent that several of his friends remonstrated with him on the subject, and that instead of repudiating the charge, he admitted it and promised amendment. These facts appear to me to be fully proved, and they are, in my opinion, altogether inconsistent with the truth of the assertion that he was, on the 9th of November, 1881, of temperate habits, and had always been so.¹ . . .

LORD FITZGERALD. I also am of opinion that the answers of the assured to the questions: “(1) Are you temperate in your habits, and (2) Have you always been strictly so? Answer—(1) Temperate; (2) Yes”—formed parts of the basis of the contract of assurance, and that the assured warranted those answers to be true. By “true” I mean true in fact without any qualification of judgment, opinion, or belief. I confine my observations to the very answers now before us. If untrue in fact, the policy is void, and the persons cannot recover. The law of Scotland is on this subject identical with that of England. The inquiry for your Lordships is whether the evidence is sufficient to satisfy you that the assured had been prior to the effecting this policy intemperate in his habits.

“Temperate in habits” is a sentence to be interpreted, and though not to be taken in the Pythagorean sense of “total abstinence,” yet seems to import abstemiousness, or at least moderation—

“The rule of ‘not too much,’
By temperance taught.”

I am, my Lords, inclined to adopt a fair and liberal interpretation, having regard to the position of the individual, the habits of the locality, and even the peculiarities of the local municipal authorities in adjourning to neighboring public-houses “to continue the debate,” but notwithstanding all these allowances I am coerced to come to the conclusion that the evidence is sufficient to establish that the assured was not a person of temperate habits; on the contrary, his habits of intemperance had been repeatedly observed at the town council and on

¹ Comments on the evidence have been omitted. —ED.

other public occasions. He has been shown at times to have been incapable of transacting business or taking care of himself. He was remonstrated with by friends, and does not seem to have denied the impeachment, and finally there is evidence that he was elected provost in the hope that the responsibilities of office might produce reformation of habit. The evidence for the defenders is not in my judgment displaced by the negative evidence led for the pursuers. The cause of death, too, is confirmation strongly of the assured having fallen into that fatal habit which produces

“ . . . all the kinds
Of maladies that lead to death’s grim cave
Wrought by intemperance.”

It was against this danger the insurers sought protection.

My Lords, I entirely concur with the noble Lord opposite (Lord Watson) in his reasons and in his criticisms on the Scotch decisions.

*Interlocutors appealed from reversed; cause remitted with instructions.*¹

MUTUAL LIFE INS. CO. v. SIMPSON.

SUPREME COURT OF TEXAS, 1895. 88 Tex. 333.

ERROR to Court of Civil Appeals for First District, in an appeal from Harris County. The opinion contains a sufficient statement.

Ewing & Ring, for plaintiff in error.

Baker, Botts, Baker & Lovett, for defendant in error.

ALEXANDER, Special Associate Justice. This was a suit by Elizabeth K. Simpson against the plaintiff in error to recover on a life insurance policy, insuring the life of her husband William Simpson, in the District Court of Harris County, in which she recovered judgment on a trial before a jury, which was, on appeal, affirmed by the Court of Civil Appeals; and on application of the insurance company a writ of error has been granted.

The insurance company defended on the ground, among others, that there was a breach of the warranties made by the assured, on the faith of which the policy was issued, and that it was thereby avoided. The record discloses, that preliminary to the insurance, and as a basis thereof, inquiry was made of the applicant for insurance, as follows: “Have you ever had any of the following diseases?” Then follow inquiries as to a variety of ailments, some of which are universally

¹ Other cases on temperate habits are: *Hartwell v. Alabama Gold L. Ins. Co.*, 33 La. Ann. 1353 (1881); *Northwestern L. Ins. Co. v. Muskegon Bank*, 122 U. S. 501 (1887); *Ætna L. Ins. Co. v. Davey*, 123 U. S. 739 (1887); *Chambers v. Northwestern Mutual L. Ins. Co.*, 64 Minn. 495 (1896). — Ed.

known to be fatal, or likely to affect the duration of life, such as "consumption," "spitting or coughing of blood," "paralysis," "apoplexy," and "disease of the heart." There are also inquiries made as to certain other physical disabilities, not necessarily or probably coming within the category above mentioned, such as "frequent or difficult urination," "dizziness," "palpitation of the heart," "shortness of breath," "headaches — severe, protracted, or frequent."

To the inquiry as to the last mentioned the assured answered, "No." It is conceded that the answers were warranties, and if untrue, that the policy was avoided, without reference to their materiality as to the risk.

The evidence shows, that for many months prior to the contract, at irregular intervals, but frequently, the assured had what is designated in the evidence as sick headache; that it was severe, accompanied by vomitings and a pain in the region of the chest, which disability continued from six to eighteen hours, but after sleep, which followed the vomitings, a normal condition existed. It also appears, that all of these spells were preceded by excessive work and fatigue and loss of sleep, which are assigned by the witness, plaintiff below, as the cause thereof. And it sufficiently appears that the assured was otherwise a man of robust health.

The District Court charged the jury to find for plaintiff, "unless . . . the assured in his application and examination, upon which the policy was issued, touching his drinking wine, spirituous and malt liquors, and to what extent, and his former habit of drinking wine, spirituous and malt liquors, answered falsely; or unless they believed that in such application, touching whether assured ever had diseases, such as headaches, severe, protracted, or frequent, and the particulars and duration of same; and as to his being in perfect health, the said assured answered falsely, in which case you will find for defendant. But you are charged, that temporary illness of assured in the course of every-day life, brought on by excessive exercise or overwork, is not embraced in said application, nor is an occasional drink of spirituous, vinous, or malt liquor embraced in the said application, but the answers in said application have reference to such diseases or ailments as indicate a vice in the constitution, or are so serious as to have some bearing on the general health, *and* such as, according to general understanding, would be called a disease.

"And you are charged, that the questions and answers respecting the drinking of spirituous, vinous, or malt liquors by assured, and former habits mentioned in said application, have no reference to an occasional drink taken, nor to occasional indulgences, unless such drinking was habitual."

This charge is approved by the Court of Civil Appeals as a correct exposition of the law of the case. There is no complaint in the application for writ of error, that this charge is on the weight of the evidence.

It is not deemed necessary to set out the charges requested and refused, or the assignments of error complaining of the charge and the refusal of charges. They are sufficient to require a determination as to whether there was material error in the instructions of the court. Justice Ramsey and the writer agree, that the part of the charge which instructs the jury that the answers of the assured have reference to such diseases or ailments as indicate a vice in the constitution, or are so serious as to have some bearing on the general health *and* in the continuance of life, was a material error, prejudicial to defendant, for which the judgment of the Court of Civil Appeals should be reversed.

We are not unmindful of the well-recognized rules as to the construction of contracts of insurance — that forfeitures are not favored, that generally in cases where there is doubt or ambiguity, that construction should be adopted most favorable to the assured, the reasons for which are obvious, and need not be recounted. On the other hand, when the language of contracting parties is plain and unambiguous, and there is no reason for misunderstanding the purport thereof, effect must be given to it, enlarged or limited only by the nature of the subject to which it is applied.

Said the United States Supreme Court, speaking by Justice Jackson, in the case of Insurance Company v. Coos, 151 United States (Co-operative Edition, book 38, page 235) : “ It is settled by this court, that when an insurance contract is so drawn as to be ambiguous, as to require interpretation, or to be fairly susceptible of two different constructions, that construction will be adopted which is most favorable to the assured. But the rule is equally well settled, that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used ; and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense.” As said by the Court of Appeals of New York (*Mack v. Insurance Company*, 106 New York), as quoted by Judge Jackson : “ It tends to bring the law itself into disrepute when, by astute and subtle distinctions, a plain case is attempted to be taken without the operation of a clear, reasonable, and material obligation of the contract.”

The charge of the court and the opinion of the Court of Civil Appeals virtually assume, that because the inquiry is about diseases, it is necessarily and always about diseases which either indicate a vice in the constitution or are so serious as to have some bearing on the general health *and* on the continuance of life ; and this, notwithstanding the specific inquiries may be as to physical disabilities or ailments which, according to common understanding, are diseases, but which nevertheless are not understood to indicate the conditions enumerated in the charge. This seems to reverse a common rule of the construction of language. If it be true, that when an inquiry about diseases is made, it means only such as are mentioned in the charge, notwithstanding the specific inquiries are about ailments not usually indicating such condi-

tions, the well-established distinction between warranties and representations would be useless, for then there would be a breach of warranty only when the matter warranted was both false and material to the risk.

The word "disease" may include, and is often used to designate, ailments more or less trivial. Medical science, as expounded by its experts, has not definitely determined all of the physical ailments which indicate a vice in the constitution, or have a direct tendency to shorten life. Through abundant caution the insurance company may, if it elects, inquire about any ailment, and take a warranty concerning it, lest it might affect the risk, although it cannot be known that it will.

The length of this opinion precludes more than a brief reference to some of the cases cited by defendant in error, and discussed by the court below.

In the Cushman case, 70 New York, 73, from the opinion in which the language of the charge under discussion seems to have been copied, it is noticeable that the court says, that "it must be *generally* true, that before an ailment can be called a disease it must be" such as is indicated in the language of the charge. The case was one upon conflicting evidence as to whether assured had ever had disease of the liver, or any serious disease, and it was decided that the defendant was not entitled to have a nonsuit entered, and that whether there were such diseases was properly submitted to the jury; and this is all that the case decides.

In the case of Trefz, 104 United States, 197, the assured, to questions about various diseases, answered, "Never sick;" and it distinctly appears that he was never sick of any of the diseases inquired about. And notwithstanding an apparent disclaimer by the court, the case obviously was in part determined upon the fact that the assured was a foreigner, unfamiliar with the English language.

In the case of Insurance Company v. Trust Company, 112 United States, 250, the inquiry was about an affection of the liver; and we think it is distinguishable from an inquiry about "headaches, severe, frequent, or protracted."

To avoid misconception, we state that we do not think, if the disability inquired about was not inherent, but was produced by extraordinary conditions, such as those described in the record, that the answer to the question should be held untrue.

For the purpose which will appear, we state that the following further inquiries were made of the assured, to which his answers follow: "Do you ever drink wines, spirits, or malt liquors?" "No." "To what extent?" "Not at all." "Former habit of drinking wines, spirits, or malt liquors?" "Not at all."

Justice Ramsey desires it stated, that in his opinion that part of the charge which instructs the jury that an occasional drink of liquor is not embraced in the application, and the questions and answers have no reference to an occasional indulgence, unless such drinking was

habitual, was material error, for which the judgment should be reversed. He holds, that the questions must be considered together, and that the obvious purpose of the questions was to ascertain whether the assured, at the time or in the past, had been addicted to the use of intoxicating liquors, and the extent thereof; and that the charge precluded the jury from giving proper consideration of the evidence about the drinking of the assured; and that the meaning of these questions and answers should have been submitted to the jury, unrestrained by these limitations in the charge.

The writer is of the opinion, that since the question of former habit was properly submitted, and since there was no evidence of the falsity of the answers to the first two questions, if there was error in this part of the charge, it was harmless.

It is not believed that the other complaints of error are well founded, nor is it considered necessary to discuss them. For the error first indicated, the judgment of the Court of Civil Appeals is reversed and the cause is remanded.

Reversed and remanded.

DISSENTING OPINION.

HUME, Special Chief Justice. I am of opinion that this case was properly determined by the Court of Civil Appeals.

Conceding all that is claimed as to the distinctive force of a warranty, it is still true, that the situation and purposes of parties to it must be considered, just as they are in cases of contracts in other forms.

The purpose of a life insurance company is to secure risks on sound lives. It is interested in knowing that the applicant for insurance is not affected with infirmities that will hasten the event against which it insures. It inquires about his "diseases." I think, that according to common understanding a disease is an affliction that takes hold of its victim; abides with him; impairs or menaces his functional vitality; and lessens the probabilities of the average duration of his life.

The charge upon which the case is reversed seems to me to be warranted by the evidence upon both points named in the opinion.¹

¹ Other cases on disease are: *Life Ins. Co. v. Francisco*, 17 Wall. 672 (1873); *World Mutual L. Ins. Co. v. Schultz*, 73 Ill. 586 (1874); *Moulou v. American L. Ins. Co.*, 111 U. S. 335, 343-346 (1883); *Connecticut Mutual L. Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 257 (1884); *Home Mutual L. Assn. v. Gillespie*, 110 Pa. 84 (1885); *Metropolitan L. Ins. Co. v. McTague*, 49 N. J. L. 587 (1887); *Manufacturers' Accident Indemnity Co. v. Dorgan*, 16 U. S. App. 290, 308-309 (1893).

Cases on consulting a physician are: *Everett v. Desborough*, 5 Bing. 503 (1829); *Metropolitan L. Ins. Co. v. McTague*, 49 N. J. L. 587 (1887); *Cobb v. Covenant Mutual Benefit Assn*, 153 Mass. 176 (1891); *Brady v. United L. Ins. Assn.*, 20 U. S. App. 337 (1894); *Providence L. Ass. Society v. Rentlinger*, 58 Ark. 528 (1894); *White v. Provident Savings L. Ass. Co.*, 163 Mass. 108 (1895); *Plumb v. Penn Mutual L. Ins. Co.*, 108 Mich. 94 (1895).

On the topic of this section, see also:—

Vose v. Eagle Life and Health Ins. Co., 6 Cush. 42 (1850);

Wheelton v. Hardisty, 8 E. & B. 232 (Ex. Ch. 1858);

- Miller *v.* Mutual Benefit L. Ins. Co., 31 Iowa, 216 (1871);
Macdonald *v.* Law Union F. & L. Ins. Co., L. R. 9 Q. B. 328 (1874);
Dwight *v.* Germania L. Ins. Co., 103 N. Y. 341 (1886);
Fidelity Mutual L. Assn. *v.* Ficklin, 74 Md. 172 (1891);
White *v.* Provident Savings L. Ass. Society, 163 Mass. 108 (1895);
Smith *v.* Baltimore and Ohio Railroad Co., 81 Md. 412 (1895);
Connecticut Mutual L. Ins. Co. *v.* McWhirter, 44 U. S. App. 492, 502, 503 (1896),
s. c. 73 Fed. R. 444, and 19 C. C. A. 519;
Reynolds *v.* Atlas Accident Ins. Co., 69 Minn. 93 (1897). — ED.

CHAPTER VI.

OTHER CAUSES OF INVALIDITY.

SECTION I.

Marine Insurance.

(A) DEVIATION.

Quod tamen periculum intelligitur solum currere assecurator, pro illo itinere convento, et non pro alio, . . . nam si navis mutaverit iter, vel a via recta illius itineris deverterit, non tenetur amplius assecurator. . . . Si iter mutaverit ex aliqua justa, et necessaria causa, puta, ex causa refectionis illius navis, vel ad evitandam maris tempestatem, vel ne incideret in hostes; siquidem in istis casibus, mutato itinere, tenetur assecurator.

ROCCUS *de Assecurationibus*,¹ notab. LII. (1655).

GREEN v. YOUNG.

KING'S BENCH, 1702-3. 2 Salk. 444.²

If after a policy of insurance a damage happens, and afterwards, in the same voyage, a deviation; yet the assured shall recover for what happened before the deviation; for the policy is discharged from the time of the deviation only.³

¹ Roccus has been edited by Westerweert (Amsterdam, 1708), and translated by Joseph Reed Ingersoll (Philadelphia, 1809). — ED.

² s. c. 2 Lord Raym. 840, according to which report HOLT, C. J., "said, that if a policy of assurance be made to begin from the departure of the ship from England until, etc., and after the departure damage happens, etc., and then the ship deviates; though the policy is discharged from the time of the deviation, yet for the damages sustained before the deviation, the insurers shall make satisfaction to the insured." — ED.

³ Acc.: Hare v. Travis, 7 B. & C. 14 (1827). — ED.

FOSTER v. WILMER.

KING'S BENCH, 1745-6. 2 Str. 1249.

THE insurance was from Carolina to Lisbon and at and from thence to Bristol: it appeared, the captain had taken in salt, which he was to deliver at Falmouth, before he went to Bristol; but the ship was taken in the direct road to both, and before she came to the point where she would turn off to Falmouth. And it was held, the insurer was liable; for it is but an intention to deviate, and that was held not sufficient to discharge the underwriter.¹ In the case of *Carter v. The Royal Exchange Assurance Company*, where the insurance was from Honduras to London, and a consignment to Amsterdam, a loss happened before she came to the dividing point between the two voyages, which the insurer was held to pay for.

ELTON v. BROGDEN.²

NISI PRIUS, KING'S BENCH, 1746-7. 2 Str. 1264.

THE ship "Mediterranean" went out in the merchants' service with a letter of marque, and bound from Bristol to Newfoundland, insured by the defendant. In her voyage she took a prize, and returned with it to Bristol, and received back a proportionable part of the premium. Then another policy was made, and the ship set out, with express orders from the owners, that if they took another prize, they should put some hands on board such prize, and send her to Bristol, but the ship in question should proceed with the merchants' goods. Another prize was taken in the due course of the voyage, and the captain gave orders to some of the crew to carry the prize to Bristol, and designed to go on to Newfoundland; but the crew opposed him, and insisted he should go back, though he acquainted them with the orders: upon

¹ *Acc.: Henshaw v. Marine Ins. Co.*, 2 Caines, 274 (1805); *Marine Ins. Co. v. Tucker*, 3 Cranch, 357 (1806); *Hare v. Travis*, 7 B. & C. 14 (1827).

See *Hobart v. Norton*, 8 Pick. 159 (1829), a shipping case.

Compare *Middlewood v. Blakes*, 7 T. R. 162 (1797).

In *Marine Ins. Co. v. Tucker*, *supra*, JOHNSON, J., said: "An intent to do an act can never amount to the commission of the act itself. That an intended deviation will not vitiate a policy, and that the vessel remains covered by her insurance until she reaches the point of divergency and actually turns off from the due course of the voyage insured, is a doctrine well understood among mercantile men, and has uniformly governed the decisions of the British courts from the case of *Foster v. Wilmer* to the present time." And PATERSON, J., said: "Where the *termini* of a voyage are the same, an intention to touch at an intermediate port, though out of the direct course, and not mentioned in the policy, does not constitute a different voyage." — ED.

² s. c. 1 Beawes' *Lex Mercatoria* (6th ed.), 329. — ED.

which he was forced to submit, and in his return his own ship was taken, but the prize got in safe.

And now in an action against the insurers, it was insisted, that this was such a deviation as discharged them. But the court and jury held, that this was excused by the force upon the master, which he could not resist; and therefore fell within the excuse of necessity, which had always been allowed. The plaintiff's counsel would have made barratry of it; but the CHIEF JUSTICE¹ thought it did not amount to that, as the ship was not run away with in order to defraud the owners. So the plaintiff had a verdict for the sum insured.²

FOX v. BLACK.

NISI PRIUS, BEFORE YATES, J., 1767. Weskett on Insurance, 171.³

THE plaintiff was a shipper of goods in a vessel bound from Dartmouth to Liverpool; the ship sailed from Dartmouth, and put into Loo; a place she of necessity must pass by in the course of her insured voyage; but as she had no liberty given her by the policy to go into Loo, and notwithstanding no accident befell her by going into or coming out of Loo (for she was lost after she got out to sea again), yet her going into Loo was a deviation, and a verdict was found for the underwriter.

WOOLDRIDGE v. BOYDELL.

KING'S BENCH, 1778. 1 Doug. 16.

THE ship "Molly," being insured "At and from Maryland to Cadiz," was taken in Chesapeake Bay, in the way to Europe. Upon this, the insured brought this action against the defendant, one of the underwriters on the policy. The trial came on at Guildhall, before Lord Mansfield, when a verdict was found for the defendant, and, a new trial being moved for, the material facts of the case appeared to be as

¹ Sir WILLIAM LEE. — ED.

² See *Lawrence v. Sydebotham*, 6 East, 45 (1805); *Haven v. Holland*, 2 Mason, 230 (1820).

Compare *Phelps v. Auldjo*, 2 Camp. 1810; *Wiggin v. Amory*, 13 Mass. 118 (1816).

In *Levabre v. Wilson*, 1 Doug. 284, 291 (1779), Lord MANSFIELD, C. J., for the court, said: "A deviation from necessity must be justified, both as to substance and manner. Nothing more must be done than what the necessity requires. The true objection to a deviation is not the increase of risk. . . . It is that the party contracting has voluntarily substituted another voyage for that which has been insured." — ED.

³ s. c. 2 Park Ins. 8th ed. 620. — ED.

follows: The ship was cleared from Maryland to Falmouth, and a bond given that all the enumerated goods were to be landed in Britain; and all the other goods in the British dominions. An affidavit of the owner stated that the vessel was bound for Falmouth. The bills of lading were "*to Falmouth and a Market.*" And there was no evidence whatever that she was destined for Cadiz. The place where she was taken, was in the course from Maryland both to Cadiz and Falmouth, before the dividing point. Many circumstances led to a suspicion that she was, in truth, neither designed for Falmouth nor Cadiz, but for the port of Boston, to supply the American army; but there was not sufficient direct evidence of that fact. At the trial, Lord Mansfield told the jury that if they thought the voyage intended was to Cadiz, they must find for the plaintiff. If, on the contrary, they should think there was no design of going to Cadiz, they must find for the defendant.

The *Solicitor-General*, *Dunning*, and *Davenport*, argued for the new trial. They contended that this was like the cases of an intention to deviate where the capture had taken place before the deviation was carried into execution; and they cited *Foster v. Wilmer*, 2 Str. 1249, *Carter v. The Royal Exchange Assurance Company*, cited in *Foster v. Wilmer*, and *Rogers v. Rogers*, a very late case in this court. They, besides, urged that by "*a Market*" in the bills of lading and in the instructions to the broker (where that expression was used, but which I believe had not been read at the trial), was meant Cadiz. And that "*to Falmouth and a Market*" might be considered as meaning to the market at Cadiz, first touching at Falmouth. (It appeared in evidence at the trial that the premium to insure a voyage from Maryland to Falmouth, and from thence to Cadiz, would have exceeded greatly what was paid in this case.)

Lee and *Baldwin* showed cause. They argued that here there had been no inception of the voyage insured, and therefore the case was very different from those cited by the counsel for the plaintiff.

LORD MANSFIELD. The policy, on the face of it, is from Maryland to Cadiz, and therefore purports to be direct a voyage to Cadiz. All contracts of insurance must be founded in truth, and the policies framed accordingly. When the insured intends a deviation from the direct voyage it is always provided for, and the indemnification adapted to it. There never was a man so foolish as to intend a deviation from the voyage described, when the insurance is made, because that would be paying without an indemnification. Deviations from the voyage insured arise from after-thoughts, after-interest, after-temptation; and the party who actually deviates from the voyage described, means to give up his policy. But a deviation merely intended, but never carried into effect, is as no deviation. In all the cases of that sort, the *terminus a quo*, and *ad quem*, were certain and the same. Here, was the voyage ever intended for Cadiz? There is not sufficient evidence of the design to go to Boston for the court to go upon. But some of the papers say to Falmouth and a Market, some to Falmouth

only. None mention Cadiz, nor was there any person in the ship who ever heard of any intention to go to that port. "A market" is not synonymous to "Cadiz;" that expression might have meant Leghorn, Naples, England, &c. No man, upon the instructions, would have thought of getting the policy filled up to Cadiz. In short, that was never the voyage intended, and consequently is not what the underwriters meant to insure.

WILLES and ASHHURST, Justices, of the same opinion.

BULLER, Justice. I am of the same opinion. I believe the law to be according to the authorities mentioned on the part of the plaintiff, but it does not apply here. This is a question of fact. There cannot be a deviation from what never existed. The weight of evidence is that the voyage was never designed for Cadiz. *The rule discharged.*¹

HARTLEY v. BUGGIN.

KING'S BENCH, 1781, AND NISI PRIUS, 1782. 3 Doug. 39.²

THIS was an action on a policy of insurance upon the ship "Blossom," at and from the coast of Africa to the West Indies, with liberty to exchange goods and slaves. The cause was tried at the last assizes at Lancaster, before HEATH, J., and a verdict was found for the plaintiff, with which the learned judge reported himself satisfied.

On a rule obtained to show cause why there should not be a new trial, it appeared that there had been a great deal of contradictory evidence, and many points started at the trial; but the question now raised was, whether the plaintiff, by the use he made of the ship on the coast of Africa, and the delay he there occasioned, was not the cause of the loss; that is, whether he did not make such use of her, during her stay on the coast, as amounted to a deviation. It appeared in evidence that this ship stayed on the coast from August to March; that she was employed in receiving slaves on board, the produce of the cargoes of other ships, which were afterwards put on board other ships and sent to the West Indies; that this is the employment of what they call a *factory ship*, but that a regular factory ship is thatched and covered, and receives the slaves till a sufficient number is collected to send away in other vessels; but it did not appear that any slaves, the produce of the "Blossom's" own cargo, were sent away in other vessels. It appeared, however, that her stay there was seven months beyond the usual stay of ships in that trade.

¹ See *Tasker v. Cunninghame*, 1 Bligh, 87 (1819).

Compare *Heselton v. Allnutt*, 1 M. & S. 45 (1813); *Snow v. Columbian Ins. Co.*, 48 N. Y. 624 (1872). — ED.

² s. c. 2 Park Ins. 8th ed. 652. — ED.

Wallace, A. G., Lee, Davenport, and Wood, showed cause against the rule for a new trial. They contended that this use of the ship as a factory ship was not inconsistent with the object of the voyage. If the ship does nothing which increases her risk and prolongs her stay, or is inconsistent with the object of her voyage, it is not a deviation. Here she parted with no slave, the produce of her own cargo, which ever was on board of her. Ships can only be supplied in turn, and whilst she is forced to wait there, she may as well receive the slaves of the other ships as not. It is the course of the trade so to do. The definition of a factory ship is a floating warehouse, not her merely being thatched and covered.

Arden and Dunning, contra, in support of the rule, were stopped by the court.

LORD MANSFIELD. When different points are agitated at a trial, and a great deal of evidence is applied to each, and the counsel go out of a cause, it is not surprising that juries should have their attention distracted from the principal point. The great advantage of a motion for a new trial is that after argument on the motion the cause goes down again winnowed from the chaff of the first trial. The single question in this case is whether there has not been what is equivalent to a deviation. It is not material, to constitute a deviation, that the risk should be increased. The voyage is to the coast of Africa, and thence to the West Indies, which includes an insurance on the ship while she stays and trades at Africa, and it is with liberty to exchange goods and slaves; but that exchange is for the benefit of the ship, one slave for another. If a ship insured for a trade is turned into a factory ship, or a floating warehouse, the risk is different; it varies the stay, for while she is used as a warehouse no cargo is bought for her.

The law being clear, how is the fact? The captain says the vessel was not used as a factory ship; but his evidence is much impeached. Indeed, he says that he was young in the trade, that he never saw a factory ship but once, and was not in her. He might have a salvo, because this vessel was not thatched, as factory ships usually are; but the question is, was she used as a factory ship? Without being thatched and roofed, she may have been put to that use. The fact is clear: the risk is different, and there must be a new trial.

Rule absolute.

This cause was again tried at the Lancaster Summer Assizes, 1782, before EYRE, B., and evidence was given that, since the establishment of agencies on the coast, it had been a custom with the plaintiff's ships to stay till others came, and that it was intended to go to the West Indies just before the accident happened; that the putting the vessel ashore was to prepare her for the voyage; that by agencies the sailing of ships was much expedited; and that she had not stayed an extraordinary time. EYRE, B., told the jury that there was no question of fact; that it was clear the ship was employed as a factory. What the effect of that was afforded great room for argument. One side con-

tended that it was usual and allowable in the course of trade ; the other side, that it varied the risk materially. New modes of trade were advantageous, and it was not for the interests of commerce to be cramped by underwriters. An assured was to conduct his trade his own way, with this exception, that it does not materially vary the risk insured. Barter, for the facilitation of the voyage, was allowable without express stipulation. The question was, if the use made of the ship had the voyage for its object. The jury found a verdict for the defendant.

BEATSON v. HAWORTH.

KING'S BENCH, 1796. 6 T. R. 531.

THIS was an action on a policy on the ship "Bazil," "at and from Fisherrow to Gothenburgh, and back to Leith and Cockenzie," valued at £500, without further account to be given. At the trial before Lord KENYON, at Guildhall, it appeared that the ship performed her voyage outward to Gothenburgh, and having taken in goods both for Leith and Cockenzie in her return home in the spring of 1787, without going to Leith, first put into Cockenzie, where she was stranded and lost. It was given in evidence that Leith was a very safe and commodious harbor, and Cockenzie a very small and insecure one, especially in the winter season. That the two places are about ten miles apart from each other ; but Cockenzie lies nearer to Gothenburgh than Leith, and it is about a mile and a half out of the way to put into Cockenzie in going from Gothenburgh to Leith. There did not appear to be any settled course of trade to regulate the track of the voyage in this respect, though the weight of the evidence was in favor of going first to Leith in point of prudence, owing to the insecurity of the harbor of Cockenzie in general ; for, by discharging the lading for Leith there in the first instance, the risk of going into the harbor of Cockenzie was thereby much lessened. Two objections were made at the trial on the part of the defendant, first, that as the ship went into Cockenzie before she went to Leith, it was a deviation from the voyage described in the policy, which was to Leith and Cockenzie ; secondly, that this was a gaming policy within the statute 19 Geo. II. c. 37, being without proof of interest. Both points were reserved ; but the decision went wholly on the first. A verdict was agreed to be taken for the plaintiff, without prejudice to the defendant, subject to the opinion of the court upon the points of law, with liberty to the defendant to move to enter a nonsuit, — a rule to that effect having been obtained.

Gibbs now showed cause against it, saying that it had never been held necessary, where two ports of discharge are named in a policy, for the ship to go first to that which happens to be named first in the pol-

icy. Every underwriter must be taken to be cognizant of the nature of the voyage which he insures, and of the course of trade which prevails in it. He must be taken to know the relative situations of the several places from and to which the vessel is insured; therefore here the defendant must have known that Cockenzie lay between Gothenburgh and Leith, and that the vessel would naturally touch at Cockenzie first, there being no course of trade to regulate her voyage otherwise, that being the shortest and most convenient track. Where a particular track is intended to be chalked out by the underwriter, the usual form of describing it is from A. to B., and from B. to C. The general mode of expression therefore adopted in this case, from A. to B. and C., shows that it was intended to leave it to the discretion of the captain; and this is confirmed by the circumstance of there being no particular usage, but sometimes the one and sometimes the other is the first port of delivery, according to the convenience of the traders.

The court were of opinion that, as the intended voyage was described in the policy, and as there was no regular and settled course known to all the traders, different from that so described, the ship deviated by putting into Cockenzie first, and consequently that the plaintiff could not recover.¹ . . .

Per curiam,

*Rule absolute.*²

HOGG v. HORNER.

NISI PRIUS, 1797. 2 Park Ins. (8th ed.) 626.

WHERE a ship was insured "at and from Lisbon to a port in England, with liberty to call at any one port in Portugal for any purpose whatever;" and where the ship had sailed from Lisbon to Faro to complete her loading, Faro being a port to the southward of Lisbon, consequently lying directly out of the course of the voyage to England, Lord KENYON was of opinion that the liberty given by this policy must be restrained to a permission to call at some port to the northward of Lisbon, in the course of the voyage to England; and that by going to the southward the assured had been guilty of a deviation.³

¹ Here LAWRENCE, J., read a manuscript note of *Clason v. Simmonds*, tried at Guildhall, before LEE, C. J. (1741). — ED.

² See *Kane v. Columbian Ins. Co.*, 2 Johns. 264 (1807); *Gairdner v. Senhouse*, 3 Taunt. 16 (1810).

Compare *Bragg v. Anderson*, 4 Taunt. 229 (1812). — ED.

³ See *Levabre v. Wilson*, 1 Doug. 284 (1779).

Compare *Lambert v. Liddard*, 5 Taunt. 480 (1814); s. c. 1 Marsh. 149; *Metcalfe v. Parry*, 4 Camp. 123 (1814). — ED.

SCOTT ET AL. v. THOMPSON.

COMMON PLEAS, 1805. 1 B. & P. N. R. 181.

THIS was an action on a policy of insurance, dated 16th September, 1801, at and from Liverpool to Amsterdam, against sea-risk and fire only, upon goods on board the ship or vessel, called the "Sophia Frederica," at three guineas and an half per cent. The defendant underwrote for £200, and the interest was averred to be in the plaintiffs. The action was brought to recover an average loss sustained by sea-damage. The cause came on to be tried the 21st day of December, 1804, before CHAMBRÉ, J., and a special jury, when a verdict was found for the plaintiffs, by consent, for £200, to be reduced by a reference in respect to the amount, in case the court should be of opinion that the plaintiff was entitled to recover upon the following case. The defendant underwrote the policy in question for £200, and received the premium. The ship was a neutral vessel, belonging to Dantzic; 154 cases of Havana sugar, at the value of £1,469 1s. 11d., the property of the plaintiffs, were shipped at Liverpool for Amsterdam previous to the voyage, which were loaded under his Majesty's license for the voyage, and were the subject of the insurance. On the 22d September, 1801, the said vessel and cargo sailed from Liverpool upon the said voyage, stanch, strong, in good order and condition, and well and sufficiently provided in all respects. About 10 A. M. on the 1st October, in the course of the said voyage, the said vessel was boarded by his Majesty's brig "Raven," commanded by Captain James Saunders, who took possession of the "Sophia Frederica," and carried her, against the will of the captain and crew, out of the course of her voyage to Amsterdam, into Falmouth, where she arrived about 12 at night, the same day, in possession of and under the direction of the officers of his Majesty's said ship the "Raven," who moored and detained her there until the 12th November, 1801. On the 12th November she was released, and immediately proceeded from Falmouth for Amsterdam. On the 20th November, being off the coast of Holland, she was there detained by tempestuous weather until the 24th, during which time she sprung a leak, and on the 24th November she arrived at Amsterdam, and unloaded her cargo, which was found to have sustained sea-damage; but it was admitted on the part of the plaintiff that no part of such sea-damage happened before her detention by the brig "Raven." When the said vessel sailed from Liverpool she was furnished with all the proper documents for the said voyage, which were on board her at the time of the said detention. On the part of the defendant it was contended that the said ship, being so taken out of the course of her voyage to Amsterdam into Falmouth, was a deviation, and put an end to the insurance. The question for the opinion of the court was, Whether under the circumstances of this

case the plaintiffs were entitled to recover? If the court should be of opinion that the said goods were covered by the insurance after the ship was so taken out of the course of her voyage, a verdict was to be entered for the plaintiffs for such damages as the arbitrator should find due. If the court should be of opinion that the insurance was determined by the above circumstance, then the verdict to be entered for defendant.

It was agreed at the trial that, at the desire of either party, this case might be turned into a special verdict.

Bayley, Serjt., for the plaintiffs.¹

Best, Serjt., for the defendant.

The opinion of the court was delivered by

Sir JAMES MANSFIELD, C. J., who, after stating the case, proceeded thus. For a short time I entertained a doubt whether on this limited policy the plaintiff was entitled to recover. That doubt arose from not having sufficiently attended to the circumstances of the case; and the argument and authority cited have satisfied me that the plaintiff is entitled to recover. The only question is, Whether, as the ship was taken out of her course by the captain of the king's ship and detained at Falmouth, and the voyage was thereby made longer than it would otherwise have been, the underwriter is relieved from his obligation to indemnify the assured during the remainder of the voyage? Nothing is more clear than the general principle that a deviation never puts an end to the insurance, unless it be the voluntary act of those who have the management of the ship. Here the state of the case excludes the idea of the deviation (as the going to Falmouth has been called) having been voluntary. The ship was carried there by force, and without any consent of those who had the management of the ship. Deviation occasioned by force, and deviation occasioned by necessity, are the same; for necessity is force. It is no matter whether it be the want of repair, or any other immediate danger, which renders the deviation necessary. When the deviation is necessary and unavoidable, it has no effect on the obligation of the insurer. Three or four cases have been cited. The last of them, namely, *Driscoll v. Passmore*, proceeded upon the same principles as that of *Elton v. Brogden*, in *Strange*, and both cases are distinguishable from this. In one of those cases there was a deviation, the ship having been carried back to Bristol; and in the other, the ship was forced to return by the crew. Though at first it struck me that there was something like a difference between a limited and a general policy, yet, on further consideration, I do not think that there is any difference. In the case of *Elton v. Brogden*, the court do not seem to have considered the act of the crew as amounting to barratry; and indeed it would be difficult to make it appear that it was barratry. Assuming, then, that there was no barratry in that case,

¹ The cases cited for the plaintiffs were *Elton v. Brogden*, *ante*, p. 431 (1746-47); *Driscoll v. Passmore*, 1 B. & P. 200 (1798); and *Driscoll v. Bovil*, 1 B. & P. 313 (1798). — ED.

there is no ground for making a distinction between the present case and that of a general policy. Indeed, if the act of the crew in *Elton v. Brogden* had amounted to barratry, it could have made no difference. It seemed to me at first that if a defendant in an action on a general policy of insurance should insist upon a deviation, it might be answered that such deviation was occasioned by barratry, which was another risk for which the underwriter would be liable on the policy. But that would be no answer, since it would amount to charging the underwriter under a declaration upon a sea-risk for barratry to which he could not be prepared to answer; and he never could be liable, directly or indirectly, on a declaration which had only led him to defend himself against a sea-risk. Considering this case, therefore, and the other cases which have been decided, I do not find anything like a real distinction between the present insurance and the ordinary insurance, including all the risks which are inserted in the policies in general. We are, therefore, of opinion that the plaintiff is entitled to recover.

Per curiam,

*Judgment for the plaintiff.*¹

The court gave leave to the defendant to turn the case into a special verdict.

RAINE v. BELL.

KING'S BENCH, 1808. 9 East, 195.

THIS was an action on a policy of insurance "on the ship 'Rio Nova,' and freight, from her loading port or ports on the coast of Spain to London, with liberty to touch and stay at any port or place whatever, without being deemed a deviation." The plaintiff declared on a loss by the perils of the sea. It appeared in evidence at the trial at Guildhall, that by the long continuance of the voyage from port to port in Spain, and the difficulty of obtaining provisions on the coast at that time, the ship's provisions had run very short, and she was obliged to put into Gibraltar to lay in a sufficient stock before her departure for London.

¹ Compare *Lee v. Gray*, 7 Mass. 349 (1811).

On deviation for the purpose of repairing the ship, see *Levabre v. Wilson*, 1 Doug. 284 (1779).

On deviation to escape capture, see *Robinson v. Marine Ins. Co.*, 2 Johns. 89 (1806); *Suydam v. Marine Ins. Co.*, 2 Johns. 138 (1807); *Haven v. Holland*, 2 Mason, 230 (1820); *Riggin v. Patapsco Ins. Co.*, 7 H. & J. Md. 279 (1826); *Bradley v. Nashville Ins. Co.*, 3 La. Ann. 708 (1848).

On deviation because of sickness of crew or passengers, see *Woolf v. Claggett*, 3 Esp. 257 (1800); *Perkins v. Augusta Ins. & Banking Co.*, 10 Gray, 312, 318 (1855).

On deviation to succor a vessel in distress, and the distinction between saving life and saving property, see *Settle v. St. Louis Perpetual Ins. Co.*, 7 Mo. 379 (1842), and these shipping cases: *Bond v. The Brig Cora*, 2 Wash. C. C. 80 (1807); *A Box of Bullion*, 1 Sprague, 57 (1843); *Walsh v. Homer*, 10 Mo. 6 (1846); *Crocker v. Jackson*, 1 Sprague, 141 (1847); *Sturtevant v. The Bark George Nicholas*, *Newberry's Adm.* 449 (1853); *Scaramanga v. Stamp*, 5 C. P. D. 295 (C. A., 1880).—Ed.

But it also appeared, that while the ship lay at Gibraltar for that purpose, the captain received on board some chests of dollars on freight: and some question was at first attempted to be made whether the true object of going there was not to take on board these dollars; but the weight of the evidence was against this supposition: and finally Lord ELLENBOROUGH, C. J., left it to the jury to say, whether the going into Gibraltar were of necessity in order to obtain a proper stock of provisions; and if so, whether the stay there were longer than was necessary for that purpose; telling them that if there were no necessity for going there or staying there so long for provisions the policy would be avoided. The jury however affirmed the necessity of the ship's touching and stay at Gibraltar in order to lay in her provisions: and the loss of the ship being proved to have happened by the perils of the sea off the coast of Cornwall in her homeward-bound voyage, they found a verdict for the plaintiff for the amount of the defendant's insurance. But a question of law was raised, whether the taking in the additional cargo of dollars at Gibraltar, which was said to be a breaking bulk in the course of the voyage at a place where there was no liberty to trade, did not avoid the policy, as increasing or having a tendency to increase the risk of the underwriters beyond the terms of the policy: and this it was contended by the defendant to do, on the authority of Lord KENYON in *Stitt v. Wardell*,¹ and of Lord ELLENBOROUGH in *Sheriff v. Potts*.² And in order to discuss this point, a rule *nisi* was obtained in the last term for setting aside the verdict, and for a new trial; against which

The *Attorney-General*, *Park*, and *Dampier*, now showed cause.
, *Garrow* and *Marryatt*, *contra*.

Lord ELLENBOROUGH, C. J. If the taking in the dollars at Gibraltar materially varied the risk of the underwriters, they would be discharged by it; but that it did not vary the risk by occasioning any delay of the voyage was expressly found by the jury to whom the question was left, and who were of opinion that the whole period of the ship's stay there was covered by the necessity which originally induced the captain to go into Gibraltar. I have turned it in my mind whether the risk might not have been increased by the particular kind of cargo, namely, treasure, taken in there: if that were known at the time to an enemy, it might hold out an additional temptation to him to seek for and attack the ship. But I do not know that a mere temptation of this sort has ever been held a sufficient ground to avoid a policy if the original act itself were lawful. This, it must be remembered, is the case of a policy on ship and freight: I reserve giving any opinion as to the operation of a change in the state of the cargo in the case of a policy on goods; because the taking in of other goods in the course of one entire voyage, where it is not provided for, may be contended to constitute a different adventure from that on which the ship started with her original cargo.

¹ Tried at the sittings after Michaelmas term, 38 Geo. III., at Guildhall, 2 Esp. Ni. Pri. Cas. 609, and *Park* on Ins. — REP.

² Sittings after Michaelmas term, 44 Geo. III. 5 Esp. Ni. Pri. Cas. 96. — REP.

But here no part of the original cargo was taken out, as in *Stitt v. Wardell*; nor any narrower liberty reserved, as in *Sheriff v. Potts*, which might operate as a virtual exclusion of taking in other goods. But this case stands on its own ground: where something has been superadded to the original cargo while the ship was delayed from necessity in a port into which she was obliged to go; and the jury having negatived that any delay was occasioned by the taking in of the additional goods.

His Lordship, after the other judges had delivered their opinions, added, that nothing said by the court would justify the taking in any cargo in the course of the voyage which would in any manner enhance the risk of the underwriters.¹

*Rule discharged.*²

BLACKENHAGEN v. LONDON ASSURANCE COMPANY.

NISI PRIUS, KING'S BENCH, 1808. 1 Camp. 454.

THIS was an action of covenant on a policy of insurance on goods in the ship "William," at and from London to Reval. The loss was laid in one count to be, by the perils of the sea; in another, by capture. Plea, *non infregit conventionem*.³

The ship sailed from the Nore on the 15th of October, 1807, under convoy of the "Forrester" sloop of war, for the Sound, and arrived there on the 27th of the same month. On the 15th of November, she proceeded from thence towards Reval, under convoy of the "Garnet" sloop of war. Two days after, while they were proceeding on the voyage, the captain of the "Garnet" received information that an embargo was laid on all British ships in the ports of Russia. In consequence, he ordered the "William" to put back, and on the 18th she returned to Copenhagen roads. She afterwards lay off Gottenburgh six days, and might have entered that friendly port if the master had thought fit. But on the 30th of November she sailed with the fleet for England, under convoy of the "Garnet" and the "Spitfire" sloops of war.

The last time she was seen was on the 3d of December, in a heavy gale of wind; and not having been heard of since, it was allowed that she had certainly perished on her voyage home.

Lord ELLENBOROUGH. This case will hardly bear to be stated. The underwriters were bound to indemnify the plaintiff for any loss that

¹ Concurring opinions by GROSE, LAWRENCE, and LE BLANC, JJ., have been omitted. — ED.

² *Acc.* Urquhart v. Barnard, 1 Taunt. 450 (1809), where the insurance was on goods; Laroche v. Oswin, 12 East, 131 (1810), where the insurance was on goods; Hughes v. Union Ins. Co. 3 Wheat. 159 (1818), where the insurance was on ship and freight, and the cargo was unloaded while the ship was stopping at a port in order to avoid being captured. — ED.

³ 11 G. 1, c. 30, § 43. — REP.

should happen on the voyage from London to Reval. If, being unable to get to Reval, the ship had lingered in that quarter, or had necessarily returned with an intention of ultimately completing the original voyage, a question of some nicety might have arisen. But by sailing back for England in the manner she did, the original voyage was abandoned, and the underwriters were discharged. The master might deem this the most advisable course he could pursue for the benefit of those he represented; but were the underwriters still to be liable on the policy, if it had been convenient for him to carry the ship to the Straits of Magellan? The case which I remember coming nearest this, was where a ship, being prevented by the ice from reaching her port of destination, took shelter for the winter in a place as near to it as she could safely go, and prosecuted her voyage the ensuing season. Here, had the ship been coming home, as the best means of getting finally to Reval, and there had been a possibility of her being able to accomplish that object when the loss happened, she might still have been considered in the course of the voyage insured; but all thought of completing the original voyage seems to have been abandoned on the 30th of November, and there is no color for charging the underwriters with a loss which happened subsequently to her setting sail for England.

*Plaintiff nonsuited.*¹

Garrow and Puller, for the plaintiff.

The Attorney-General, Carr, and Moore, for the defendant.

WILLIAMS v. SHEE.

NISI PRIUS, KING'S BENCH, 1813. 3 Camp. 469.

THIS was an action on a policy of insurance on goods by the ship "Sir Sidney Smith," "at and from London to Berbice, with liberty to touch and stay at any ports and places whatsoever and wheresoever, and for all purposes whatsoever, particularly to land, load, and exchange goods, without being deemed a deviation."

The vessel sailed from Portsmouth on the 25th of September, 1812, with a fleet for the West Indies, under convoy of his Majesty's ship "Narcissus." They arrived off Madeira on Saturday, the 17th of October. The "Sir Sidney Smith" had taken in a quantity of goods for that island, which the captain had been ordered to land there, and for

¹ The plaintiff afterwards brought an action against the defendant on this policy, in the Court of Common Pleas, which was tried at the sittings after last Michaelmas Term. Sir JAMES MANSFIELD, as well as Lord ELLENBOROUGH, clearly thought that the voyage was abandoned, by the ship sailing for England instead of putting into Gottenburgh. The jury, nevertheless, found a verdict for the plaintiff; but in Hilary Term following, the Court of Common Pleas set it aside and ordered a new trial. —

REP.

See *Parkin v. Tunno*, 11 East 22 (1809); s. c. 2 Camp. 59, 62. — ED.

which wines were to be sent on board. He began to land the goods as soon as he arrived, but not being allowed to work on the Sunday, he had not got the wines on board till the Monday at noon. The "Narcissus," with the greatest part of the fleet, had sailed away the preceding day, and was then too far off to be overtaken. Seven or eight other ships belonging to the fleet, however, were left behind at Madeira; and they all agreed to sail together for mutual protection. With this view the "Sir Sidney Smith" remained at Madeira till the 24th of October. She finally parted company with them off Barbadoes, and on the 19th of November was captured by an American privateer on her way to Berbice. The owner of the goods insured was on board during the voyage.

Garrow, A. G., contended, that the underwriters were discharged on two grounds: 1st, The ship, by putting into Madeira and staying behind there when the rest of the fleet had sailed, had been guilty of a deviation. 2dly, The captain had wilfully deserted the convoy, and as this was done with the privity of the owner of the goods, who was on board, the policy was vacated.

Park, for the plaintiff, insisted, 1st, That the ship had a right to put into Madeira, and to stop there in the manner she had done, under the liberty given by the policy to touch and stay at all ports and places to land, load, and exchange goods. 2dly, The captain could not be said wilfully to have deserted the convoy; for he was anxious, if possible, to enjoy its protection; and the convoy had rather deserted him.

LORD ELLENBOROUGH. I am of opinion that the underwriters are discharged on the ground of deviation. The liberty in the policy must be construed with reference to the main scope of the voyage insured. I am inclined to think this was not a wilful desertion of convoy within the meaning of the act, as the captain appears to have acted *bona fide*, and not to have been aware of the precise time when the convoy sailed away from Madeira. However, it is unnecessary to determine that point now; for upon well-established principles the ship was guilty of a deviation by putting into Madeira and voluntarily staying behind there for the purposes of trade, when the rest of the fleet had sailed away in the prosecution of the voyage.

Plaintiff nonsuited.

Park and *Barnewall*, for the plaintiff.

Garrow, A. G., and *Nolan*, for the defendant.

REDMAN v. LONDON.

NISI PRIUS AND COMMON PLEAS, 1813. 3 Camp. 503.

THIS was an action on a policy of insurance, dated 8th January, 1813, on the ship "Sir Sidney Smith," at and from London to Berbice.

After the printed words in the policy, "beginning the adventure upon the said goods and merchandises, from the loading thereof aboard the said ship," there were inserted, in writing, the words "at sea."

The only extraordinary liberty given by the policy was, "to join and sail with convoy, without being deemed a deviation."

This policy was on the same ship and the same voyage mentioned in *Williams v. Shee*, 3 Camp. 469, and exactly the same evidence was now given respecting the transactions at Madeira and the subsequent loss as upon the trial of that cause before Lord Ellenborough. The broker, however, swore that when he effected the policy he showed the underwriters a letter, written by the captain at sea, when he was between Barbadoes and Berbice, stating that he had parted company with the convoy.

Best, Serjt., for the defendant, read the foregoing note of *Williams v. Shee*, and insisted that the present case was much stronger in favor of the underwriters, as the policy here did not contain the liberty to land, load, and exchange goods, which was there relied upon.

Shepherd, Serjt., for the plaintiff, allowed that the ship had been guilty of a deviation at Madeira, but contended that the underwriters on this policy could not take advantage of it. This policy was only meant to take the ship up "at sea" from the date of the last letter from the captain, and to protect her during the remainder of the voyage to Berbice. For this purpose, the words "at sea" were introduced into the policy. Their meaning might be a little equivocal on the face of the instrument, but became quite apparent when coupled with the letter shown to the underwriters; therefore a deviation prior to that letter was equally immaterial as a deviation upon any former voyage.

Best, Serjt., in reply. It is impossible to make "at sea" one of the termini of the adventure. The policy is "at and from London to Berbice," and the declaration accordingly avers that the ship was in good safety at London, and sailed from thence on the voyage in the policy of insurance mentioned. Had the ship sustained any secret damage at Madeira, the underwriters would unquestionably have been liable for an average loss. The date of a policy is wholly immaterial, if it be effected before the event is known to either party. The invariable rule is, that it attaches at the place where the risk is described to commence, and if not discharged by a deviation, protects the ship during the whole of the adventure. The captain's letter cannot be made a part of this policy, which does not refer to it, and the words "at sea," connected as they are with the loading of goods and merchandises, are wholly nonsensical.

MANSFIELD, C. J. Whatever the intention of the parties might be, I see nothing in this policy to show that it was not to attach at London. I must therefore hold, that the underwriters were discharged by the deviation at Madeira.

The plaintiff was nonsuited, and the nonsuit was afterwards confirmed by the Court of Common Pleas.

Shepherd, Serjt., and *Marryat*, for the plaintiff.

Best, *Vaughan*, Serjts., and *Campbell*, for the defendant.

KETTELL v. WIGGIN AND OTHERS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1816. 13 Mass. 68.

ASSUMPSIT on a policy of insurance, subscribed by the defendants, upon the schooner "Pocahontas," and freight from Boston to Gibraltar, and from thence to her port of discharge in the United States, with liberty to proceed to St. Ubes or the Cape de Verd Islands for salt.

The vessel arrived in safety at Gibraltar, and from thence sailed for the Isle of May, one of the Cape de Verds, for a cargo of salt, where she arrived on the 12th of May, 1810. On her arrival there, there were seventeen vessels in the port, and it is the custom of the place for vessels to load in turn as they arrive. The "Pocahontas" could not have had her turn in less than four or five weeks, and she was short of provisions, of which and of water there was a scarcity at that place. The governor of the island proposed to the master to go with his vessel to St. Jago and Fuego, two other of the Cape de Verd Islands, and procure a cargo of provisions; and engaged, that, if he would, he should be loaded with salt as soon as he should return, although his turn should not have arrived. The master agreed to this proposal, went to those islands, brought provisions for the governor, and was immediately permitted to take his cargo of salt; and he was thus enabled to load his vessel considerably sooner than he would have been, if he had remained at the Isle of May for his turn.

After taking in the cargo, the vessel sailed on the return voyage, and, being short of water and provisions, put into the port of Praya, in St. Jago (which is a place usually stopped at for provisions and water, on a voyage from the Isle of May to the United States), where she arrived on the 4th of June, and in the night of the 5th was attacked by banditti, carried off, and subsequently totally lost; having been recovered by the master nineteen days after she was so piratically seized, but some time afterwards captured by a British vessel of war, libelled as prize, and condemned.

The evidence was full and satisfactory, that provisions and water were scarce and difficult to be procured at the Isle of May; and that it was the usage to touch at St. Jago, on the way home, for supplies. It

was also proved, that it was usual for vessels to go from island to island, among the Cape de Verds, for salt or to complete their cargo.

The CHIEF JUSTICE, before whom the cause was tried, November term, 1814, instructed the jury, that, if they believed the usage with respect to touching at St. Jago, on the way home from the Isle of May, and that there was a necessity for it, without any fault of the master, on account of provisions or water, the act would not be a deviation; and further, if they were fully satisfied that the trip taken to St. Jago and Fuego, at the request of the governor, was for the purpose of expediting the loading of the vessel and the return home, without any intention on the part of the master to deviate from his voyage; and that the voyage home was, in fact, expedited by that circumstance; and that the stay at the Isle of May for her turn to load would have been hazardous, on account of the scarcity of provisions and water; they might consider that there was no deviation from the voyage, less time being consumed than would have been, had the vessel remained at the Isle of May.

A verdict was returned for the plaintiff, and the defendants moved for a new trial, for misdirection to the jury, by the judge who sat at the trial.

Selfridge, for the defendants.

Rockwood, for the plaintiff.

PARKER, C. J. The touching at St. Jago, on the voyage home, was relied upon by the defendants as a deviation which destroys the action. But, it being in evidence, that vessels from the Isle of May usually touch at St. Jago for supplies, which are not always to be obtained at the Isle of May, the touching there was justifiable, and no deviation.

But the vessel went an intermediate voyage after her arrival at the Isle of May, under a contract with the governor of that island; and the question is, whether that act is justifiable. The vessel is insured from Gibraltar to the United States, with liberty to touch at St. Ubes or the Cape de Verd Islands for salt. Under this policy she might have sailed from one to another of those islands, and successively to all of them, for salt; but her arrival at any one of them, where salt was to be obtained, and where the cargo was intended to be taken on board, determined the voyage to those islands, and the vessel could not proceed from thence to another for the purpose of earning a freight, or for any other purpose, under the policy. Now the Isle of May is one of the Cape de Verd Islands, at which the vessel might touch; she did touch there, and it was determined to take on board a cargo there; but she went thence to St. Jago and Fuego, not for the purpose of procuring salt, but on a contract with the governor, to get provisions for the island, and then returned to the Isle of May, to prosecute her homeward voyage. This was undoubtedly a deviation, unless it can be shown to have been necessary for the safe prosecution of the voyage. Mere purposes of convenience will not excuse a deviation, nor will anything but actual necessity.

It was contended, that this voyage was necessary, because there was a scarcity of provisions and water, and the crew of the vessel might have suffered. This, perhaps, would be a sufficient excuse, if the necessity, on which it is founded, did not arise from the negligence of the master; if it did, the owners cannot avail themselves of it, to excuse a deviation. The voyage from Gibraltar was to the United States, with liberty to touch at the Cape de Verds. The vessel should have been sufficiently found at Gibraltar, to enable her to stay and load at the Isle of May, without depending upon procuring provisions there. Indeed, the necessity, which is alleged, seems to prove that the ship was not seaworthy at the time the policy was to take effect.

But it was confidently insisted, that, as the effect of this expedition, at the request of the governor, was to shorten the duration of the voyage, by enabling the master to obtain his cargo much sooner than he otherwise could, it ought to be considered as done for the benefit of all concerned, and not as amounting to a deviation.

But masters have not a right to speculate, in this manner, upon the possible advantages of pursuing a route which does not belong to the voyage. They are to pursue the usual course, and let the consequences fall where they may. In this case the master probably thought he was advancing the interest of his employers, of the underwriters, and of all concerned, by getting his vessel loaded several weeks sooner than would have been his turn; and yet it is almost certain, that his very success, in being able to commence his homeward voyage so soon, was the cause of the disaster which befell his vessel. Certainly, had he arrived at St. Jago a week later, he would have avoided the immediate cause of the loss.

Notwithstanding it is established by the verdict, that the voyage was in fact expedited by the intermediate voyage to St. Jago and Fuego, we are of opinion that voyage was, under the circumstances, an unjustifiable deviation. To test this, let us inquire whether the vessel was at the risk of the underwriters, from the Isle of May to Fuego and back. It was not within the terms of the policy; it was not necessary, unless it had become so by the culpable neglect of the master. Had the vessel been lost upon that voyage, the underwriters could not have been held answerable. The policy, then, had ceased to protect the vessel; and it is not possible that anything subsequent should restore the obligation of the underwriters.

We are all of opinion, that the verdict must be set aside and a

New trial granted.

HAMMOND v. REID.

KING'S BENCH, 1820. 4 B. & Ald. 72.

ACTION on a policy of insurance on the ship "*Arabella*," on a voyage at and from Para to New York, during her stay there, and at and from thence to Para, *with leave to call at all or any of the Windward and Leeward Islands and colonies on her passage to New York*, with leave to discharge, exchange, and take on board the whole or any part of any cargo or cargoes at any ports or places she might call at or proceed to, particularly at all or any of the Windward and Leeward Islands, without being deemed any deviation from and without prejudice to the insurance. The declaration stated the sailing of the vessel on the voyage insured, and a loss by perils of the seas. Plea, general issue. At the trial, at the Lancaster Summer Assizes, 1819, before BAYLEY, J., a verdict was found for the plaintiff, subject to the opinion of the court on a case, which stated that the ship sailed from Para on the voyage insured with a cargo on board, bound for New York; but with orders from the plaintiff, her owner, to proceed in the first instance to Barbadoes, where the captain was directed to sell the cargo and receive other goods on board in exchange for it, and proceed from thence to New York, after calling at the islands of St. Bartholomew and St. Thomas, two of the Leeward Islands, for the purposes after stated. When the vessel sailed from Para the plaintiff was there, and intended to proceed from thence in another vessel direct to New York, where he expected to meet a vessel, also belonging to himself, called the "*Alice*," from Liverpool, which last-mentioned vessel he then proposed to load at New York with goods for the said islands of St. Bartholomew and St. Thomas, and directed the captain of the "*Arabella*," after finishing his trading at Barbadoes, to proceed to St. Bartholomew and St. Thomas, for the purpose of obtaining information in regard to the state of the market, and on other subjects at those islands, with the view of forming his opinion upon the speculation he proposed to enter into by the said ship "*Alice*" from New York to those islands. The "*Arabella*" arrived at Barbadoes on the 5th March, 1817, where she discharged her cargo, and received on board a quantity of sugar, with which she sailed for New York on the 4th of April following, intending to call at St. Bartholomew's and St. Thomas's, two of the Leeward Islands, in her way to New York. In the course of this voyage, after having passed the islands of St. Bartholomew and St. Thomas, she was lost off Savannah. When the ship sailed from Barbadoes, on the 4th of April, her objects of trade were at an end, until she should arrive at New York, and she proceeded to the island of St. Bartholomew and St. Thomas only to obtain information for the purpose before stated.

Littledale, for the plaintiff, contended that the going to the islands of St. Bartholomew and St. Thomas was no deviation. Here is an

express leave given to touch at all or any of the Windward or Leeward Islands. Under that liberty the vessel had a right to go to the islands in question. And, besides, the intelligence obtained there might probably have some effect on her ultimate destination.

F. Pollock, contra, after citing *Rucker v. Allnutt*, 15 East, 278, and *Langhorn v. Allnutt*, 4 Taunt. 519, was stopped by the court.

ABBOTT, C. J. This calling at the islands of St. Bartholomew and St. Thomas was for a purpose wholly unconnected with the voyage in question. If, as it was said, the intelligence to be obtained there would be likely to have altered the destination of the ship, the question would be different. But the contrary is expressly stated in the case; for it is stated that it had reference to some new adventure to be subsequently undertaken in another vessel. I think, therefore, that this being a calling for a purpose entirely unconnected with the voyage was, notwithstanding the words in the policy, a deviation, and that the plaintiff is not entitled to recover.

Per curiam,

*Judgment for the defendant.*¹

PALMER v. MARSHALL.

COMMON PLEAS, 1832. 8 Bing. 317.

POLICY of insurance effected January 28th, 1831, on the "Ruby" yacht of thirty-seven tons, at and from Bristol to London. The yacht, which was lying in the float at Bristol at the date of the policy, did not sail till the 17th of May, and was lost in the Channel three or four days after. In an action on the policy, the case having gone down to a new trial,² PARK, J., at the Dorchester Assizes, nonsuited the plaintiff, on the ground of an implied deviation or variance of the risk, by an unreasonable delay in the time of sailing. It having been agreed that the plaintiff should stand in the same position as if the question had gone to the jury with a strong direction on the part of the judge,

Bompas, Serjt., now moved for a new trial, on the ground that the judge ought not to have nonsuited, or to have directed a jury that there had been a variance of the risk by unreasonable delay. There had, in fact, been no variance of the risk; unless, indeed, to lessen it. The vessel was described in the policy as a yacht; the underwriter was bound to be conversant with the usage as to different classes of vessels; and if so, with usage as to yachts, which is, to sail only in the summer. As yachts do not go to sea in the winter, the delay from January to May was not unreasonable. And it is clear the risk was not varied, — which

¹ *Acc.* : *Solly v. Whitmore*, 5 B. & Ald. 45 (1821).

See *Rucker v. Allnutt*, 15 East, 278 (1812). — Ed.

² At earlier stages the case is reported in 8 Bing. 79 (1831) and 155 (1832). — Ed.

is the real question, *Mount v. Larkins*, 8 Bingh. 195, — for the defendant would not have required a higher premium if May had been named for the time of sailing instead of January.

TINDAL, C. J. This was an insurance on the “Ruby” yacht, at and from Bristol to London. The policy bore date the 28th of January, 1831, and the vessel remained in the float at Bristol from the date of the policy till the 17th of May, when she sailed on her voyage, and was shortly afterwards lost. A policy effected in these terms, and in this shape, implies that the voyage insured shall be very shortly commenced, or is, at all events, in the near contemplation of the parties; and when we see that, in the present instance, the voyage was not commenced till the middle of May, we are bound to say that the delay was unreasonable unless it be accounted for. No doubt, whether there has been unreasonable delay or not, is properly a question for a jury; and I take it up, therefore, as if it had been left to the jury, with a strong direction that the delay here was unreasonable. What I have to consider, therefore, is whether any facts have been stated by the plaintiff to account for this delay. I find none suggested, beyond the circumstance that this vessel was described as a yacht upon the policy, and that yachts are usually laid up in the winter. But if the plaintiff meant to rely on that, he should have taken a policy adapted to his purpose. He might have insured his vessel *in port* for a definite time and on the voyage to be commenced afterwards; instead of that, he adopts a form of policy from which the underwriter must have understood that the vessel would sail within a reasonable time. Here the vessel lies by for more than three months, during which, in addition to the risk of the voyage, the underwriter is exposed to the risk of every accident which may happen in port. Where the delay is unexplained and so great as to fix it with the character of unreasonableness in the mind of every reasonable person, the strongest direction to the jury, and a verdict for the defendant, would be fully justified.

PARK, J. I am astonished at the argument which has been used today. There never was so clear a case. The risk on a policy at and from Bristol attaches *at Bristol*, and the language of the policy implies, that if the vessel be ready for sea, she shall sail without delay, unless the delay be accounted for. Here the vessel was lying in the float; and the circumstance of her being a yacht does not constitute any exception to the general rule. If the owner proposed that she should sail only in the summer, he should have insured accordingly, “in port and at sea.” After the risk has attached, it lies on the assured to show why he did not sail; and I offered to leave the question of delay to the jury, with a strong direction, when it was agreed that the plaintiff should be nonsuited, standing in the same position with respect to the present motion as if the point had been so left to the jury. However, there is nothing in the case. The risk attached at Bristol; and the plaintiff not having insured “in port and at sea,” as he might have done, has given no reason for his delay in proceeding to sea.

GASELEE, J. I am of the same opinion. The yacht being afloat at Bristol ought, according to the policy, to have sailed without delay.

ALDERSON, J. Upon a policy like this, a delay in sailing, in order to be justified, must be a delay incurred for the purpose of the voyage; as in *Langhorn v. Allnutt*, 4 Taunt. 511, where it was necessary to wait for the purpose of procuring simulated papers, without which the voyage could not be performed; or in *Raine v. Bell*, 9 East, 195, where the vessel waited for the purpose of taking in provisions. But here the vessel was afloat; no reason connected with the voyage is assigned for her remaining in port; and the risk of the underwriter is materially changed. Instead of the risk of a voyage performed within a reasonable time after the 28th of January, the plaintiff has substituted the risk of lying in the port of Bristol more than three months, and a voyage at a different time.

*Rule refused.*¹

¹ See *Smith v. Surridge*, 4 Esp. 25 (1801); *Grant v. King*, 4 Esp. 175 (1802); *Lawrence v. Sydebotham*, 6 East, 45 (1805); *Palmer v. Fenning*, 9 Bing. 460 (1833); *Phillips v. Irving*, 7 M. & G. 125 (1844).

In *Chitty v. Selwyn*, 2 Atk. 359 (1742), Lord HARDWICKE, C., said: "When a ship is insured at and from a place, and it arrives at that place, as long as the ship is preparing for the voyage, upon which it is insured, the insurer is liable; but if all thoughts of the voyage are laid aside, and the ship lies there five, six, or seven years, with the owner's privity, it shall never be said that the insurer is liable; for it would be very absurd to make him suffer for the whim or caprice of the owner, who chooses to let the ship lie and rot there."

In *Coffin v. Newburyport M. Ins. Co.*, 9 Mass. 436, 447-449 (1812), SEDGWICK, J., for the court, said: "A deviation is a voluntary departure, without necessity or reasonable cause, from the regular and usual course of the voyage insured. This discharges the underwriters from the time of the deviation. And any unnecessary delay during the course of the voyage, whether at sea or in port, is tantamount to a deviation, and followed by the same consequence. And the reason, on which these principles are founded, is that it is understood, as a part of the contract of insurance, that the voyage insured is to be prosecuted in the usual and ordinary route, and the business of it attended to, at least, with ordinary diligence. But an intention to deviate, however deliberately formed, is not a deviation. . . . The shortness of the time, or the distance of a deviation, makes no difference, as to its effect on the contract. Whether for one hour or one month or for one mile or one hundred miles, the consequence is the same. If it be voluntary and without necessity, it puts an end to the contract."

In *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383 (1827), where a policy insured goods on a ship at and from Alexandria to St. Thomas and two other ports in the West Indies and back to her port of discharge in the United States, SPOFFORD, J., for the court, said: "The next question is, whether the delay at St. Thomas for seventy days was not so unreasonable as to constitute a deviation. Without question, any unreasonable delay in the ordinary progress of the voyage avoids the policy on this account. But what delay will constitute such a deviation depends upon the nature of the voyage and the usage of the trade. It may be a very justifiable delay, to wait in port and sell by retail, if that be the course of business, when such delay would be inexcusable in a voyage requiring or authorizing no such delay. The parties, in entering into the contract of insurance, are always supposed to be governed in the premium by the ordinary length of the voyage and the course of the trade. That delay, therefore, which is necessary to accomplish the objects of the voyage according to the course of the trade, if *bona fide* made, cannot be admitted to avoid the insurance. In the present case it is proved, that the stay at St. Thomas was solely for the purpose of selling the cargo, and for no other cause. But, it is said, that a sale might have taken place at St. Thomas of the whole cargo, if the orders of the owner had not contained a

LAPHAM ET AL. v. THE ATLAS INSURANCE COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1833. 24 Pick. 1.

ASSUMPSIT on a policy of insurance on the schooner "Edward" at and from Boston to port or ports in the West Indies, and at and thence to a port of discharge in the United States. Trial before SHAW, C. J.

The vessel sailed from Boston to the port of Aux Cayes in St. Domingo, thence to the port of Savannah in Georgia, and thence to Boston, and the loss alleged was occasioned by her striking the rocks and going ashore at Scituate, near the entrance of Boston harbor, on the passage from Savannah to Boston.

It was in evidence, that when the vessel arrived at Aux Cayes, the master, being unable to sell his outward and procure a homeward cargo in convenient time, determined to take in a cargo of logwood, and proceeded to Savannah for the purpose of disposing of it, and if he should do direction to the master limiting the sale at St. Thomas to the price of eight dollars, and that this limitation was the sole cause of the delay, and was unreasonable; that the master ought, under the circumstances, to have sold at a lower price, or have immediately elected to go to another port. We are of a different opinion. In almost every voyage undertaken of this nature, where different ports are to be visited for the purposes of trade, and to seek markets, it is almost universal for the owner to prescribe limits of price to the sales. Such limitations have never hitherto been supposed to vary the insurance, or the rights of the party under it. It cannot be, that the master, if entitled to go to a single port only, is bound to sell at whatever sacrifice, as soon as he arrives at that port, and within the period at which he may unload, and sell, and reload a return cargo. He must, from the very nature of the case, have a discretion on this subject. If he arrives at a bad market, he must have a right to wait a reasonable time for a rise of the market, to make suitable inquiries, and to try the effect of partial and limited sales. He is not bound to sell the whole cargo at once, whatever be the sacrifice, and thus frustrate the projected adventure. In short, he must exercise in this, as in all other cases, a sound discretion for the interest of all concerned; and if it be fairly and reasonably exercised, it ought not to be deemed injurious to rights secured by the policy. It is as much the true interest of the owner to sell in a reasonable time, and with all proper despatch, as it is for the underwriters. To be sure, if the owner should limit the price to an extravagant sum, or the master should delay after all reasonable expectations of a change of market were extinguished, such circumstances might properly be left to a jury to infer a delay amounting to a deviation. And here, again, as on the former point, it may be remarked, that every underwriter is presumed to know the ordinary course of the trade, and to regulate his proceedings accordingly."

In *Mount v. Larkins*, 8 Bing. 108, 122 (1831), TINDAL, C. J., for the court, said: "It must be admitted that, if the policy had been effected upon this ship at and from Singapore, the ship then being at Singapore, unreasonable and unjustifiable delay at Singapore would have avoided the policy. Why, but because the voyage, commenced after an unreasonable interval of time, would have become a voyage at a different period of the year, at a more advanced age of the ship, and, in short, a different voyage than if it had been prosecuted with proper and ordinary diligence; that is, the risk would have been altered from that which was intended by all parties when the policy was effected?" — ED.

so, then to return to Aux Cayes and take on board the proceeds of his original outward cargo; that the vessel sustained some damage in her sails, on her passage from Aux Cayes to Savannah; that on her arrival at Savannah, the master, after inquiring the state of the market, and without discharging any part of his cargo or breaking bulk, determined to proceed to Boston; and that after procuring some repairs and supplies, he sailed accordingly.

Upon these facts it was contended by the defendants, that by the true construction of the policy, the risk terminated at Savannah, and that for any loss happening afterwards they were not responsible.

But the jury were instructed, that upon this policy the port of destination was not necessarily the port of discharge; and that in case no part of the cargo was discharged at the port of destination, the vessel was protected by the policy in going from one port of the United States to another, if done in good faith, as a port of discharge; and that if such was the case with the "Edward," the risk continued to the time when the loss happened. To these instructions the defendants excepted.

It was further in evidence, that the vessel took on board, at Savannah, a deck-load of forty bales of cotton for Boston, on freight. Thereupon it was contended, that as by the terms of the policy no port of the United States was contemplated as a loading port, the taking of this cotton on board was, 1, an alteration of the risk; or 2, an increase of the risk; or 3, that it occasioned a delay amounting to a deviation; and that upon one or all of these grounds, the risk terminated at Savannah by taking the cotton.

The jury were instructed, that the master had a right, without affecting the policy, to stop a reasonable time at Savannah to obtain necessary repairs and supplies for the further prosecution of his voyage, and also to make full and extensive inquiries of the state of the market there, and form his judgment deliberately whether he would discharge his cargo there or proceed to Boston, and that a delay for these purposes, pursued in good faith and with reasonable diligence, was not a deviation; that the taking on board the deck-load of cotton was not such an alteration in the risk as would necessarily discharge the underwriters, and that it would not have this effect unless it in fact increased the risk, to the injury of the underwriters, or occasioned a delay in the voyage; but that if it did in fact increase the risk, or if any delay was occasioned, either to procure the freight of cotton or to take it on board and secure it, the underwriters were discharged.

In relation to the question, whether there was an increase of the risk, by taking a deck-load of cotton, several of the nautical witnesses had stated what in their opinion would be the advantages and disadvantages of that measure, considering the season of the year and other circumstances; in relation to which the jury were instructed, that the question was, whether on the whole the risk was in fact increased by taking the deck-load, upon a balance of advantages and disadvantages; and that it

did not vacate the policy, although it did increase the risk in one particular, if it diminished it in another in an equal or greater degree. To this instruction the defendants excepted.

In the course of the examination of nautical witnesses upon the question, whether taking the deck-load of cotton increased the risk, either by rendering the vessel less stiff and less secure under a heavy press of sail, or by preventing her from holding as good a wind and making as good a course on a lee shore, or by embarrassing the operations of the vessel and exposing the men to greater danger, or otherwise, the plaintiffs proposed to ask the witnesses whether it was usual for certain species of vessels to carry a deck-load. This question was objected to by the defendants, on the ground that as the policy did not cover a voyage from Savannah to Boston, they were not bound by the usage, if one existed. But it was ruled that to some purposes the evidence of general usage was admissible; and upon this subject the jury were instructed, that if the voyage insured had been from Savannah to Boston, the usage to take a deck-load, if proved, would have been conclusive on the underwriters, because they would be presumed to have made their contract in reference to the known usage of the voyage, and to have adjusted the premium accordingly; that such usage therefore would of itself have little tendency to show that it did not increase the risk; but that in the present case the risk to the vessel, of carrying a deck-load or other freight from one port in the United States to another, was not contemplated as part of the contract, nor covered by the premium, and it could be excused only on the ground that it did not in fact increase the risk, and therefore the evidence of usage was not binding or conclusive; but that if the usage of carrying a deck-load upon this species of vessels, in various kinds of navigation, and in different seasons of the year, was common and general, it might lead to a belief, in connection with the evidence of opinion, that it is considered among practical persons conversant with navigation as no more dangerous to the vessel to carry goods on deck than under deck, and to this extent it was competent evidence, but no further.

The questions whether the risk was increased by taking the cotton at Savannah, and whether the vessel was thereby delayed, were left to the jury upon the evidence produced on both sides.

The jury found a verdict for the plaintiffs; and upon inquiry being made, they stated that they were fully satisfied that the risk was not increased by taking the deck-load of cotton from Savannah to Boston.

If, in the opinion of the whole court, the foregoing directions, or any one of them, were wrong, a new trial was to be granted; otherwise judgment was to be rendered for the plaintiffs.

Fletcher and Cooke, for the defendants.

C. G. Loring, *contra*.

Per curiam. The defendants contend that the voyage was terminated at Savannah; and the first question to be considered is, whether

that port was "a port of discharge in the United States," according to the true construction of the policy. And in determining the question we are aided by decisions of this court and of other courts, cited by the counsel for the plaintiffs. The authority upon which they principally rely is the case of *Coolidge v. Gray*, 8 Mass. 527. There, goods on board a vessel were insured from Boston to her port of discharge in Europe. The policy stated, that the vessel, though cleared for Tonningen, was intended for some port in Holland, or wherever else the master should deem proper, in case he could not get into Holland. The master entered the river Maese, but being informed that his vessel and cargo, if discovered by the French guards, would be seized and confiscated, he left the river and went to Gottenburg, where he remained a few days, in order to ascertain at what port he might sell his cargo, and he then proceeded for a market in the Baltic, and was captured. It was made a question whether Gottenburg was not the port of discharge; but it was held, that the master had a right to obtain advice, at his port of arrival, respecting the markets, and having informed himself, to proceed elsewhere, and that the underwriters were answerable for the loss. The court there say, that if the master had broken bulk or begun to unlade at Gottenburg, that must have been deemed the port of discharge. It is difficult to distinguish between the case referred to and the one now before us. That case has never been questioned, we believe, but it has been frequently discussed, and its principles adopted in other States. *King v. Middletown Ins. Co.*, 1 Conn. 184; *King v. Hartford Ins. Co.*, 1 Conn. 333; *Sage v. Middletown Ins. Co.* 1 Conn. 239. We think, then, upon the true construction of the policy now in question, that the voyage did not terminate at Savannah, and that the master had a right to proceed to another port, and that the loss is within the policy.

It appears that while the vessel was at Savannah, the master took on board forty bales of cotton on freight; and this, it is urged, released the defendants from their responsibility. But it has been settled by this court, that the mere fact of putting goods on board a vessel at a port where she has a right to touch, if it neither increase the risk nor occasion delay, does not discharge the underwriters. *Thorndike v. Boardman*, 4 Pick. 471; *Chase v. Eagle Ins. Co.*, 5 Pick. 51. The questions whether the risk was increased, and whether any delay was occasioned by procuring and taking on board the cotton, were rightly left to the jury, and they have found for the plaintiffs.

The circumstance of carrying the cotton on deck, if it did not increase the risk, would not of itself avoid the policy. Many witnesses were examined in regard to the effect of a deck-load, upon the safety of the vessel, and evidence was introduced that it was customary for this species of vessels, in various kinds of navigation and at different seasons of the year, to carry goods on deck. This evidence was objected to by the defendants. The usage was not admitted in evidence for the purpose of giving a construction to the contract. In that view it would

have been competent, if the contract had been made in reference to it. But it was introduced merely as to the question, whether in point of fact the risk was or was not increased by taking the cotton on deck. It does not seem to have been very material, but we cannot perceive that it was altogether irrelevant. We are of opinion that it was not incompetent evidence.

The defendants further objected, that the jury were instructed to consider, whether on the whole the risk was increased by taking the deck-load, upon a balance of advantages and disadvantages. We think the language of the instruction was incapable of being misunderstood by the jury, and that it was substantially right. The counsel for the defendants have animadverted upon the use of the word *increased*, and have argued that if the risk is *changed*, the underwriters are discharged. This view of the subject, however, is too limited, for any alteration in the cargo may be said to change the risk in some degree. But the real question was, whether the vessel was practically exposed to greater danger than if the cotton had not been taken on deck.

Judgment on the verdict.

BROWN AND OTHERS v. TAYLEUR.

KING'S BENCH, 1835. 4 Ad. & E. 241.

ASSUMPSIT on a policy of insurance. On the trial before Lord DENMAN, C. J., at the sittings in London after Trinity term, 1834, it appeared that the insurance was upon goods and merchandise, and also upon the body, tackle, &c., of and in the ship "Penrith," "lost or not lost, at and from her port of lading in North America, to Liverpool;" beginning the adventure upon the goods from the loading thereof on board, &c. A total loss was proved; but, upon the case for the plaintiffs, Sir *James Scarlett*, for the defendant, contended that there had been a deviation. The evidence on this point was as follows:—

The "Penrith" was launched at Cocagne, in the province of New Brunswick, at the end of June, 1828. Her burden was 510 tons. A few days after she was afloat, she began to take in a cargo of timber at Cocagne, and she continued to do so for three weeks. The lower hold, which would contain from 400 to 500 tons, was loaded at Cocagne. During this time the vessel was described, in evidence, as lying "in the stream, inside of the Cocagne bar." On the 1st of August, she sailed from thence to Buktouche, described by different witnesses as five, and seven, miles distant, to complete her loading. She arrived there in a few hours. Cocagne and Buktouche are situate on different creeks of the same bay. Buktouche is not in the line of voyage from Cocagne to Liverpool. The "Penrith" lay off Buktouche three weeks

to take in the residue of her cargo, and returned to Cocagne on the 22d of August to receive provisions, water, and wood, and to get the ship ready for sea; but she took no additional cargo, unless (which was mentioned as doubtful) a few pieces of timber on the deck. She sailed for England on the 31st of August, and was lost on the voyage. Cocagne was spoken of by witnesses as a "harbor" and a "port," and Buktouche as a "port," but neither had a custom-house, though there were officers of customs at both places, and it appeared that both were within the jurisdiction of the custom-house of St. John, New Brunswick. The "Penrith," though built at Cocagne, was registered at the port of St. John.¹ The letter ordering the insurance was dated August 25th, 1828.

The LORD CHIEF JUSTICE gave leave to move to enter a nonsuit on the objection taken, and the plaintiffs had a verdict. In the following term a rule *nisi* was obtained for entering a nonsuit, or for a new trial upon grounds which it is unnecessary to notice, as the decision of the court did not turn upon them.

Sir *J. Campbell*, Attorney-General, *Wightman*, and *Crompton* now showed cause.

Maule and Sir *W. W. Follett*, *contra*.

LORD DENMAN, C. J. I think that the rule for a nonsuit must be absolute. It was clear, on the close of the evidence for the plaintiffs, that Cocagne and Buktouche were two distinct places, and two places at each of which there might be a lading. There was no technical meaning to be attached to the words "port of lading." If it could have been shown that the two places were in reality one, the plaintiffs should have produced evidence to that effect. My only doubt was, whether there should have been a nonsuit, or whether the defendant should have been called upon to give evidence on the subject; but as the plaintiffs themselves have made out a *prima facie* case of distinctness, I think the defendant is entitled to a nonsuit.

PATTESON, J. I am of the same opinion. We cannot construe the words "at and from her port of lading," as if they were "at and from her ports;" the expression used points out one single place. Nor can we adopt the technical meaning which may be ascribed to "port," as signifying all that is subject to one custom-house, or one port jurisdiction; the result of which would be that a ship, under such a policy as this, might sail to every part of a district so situated. The cases which explain the meaning of the word "port," as here used, are not many. There is one,² where a brigantine was insured to Barcelona, and at and from thence, and two other ports in Spain, to a port in

¹ It appears, on reference to a map, that St. John is on one side, Cocagne and Buktouche on the other, of the neck of land which joins New Brunswick to Nova Scotia. St. John is on the Bay of Fundy. Cocagne and Buktouche are in the Gulf of St. Lawrence, each at the mouth of a river. The distance from St. John to Cocagne by land appears to be about one hundred miles, in a direct line. — *REP.*

² The Sea Insurance Company of Scotland v. Gavin, 4 Bligh, n. s. 578; s. c. 2 Dow & Clark, 125. — *REP.*

Great Britain; and she put into a place situate in the recess of a bay, having a custom-house and port captain, and having also warehouses and a jetty, with accommodation for small vessels only, there being, however, convenient anchorage for large ones in the roadstead; and the ship having been lost in the roadstead, this was held to be a port within the meaning of the policy. Here, I think that "port" means the same as place, and that the vessel's place of loading must be one place. When she had once begun to take her cargo at Cocagne, that was her place of lading, and her removal afterwards to Buktouché was a deviation. The cases of insurance at and from Jamaica,¹ and Grenada,² do not apply. There the words used would comprehend all places in the island. If the policies in those cases had said "at and from her port of lading in Jamaica," or Grenada, the commencement of the voyage would have been restricted to one particular place. That the two places here are within the jurisdiction of a single custom-house, makes no difference. If that entitled the ship to go from one to the other, she might also have gone to St. John. In construing the word "port" as the place of lading, I do not mean to say that, if a ship were at a particular quay on a river, as at Liverpool, and merely removed to another quay a mile or two off, that would be a deviation, because the vessel there would be all the time in one port and place; but it is a deviation if she removes to a different town, a different place of habitation, and a point which might itself be her place of lading. As to the date of the letter, the policy would attach when the vessel began to load; and if an unknown loss had happened before the writing of the letter, it would be covered by the policy. I think that there ought to be a nonsuit, because further evidence could not have altered the state of facts, or if it could, the plaintiffs should have offered it when a nonsuit was applied for.

WILLIAMS, J. The word used in the policy is "port" of lading, in the singular number: we cannot construe that as ports. And the moment the taking in of the cargo was begun at Cocagne, that was to be considered as the port of lading designated. Had evidence been given that, for purposes of this kind, Cocagne and Buktouché formed in fact only one place, the case would have been different. But if, by means of the construction attempted, places at a distance from each other can be included under the term "port of lading," what rule of restriction can be laid down? May the places be fifty or a hundred miles apart? "Jamaica" and "Grenada," in the cases which have been referred to, signified the whole of those islands. It would have been a violence there to limit the meaning of the policy to a single port. Here, nothing warrants the extension insisted upon.

COLERIDGE, J. There must be a nonsuit in this case, unless we are prepared to say that "port" is equivalent to "ports," or to "port or

¹ *Bond v. Nutt*, 2 Cowp. 601 (1777); and *Cruickshank v. Janson*, 2 Taunt. 301 (1810). — ED.

² *Warre v. Miller*, 4 B. & C. 538 (1825); s. c. 7 D. & R. 1. — ED.

ports." The plaintiffs must contend that it is an aggregate term, comprehending every member of a port, together with the chief port itself. But I think we are not at liberty here to construe the word with reference to custom-house regulations, but must consider it merely as indicating a place. Looking at it in this way, can we regard "port" as an aggregate term, comprehending a number of neighboring places? I think not, and for this reason among others, that it makes a difference in the risk whether a ship stays at one place to load, or goes on a roving voyage to pick up a cargo. It is important in these matters that parties should come to a plain understanding; and if it is meant that a vessel should have the liberty of going to a number of places, though near each other, the party insuring had better express it so, than run a risk, at least, of deceiving the underwriters.

*Rule absolute for a nonsuit.*¹

GREENLEAF AND OTHERS, APPELLANTS, v. THE ST. LOUIS
INSURANCE COMPANY, RESPONDENT.

SUPREME COURT OF MISSOURI, 1865. 37 Mo. 25.

APPEAL from the St. Louis Circuit Court.

T. T. Gantt and *J. H. Rankin*, for appellants.

Glover & Shepley, for respondent.

WAGNER, J. This was an action on a policy of insurance for five thousand dollars effected in the St. Louis Insurance Company on the hull of the steamer "A. McDowell."

The insurance was for one year, beginning on the 4th day of April, 1862, and ending on the 4th day of April, 1863. The policy contained the following clause: "With permission to navigate the Mississippi and Ohio rivers and their tributaries, usually navigated by boats of her class, the Missouri, Arkansas, White, Red, and Yazoo rivers excepted."

At the trial the following facts were agreed upon by both parties:

1. That the policy described in the petition was executed by the insurance company.

2. That on the 24th of May, 1862, the "McDowell" left St. Louis on a voyage to Leavenworth, Kansas, and returned to St. Louis on the 1st day of June, 1862.

3. That said voyage was undertaken entirely for the United States Government, the vessel having no freight except three hundred soldiers and two hundred mules and horses.

¹ See *National Traders Bank v. Ocean Ins. Co.*, 62 Me. 519 (1871); *Fernandez v. Great Western Ins. Co.*, 48 N. Y. 571 (1872); *Hearne v. Marine Ins. Co.*, 20 Wall. 488 (1874). — ED.

4. That full notice of her arrival and departure on this trip was given by advertisement in the "Daily Missouri Republican," a paper taken daily by the defendant.

5. That no damage was done to said vessel by said voyage, and that she returned in a good and seaworthy condition to the port of St. Louis.

6. That no other act of the plaintiffs, except said voyage, is set up by the defendant to defeat this action.

7. That before the "McDowell" went into the Missouri River on said voyage, the owners had a consultation about the expediency of obtaining insurance on said vessel in the Missouri River, during said voyage, but they finally concluded to take the risk themselves for that voyage. It is insisted, in support of the judgment of the court below, that the policy contained a warranty that the vessel should navigate none of the excepted streams; and also that in going into the Missouri River the boat had been guilty of a deviation.

If either of these positions be true, it is fatal to the appellants. Every affirmation of a fact contained in a policy, in whatever terms expressed, will be construed as a warranty. (2 Duer on Ins., 644.) Designating a ship as of a certain nationality, describing her as containing a certain armament, or as being fitted out in a particular manner, will amount to a warranty that the vessel is of the national character ascribed to her, and that she has the armament or outfit described; and whether these matters are material or immaterial, as regards the risk, will make no difference. The first question to be determined in interpreting the clause in the policy is to ascertain the true intention of the parties to the instrument; and here it is to be considered that the provision or exception being in writing, and being the especial words of the insurers, if there is any ambiguity or uncertainty, the construction must be most strongly against or unfavorable to them. (2 Par. on Marit. Law, 55.) From a careful perusal and examination of the exception, we are of opinion that it does not constitute a warranty.

This was a time policy, and a policy *on time* insures no specific voyage, but covers any voyage within the prescribed time. It is of the nature of a policy on time that it limits the vessel to no geographical track, and deviation is therefore not predicable of it. (Bradlie v. Md. Ins. Co., 12 Pet. 378; Union Ins. Co. v. Tyson, 3 Hill, 118; Keeler v. Fireman's Ins. Co., 3 Hill, 250.)

In *Yeaton v. Fry* (5 Cranch, 335), the policy of insurance was for a specific sum on the brig "Richard," "at and from Tobago to one or more ports in the West Indies, and at and from thence to Norfolk," and the insurance was declared to be made against all risks, blockaded ports and Hispaniola excepted." The vessel sailed from Tobago to a blockaded port, but without a knowledge of the blockade, and was turned away, and afterwards, on her voyage back to Norfolk, was captured by a French privateer. Chief Justice Marshall delivered the

opinion of the court, and held that the words, "all blockaded ports," &c., could not be construed as a warranty on the part of the insured, but were the words of the insurers, and must be considered as an exception from the general risks of the policy.

In a policy of insurance on time containing the following clause, "excluding, during the term, all ports and places in Mexico and Texas, also the West Indies, from July 15 to October 15, 1839, each at noon,"—and the vessel sailed from New York for and arrived at St. Iago de Cuba within the excluded period, and was lost on her return in December following, — it was decided that the underwriters were liable, the loss not happening within the excepted period, and the clause in the policy not being an exception or exclusion of voyages, but only a suspension of the risk during such time as the vessel should be at the excepted ports. (*Palmer v. Warren Ins. Co.*, 1 Sto. 360.)

Now, the "McDowell" made her trip in the Missouri River in the latter part of May, and was destroyed by fire in the subsequent October. It is admitted that while prosecuting her voyage in the Missouri River she received no damage or injury whatever that in any wise conduced to her destruction. The permission in the clause is to navigate the Mississippi and Ohio rivers and their tributaries, excepting the Missouri and others, during the term of one year.

The language here does not amount to a prohibition, or a condition, or a warranty. The words without the exception would embrace all the tributaries of the above-mentioned rivers. The exception has the effect of restraining or suspending the liability of the underwriters in a certain event. If the intention had been that the policy should be defeated by making voyages on any of the excepted rivers, that intention would have been expressed. But if there is any doubt about it, that exception being made by the parties for their own benefit to relieve themselves from a risk which they otherwise would have incurred, the doubt is to be resolved against them. The policy did not amount to a prohibition or warranty against navigating the excepted rivers, on the part of the assured, but to a suspension of the risk during the period the boat was so employed.

This is not like the case of *Stevens v. Conn. Mut. Ins. Co.*, 6 Duer, 594. There the policy of insurance, on which the action was founded, contained a warranty that the vessel insured should not use any port or ports in the Gulf of Mexico, and there was a plain breach of the warranty on the part of the assured.

The judgment is reversed, and, as there is no disagreement about the facts, judgment will be entered in this court for the appellants.¹

HOLMES, J., concurs; LOVELACE, J., absent.

¹ *Acc* : *Wilkins v. Tobacco Ins. Co.*, 30 Ohio St. 317 (1876).

See *Ellery v. New England Ins. Co.*, 8 Pick. 14 (1829); *Hennessey v. Manhattan F. Ins. Co.*, 28 Hun, 98 (1882).

Compare *Company of African Merchants v. British and Foreign M. Ins. Co.*, L. R. 8 Ex. 154 (Ex. Ch., 1873). — ED.

BURGESS v. EQUITABLE MARINE INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1878. 126 Mass. 70.

CONTRACT on a policy of insurance, dated June 20, 1874, against perils of the seas, whereby the defendant company insured, "lost or not lost, B. A. Hathaway, for Sylvanus W. Burgess, twenty-three hundred dollars, loss, if any, payable to Sylvanus W. Burgess, on schooner 'Christie Johnstone;' eight hundred dollars on great generals; three hundred and fifty dollars on small generals; three hundred and fifty dollars on advance to crew on board said schooner, at and from Plymouth to Banks, codfishing, and at and thence back to Plymouth; risk to commence June 13, 1874, at noon." The rate of the premium was 3-4 per cent per month, the premium note given was for \$114, and the vessel was valued at \$2,500. The policy was indorsed "expires with voyage." Answer, a deviation.

Trial in this court, before GRAY, C. J., who reported the case for the consideration of the full court, in substance as follows:

The plaintiff introduced evidence tending to show the following facts: The vessel sailed from Plymouth on June 13, 1874, on a cod-fishing voyage to the Banks, in a seaworthy condition, with four barrels of clam-bait, which was the usual quantity of bait taken by vessels of her class on such a voyage. For several years past it has been the practice of such vessels not to take enough bait to last for the entire trip, but to rely principally on catching squid on the Banks, and to use them for bait; and for several years prior to 1874 squid have been plenty on the Banks, but in 1874 they were very scarce.

After fishing on the Banks for three weeks, and having exhausted nearly all his bait, the master of the vessel, solely for the purpose of procuring bait, went to St. Peter's, the nearest practicable port where bait could be obtained, there procured bait, and then sailed from St. Peter's to the Banks, and resumed fishing. To reach the port of St. Peter's, the vessel sailed about one hundred and ten miles from the fishing-ground. She left the fishing-ground on Thursday, reached St. Peter's on Saturday; and, having procured bait there, left St. Peter's on Tuesday following, and then sailed for another Bank, where she arrived and resumed her fishing on the next Thursday. On August 6, 1874, while so fishing on the Banks, the vessel encountered a severe gale, sprung a leak, and was totally lost, with all the property on board.

The defendant requested the judge to rule that these facts amounted in law to a deviation. The judge declined so to rule, but ruled as follows: "If the vessel left Plymouth with the usual amount of bait for the kind of fishing in which she was to engage, and, by an unexpected failure of bait of the kind ordinarily taken on the fishing-ground,

it became necessary for her to go into port to procure bait, and she went to the nearest practicable port for that purpose, such going into port was not, as matter of law, a deviation."

The defendant consented to a verdict for the plaintiff, subject to the opinion of the full court upon the question whether, as matter of law, there had been a deviation. If, in the opinion of the court, the going to St. Peter's for bait was a deviation which discharged the insurer, the verdict was to be set aside, and judgment entered for the defendant; otherwise, judgment for the plaintiff on the verdict.

J. C. Dodge, for the defendant.

J. Lathrop and *A. Mason*, for the plaintiff.

ENDICOTT, J. By the terms of the policy the vessel was insured "at and from Plymouth to the Banks, cod-fishing, and at and thence back to Plymouth." This is a definite and distinct description of the contemplated voyage between two fixed termini. The Banks are named as the outward terminus, and while there engaged in cod-fishing, and until her return to Plymouth, the vessel was covered by the policy. The language used is not open to the construction that it was the intention of the parties to insure her while prosecuting the adventure elsewhere, or doing what was necessary to make it successful outside and beyond the prescribed limits. A voyage is the sailing of a vessel from one port or place to another port or place, and the purpose for which it is to be conducted, whether as a trading, freighting, or fishing voyage, is often mentioned in policies of insurance. But this designation cannot vary or extend the description, route, or termini of the voyage, as named in the policy, unless some usage, connected with the particular trade or adventure, is shown to exist. No evidence was offered of a usage in such voyages to leave the Banks and go into port for bait. So far as the evidence reported discloses any usage in that regard, it appears that for some years it had been the practice to carry out a limited amount of bait, and to rely upon obtaining an additional supply on the Banks. Such being the practice to obtain bait on the Banks, when the supply taken out was exhausted, a departure from the Banks for that purpose could not have been contemplated by the parties in making the policy. We have, therefore, a definite description of the voyage in the policy, and a usage that does not extend its provisions. The question decided in *Friend v. Gloucester Ins. Co.*, 113 Mass. 326, arose upon a clause in a policy prohibiting a fishing vessel from sailing on a voyage east of Cape Sable after a certain date, and throws no light upon the construction to be given to the words of this policy. The decision in "*The Tarquin*," 2 Lowell, 358, turned upon the construction of the shipping articles of seamen, and not of a policy of insurance.

We are therefore of opinion that the vessel, by leaving the Banks and going to St. Peter's for bait, departed from the voyage described in the policy, and the only question to be determined is whether, in law, there has been a deviation which avoids the policy.

It may be stated in general terms that the assured is protected by his policy while the vessel pursues the usual and customary course of the voyage; but any departure from the course, or delay in prosecuting it, without necessity or just cause, is a deviation, and discharges the insurer, because another voyage has been voluntarily substituted for that which was insured. Whether the degree or period of the risk is increased is unimportant, as the assured has no right to substitute a different risk. Whenever, therefore, there is a manifest departure from the course of the voyage, the assured must show that it was justified by the necessity of the case. *Stocker v. Harris*, 3 Mass. 409, 418; *Brazier v. Clap*, 5 Mass. 1; *Coffin v. Newburyport Ins. Co.*, 9 Mass. 436, 449; *Kettell v. Wiggin*, 13 Mass. 68.

In the case at bar, the alleged necessity arose from scarcity of bait. The plaintiff did not put on board, when the vessel sailed from Plymouth, enough for the entire trip. Squid had been plenty on the Banks during several years prior to 1874, and the plaintiff relied upon catching them there and using them for that purpose. They happened this season to be very scarce, and, after fishing three weeks and nearly exhausting his supply, the master sailed for St. Peter's, over one hundred miles distant, procured bait, and returned to the Banks after an absence of a week. It is to be observed that this so-called necessity did not arise from any peril insured against in the policy, or ordinarily insured against in policies of insurance, and did not involve the safety of the vessel, or of any property on board; it had relation solely to the success of the fishing adventure, and in this the defendant had no interest, and had assumed no responsibility.

We are of opinion that the claim of the plaintiff cannot be sustained; and that a necessity to justify the departure in this case cannot be found in the fact that, without going to St. Peter's for bait, the voyage would have failed to be successful or profitable to the plaintiff.

The strictness with which the courts have held the insured to the route named in the policy is illustrated by the cases already cited, and by many others cited at the argument. *Dodge v. Essex Ins. Co.*, 12 Gray, 65; *Middlewood v. Blakes*, 7 T. R. 162; *Brown v. Tayleur*, 4 A. & E. 241; *Fernandez v. Great Western Ins. Co.*, 48 N. Y. 571; *Merchants' Ins. Co. v. Algeo*, 32 Penn. St. 330. But the question to be determined here is, what is the nature and extent of the necessity or just cause which will warrant a departure from the route.

In this connection it may be well to refer to the necessities which clearly justify a departure. There is no deviation when the master is compelled by force either to depart from his route, or delay its prosecution by the acts of his crew (*Elton v. Brogden*, 2 Str. 1264; *Driscoll v. Passmore*, 1 B. & P. 200; *Driscoll v. Bovil*, 1 B. & P. 313); or where he is detained by those in authority, or taken out of his course by a ship of war. *Scott v. Thompson*, 1 N. R. 181. In *Phelps v. Auldjo*, 2 Camp. 350, a master was ordered to sail out and examine a vessel in the offing by a captain of a king's ship, and, it appearing that he com-

plied without remonstrance or threat of force, it was held to be a deviation. In cases of this description there must be a *vis major*, compelling a departure or delay, which excuses the master. So where the master is obliged to leave his course, or delay by stress of weather or other peril of the sea, or to go into port to repair or refit, or to remain or recruit his crew disabled by sickness or reduced by casualties, or to avoid capture or to join convoy in time of war, there is no deviation. It is unnecessary to cite all the cases which fall within these exceptions; many of those relied on by the plaintiff are clearly within them. *Dunlop v. Allan*, Millar on Ins., 414; *Green v. Elmslie*, Peake, 212; *Clark v. United Ins. Co.*, 7 Mass. 365. The case last cited is put upon the express ground that the ship was prevented by causes insured against from proceeding on her route, and the departure was from necessity. See also *Folsom v. Merchants' Ins. Co.*, 38 Maine, 414.

Nor is the departure from the route for the purpose of saving human life a deviation; nor is a policy avoided when the ship goes out of her course to obtain necessary medical assistance for those lawfully on board. *Bond v. Brig Cora*, 2 Wash. C. C. 80; *Perkins v. Augusta Ins. Co.*, 10 Gray, 312. In this class of cases the justification does not rest on the same ground as in those previously noticed. It is allowed from motives of humanity, and cannot be extended to the saving or protection of property. In all other cases the necessity must be a real and imperative necessity affecting the vessel, such as actual force preventing the master from exercising his will, peril of the sea, danger of capture, want of repair, disability of the crew, or unseaworthiness, occurring under such circumstances that the master, acting upon his best judgment for the interest of all parties, has no alternative, and is forced to leave his route, or delay its prosecution.

When the departure is caused by such a necessity, the change of route in no respect alters the insurance, because the course of a sea voyage must at times be necessarily subject to extraordinary perils of the sea, and contingencies beyond the control of the master, and in the presence of which he is forced to succumb; and when they occur, and he is obliged to depart from the usual course of the voyage, there is no deviation in the legal sense of the term, for the departure is the necessary incident of the route named in the policy as prosecuted at the time by the ship. The probability of such occurrences is well understood; they are known perils of the voyage, and enter into the ordinary contract of marine insurance. And when the master, compelled by the necessity, does that which is for the benefit of all concerned, the act is within the intention of the policy as much as if expressed in terms. It would be practically impossible to state in the policy all the perils which might arise in a sea voyage and excuse departure from the route; and therefore, by the rules of interpretation applicable to this species of contract, the policy is held by implication to include them. See *Greene v. Pacific Ins. Co.*, 9 Allen, 217, 219. In such a

policy as this, the necessities justifying a departure, in the absence of usage, from the route, and a visit to a port not named, are those which are caused by some peril occurring in the prosecution of the voyage within the limits named in the policy, and not those which arise in the prosecution of the business for which the voyage was undertaken.

It is true there is a class of cases much relied on by the plaintiff, where the test is whether the ship at the time of the alleged deviation was pursuing the object and business of the voyage. But those are cases of delay, where the ship was at the port or place named or permitted in the policy. The permission in a policy to go to certain ports or places must always be construed in reference to the purpose of the voyage. *Williams v. Shee*, 3 Camp. 469; 1 Arnould on Ins., §§ 141, 142. Any delay for the prosecution of other business, or any unreasonable delay in prosecuting the business of the voyage at such port, is a deviation. *African Merchants' v. British Ins. Co.*, L. R. 8 Ex. 154. But if the delay was necessary in order to accomplish the objects of the voyage, and was reasonable under the circumstances of the case, then there is no deviation. *Columbian Ins. Co. v. Catlett*, 12 Wheat. 383; *Phillips v. Irving*, 7 Man. & Gr. 325. In other words, if the ship is at a place permitted, the delay shall not be a deviation, if it is necessary in the proper prosecution of the business of the voyage. But this test cannot be applied to a departure from the route to a port not named or permitted for the purpose of the adventure. In all trading voyages, for example, the ship is confined to the ports or coasts named in the policy, and she cannot depart to other places simply because she may better prosecute the trade elsewhere. If the departure from the route to insure the success of the adventure can be justified as a necessity, it would be difficult to state any limit to the privilege, or to the duration of the insurance, and, in the absence of permission to do so in the policy, it cannot be implied. See *Kettell v. Wiggins*, 13 Mass. 68; *Robertson v. Columbian Ins. Co.*, 8 Johns. 491. The plaintiff's vessel might have delayed for any reasonable time upon the Banks for the purpose of fishing or getting bait without being guilty of deviation; and would have been protected by the policy, even without proof of usage, because fishing was the purpose of the voyage, and she could properly prosecute it within the route named in the policy. *Noble v. Kennoway*, 2 Doug. 510, 513. But she could not go beyond or away from the route for that purpose.

The illustration put by the defendant's counsel is apposite: "If a vessel insured to Havana and back should learn, before entering the port, that there was no cargo there with which she could be loaded, no one would say that her policy protected her in going to the nearest port where a cargo could be had." Other illustrations may be given. If a vessel insured to a particular port, having letters of credit, should find on arrival that the parties on whom they were drawn had failed, she could not go to another port for funds, and return for her cargo, and be protected by her policy. If fish had been scarce on the Banks in

1874, it would hardly be contended that the vessel could have gone to other fishing-grounds to fish, although not more distant than St. Peter's, and yet, if she was justified by necessity in leaving to obtain bait at St. Peter's, and to return in order to make the trip successful, it would be difficult to hold that the same necessity would not allow her to fish elsewhere.

In the argument of the plaintiff's counsel no case was cited which sustains the position he has assumed, and we are not aware of any case which goes to this extent.¹ . . . If the master had failed to find bait at St. Peter's, the same necessity would have justified him in visiting port after port until he found it.

As in the opinion of the court the trip to St. Peter's was a deviation which discharged the insurer, by the terms of the report there must be
*Judgment for the defendant.*²

¹ Here were discussed *Greene v. Pacific Mutnal Ins. Co.*, 9 Allen, 217 (1864), and *Stocker v. Harris*, 3 Mass. 409 (1807). — Ed.

² See the authorities cited *ante*, p. 440, n. 1.

On deviation in general, see also:—

Bond v. Nutt, 2 Cowp. 60 (1777);
Delany v. Stoddart, 1 T. R. 22 (1785);
Way v. Modigliani, 2 T. R. 30 (1787);
Driscoll v. Bovil, 1 B. & P. 313 (1798);
Brazier v. Clap, 5 Mass. 1 (1809);
Clark v. United F. & M. Ins. Co., 7 Mass. 365 (1811);
Oliver v. Maryland Ins. Co., 7 Cranch, 487 (1813);
Inglis v. Vaux, 3 Camp. 437 (1813);
Graham v. Commercial Ins. Co., 11 Johns. 352 (1814);
Warre v. Miller, 4 B. & C. 538 (1825); s. c. 7 D. & R. 1;
Bottomley v. Bovill, 5 B. & C. 210 (1826);
Samuel v. Royal Exchange Assurance Co., 8 B. & C. 119 (1828);
Hamilton v. Sheddon, 3 M. & W. 49 (1837);
Lockett v. Merchants' Ins. Co., 10 Rob. La. 339 (1845);
Parsons v. Manufacturers' Ins. Co., 16 Gray, 463 (1860);
McCall v. Sun Mutual Ins. Co., 66 N. Y. 505 (1876);
Snyder v. Atlantic Mutnal Ins. Co., 95 N. Y. 196 (1884);
Schroeder v. Schweizer, L. T. V. Gesellschaft, 66 Cal. 295 (1885);
Thebaud v. Great Western Ins. Co., 155 N. Y. 516 (1898). — Ed.

SECTION I. (*continued*).

(B) UNSEAWORTHINESS.

OLIVER v. COWLEY.

. NISI PRIUS, 1765. 1 Park Ins. 8th ed. 470.

AN action was brought by an innocent shipper of goods (no part owner of the ship) against the underwriter, and the policy was effected on goods in the "Amy and Laetitia" at and from Montserrat to London. It appeared that the ship sailed the 26th of July, and the next day without any bad weather she was very leaky and obliged to run for St. Thomas', one of the Virgin Islands, where she was unloaded, and the goods, being much damaged, were sold. It could not but be allowed on all sides, that the ship was not seaworthy to undertake the insured voyage; and it was agreed and admitted by defendant that the shipper of the goods was a stranger to it when the goods were shipped. The plaintiff was nonsuited, Lord MANSFIELD saying, that the implied warranty could not be dispensed with in any case; that it was a point of law, and if the plaintiff's counsel thought there was any ground to go upon he would save the points: but the plaintiff's counsel declined this, being satisfied the question was clear against them.¹

¹ Compare *Koebel v. Saunders*, 17 C. B. n. s. 71 (1864). See *Daniels v. Harris*, L. R. 10 C. P. 1 (1874).

In *Christie v. Secretan*, 8 T. R. 192, 198 (1799), LAWRENCE, J., in speaking of "an implied warranty of seaworthiness," said: "The latter is implied from the nature of a contract of insurance. The consideration of an insurance is paid in order that the owner of a ship which is capable of performing her voyage may be indemnified against certain contingencies; and it supposes the possibility of the underwriter gaining the premium: but if the ship be incapable of performing her voyage, there is no possibility of the underwriter's gaining the premium; and if the consideration fail, the obligation fails."

In *Burges v. Wickham*, 3 B. & S. 669, 690-691 (1863), BLACKBURN, J., commenting upon the foregoing passage from LAWRENCE, J., said: "But nothing in that case depended on the question what were the elements to be taken into account in determining what amounts to seaworthiness; and the language of LAWRENCE, J., was not chosen with a view to express any opinion on that point. And it seems clear that a mere capacity of performing the voyage, and earning the premium, is not sufficient to constitute seaworthiness. As a matter of fact a vessel, though far from seaworthy, may, and often does, successfully perform her voyage, and so proves in one sense capable of performing it, whilst a seaworthy vessel may, and often does, perish without any extraordinary accident. We must, therefore, look for some other criterion to determine what constitutes seaworthiness." — ED.

FORBES AND ANOTHER v. WILSON.

NISI PRIUS, 1800. 1 Park Ins. 8th ed. 472.

WHERE a policy of assurance was effected on the ship "Henry," "at and from Liverpool to the coast of Africa," it appeared that, at the time the policy was made, the ship was not in a condition to go to sea, but was, in fact, at the time undergoing very material repairs; and it was contended by the underwriters that as the risk described was "at" as well as "from," if the ship was not seaworthy, from whatever cause, when the policy was subscribed, it was void; and that any repairs done afterwards, so as to make her completely seaworthy at the time of sailing, would not cure that defect. But Lord KENYON was of opinion that under the words "at and from" it is sufficient if the ship be seaworthy at the time of sailing, for, from the nature of the thing, the ship, while at the place, probably must be undergoing some repair.¹ The plaintiffs had a verdict, and no motion was made to set it aside.

¹ In *Smith v. Surridge*, 4 Esp. 25 (Nisi Prius, 1801), Lord KENYON, C. J., said: "The policy was *at* and from *Pillaw*. Such a policy, *at* and from a place, attached on the ship while she was undergoing repairs. It was not necessary that she should be seaworthy at the time of the insurance."

In *Hibbert v. Martin*, 1 Park Ins. 8th ed. 473 (Nisi Prius, 1808), Lord ELLENBOROUGH, C. J., said as to *Forbes v. Wilson*: "I agree with the doctrine of that case: it is quite sufficient if the state of the ship be commensurate to her then risk. There may be a seaworthiness sufficient while in harbor; and there is a state of seaworthiness for the voyage."

In *Tidmarsh v. Washington F. & M. Ins. Co.*, 4 Mason, 439 (1827), STORY, J., charging the jury, said: "The standard of seaworthiness has been gradually raised within the last thirty years, from a more perfect knowledge of shipbuilding, a more enlarged experience of maritime risks, and an increased skill in navigation. In many ports, sails and other equipments would now be deemed essential, which at an earlier period were not customary on the same voyages. There is also, as the testimony abundantly shows, a considerable diversity of opinion, among nautical and commercial men, as to what equipments are, or are not, necessary. Many prudent and cautious owners supply their vessels with spare sails and a proportionate quantity of spare rigging; others do not do so, from a desire to economize, or from a different estimate of the chances of injury or loss during the same voyage. Of course, different men may well therefore come to different conclusions from the same premises, on a point like this, from their own habits of life, and the general custom of the place to which they belong."

In *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, 183-184 (1828), STORY, J., for the court, said: "There is no doubt that every ship must, at the commencement of the voyage insured, possess all the qualities of seaworthiness, and be navigated by a competent master and crew. . . . The argument assumes that the ship ought not to have got under way, or proceeded into the offing, until the master and all the crew necessary, not for that act, but for the entire voyage, were on board. If the law were so, we have no means of ascertaining what crew was actually on board at the time. . . . But we are far from being satisfied that the law has interposed any such positive rule as the argument supposes. Seaworthiness in port, or for temporary purposes, such as mere change of position in harbor, or proceeding out of port, or lying in the offing, may be

PARMETER v. COUSINS.

NISI PRIUS, 1809. 2 Camp. 235.

THIS was an action on a policy of insurance on ship and freight, valued at £1,200, at and from St. Michael's, or all or any of the Western Islands, to England.

The ship met with very tempestuous weather on her outward voyage; and when she arrived at St. Michael's she was so leaky that the crew were obliged to work at the pumps spell and spell. She was then quite in an unfit state to take in a cargo, and there being no harbor in the island, she was in great danger from the storm, which still continued. In fact, after lying at anchor above twenty-four hours, she was blown out to sea and was wrecked.

Park, for the plaintiff, contended that the underwriters were clearly answerable for a loss so happening. The policy being *at* as well as *from*, attached the moment the ship cast anchor at St. Michael's; and at any rate she had lain there twenty-four hours, so that the outward risk had completely expired. The objection of want of seaworthiness when properly considered was without any foundation. The ship, on her arrival at St. Michael's, was unfit to commence the homeward voyage; but this was unnecessary. It was enough if she was fit for the voyage, when the voyage commenced. One state of seaworthiness was required while she remained *at*, and another when she sailed *from*, the place. This distinction had been settled by Lord Kenyon, *Forbes v. Wilson*, *Park*, 299 n. *Marsh*, 155. *Smith v. Surridge*, 2 Esp. 25 S. P., and recognized by Lord Ellenborough, *Hibbert v. Martin*, Sitt. after M. T. 1808. If it were not allowed, the policies on the homeward voyage would in almost every instance be vitiated; as it seldom happens that a ship on her arrival at the outward port wants no repairs, but is in a condition immediately to take in the homeward cargo. If, in this case, the policy on the outward voyage had expired, and the policy on the homeward voyage had not attached, how was the ship-owner to secure himself an indemnity during the whole course of the adventure?

LORD ELLENBOROUGH. What we have to consider here is, whether the underwriters on this ship, at and from St. Michael's to England, be liable for a loss happening in the manner that has been described? And

one thing; and seaworthiness for a whole voyage, quite another. A policy on a ship, at and from a port, will attach, although the ship be at the time undergoing extensive repairs in port, so as, in a general sense, for the purposes of the whole voyage, to be utterly unseaworthy. What is a competent crew for the voyage; at what time such crew should be on board; what is proper pilot ground; what is the course and usage of trade in relation to the master and crew being on board, when the ship breaks ground for the voyage; are questions of fact, dependent upon nautical testimony; and are incapable of being solved by a court, without assuming to itself the province of a jury, and judicially relying on its own skill in maritime affairs." — ED.

I am clearly of opinion that they are not. To be sure, while the ship remains *at* the place, a state of repair and equipment may be sufficient, which would constitute unseaworthiness after the commencement of the voyage. But while in port, she must be in such a condition as to enable her to lie in reasonable security till she is properly repaired and equipped for the voyage. She must have once been *at* the place in good safety. If she arrives at the outward port so shattered as to be a mere wreck, a policy on the homeward voyage never attaches. Such is the present case. I do not remember any one like it; but the principles on which it must be decided are perfectly well established.

Plaintiff nonsuited.

Park and Richardson, for the plaintiff.

The *Attorney-General*, *Garrow*, *Scarlett*, *Barrow*, and *F. Pollock*, for the defendant.

FORSHAW v. CHABERT.

COMMON PLEAS, 1821. 3 B. & B. 158.¹

ASSUMPSIT on a policy of insurance on the ship "Hope" and goods, "at and from her port or ports of lading in Cuba, to Liverpool," with liberty "in that voyage to proceed and sail to, and touch and stay at, any ports or places whatsoever; and with leave to discharge and take in at any ports or places she might touch at, without prejudice to that insurance." At the trial, before DALLAS, C. J., at the London sittings after last Trinity Term, it appeared that, subsequently to the subscription of the policy by the different underwriters, the words "with leave to call off Jamaica" had been inserted in the body of it after the word "Liverpool." All the underwriters, except the defendant, on being applied to, sanctioned this interpolation by writing their initials in the margin of the policy opposite to the words inserted, and required no additional premium. The defendant, being ill and absent from London, was not applied to for this purpose. There were two counts in the declaration, on the policy in question, the first, setting out the policy, with the words interpolated; the other, setting it out as it originally stood.

The captain, having lost some of his outward-bound crew by sickness and desertion at Cuba, and finding it impossible there to engage ten men for Liverpool, sailed from Cuba with a crew composed of eight men engaged for Liverpool, and two for Montego Bay in Jamaica. He then proceeded to and touched at Montego Bay, for the sole purpose of landing the two men (who refused to proceed further), and of procuring others to supply their place. Having effected both these objects, he sailed from Montego Bay; and the ship, while in the prosecution of her

¹ s. c. 6 Moore, 369. — ED.

homeward voyage, was lost. It was proved that ten men were a sufficient crew to navigate such a vessel as the "Hope" to England, and that the captain had no fraudulent purpose in touching at Montego Bay. Some of the witnesses said the touching at Jamaica increased the risk, and others denied this. It was objected, on the part of the defendant, that the alteration in the policy was material, and rendered it void; that the touching at Montego Bay was a deviation; and that the ship, having sailed from Cuba with an insufficient crew, was not seaworthy when she broke ground (eight men only being there engaged for England). But the jury found a verdict for the plaintiff, and that the captain put into Montego Bay for a justifiable cause, even though there had been no alteration in the policy.

Taddy, Serjt., on a former day, having obtained a rule *nisi* to set aside this verdict, and instead thereof to enter a general verdict for the defendant, or to have a new trial, on the grounds of objection above stated.

Hullock, Serjt., now showed cause against the rule.

Taddy, in support of the rule.

DALLAS, C. J. This is an objection to which one feels disposed very reluctantly to yield, for it is an objection against the justice of the case. All the other underwriters were applied to for their consent to the alteration of the policy, and gave that consent; thereby saying for themselves (of all persons the best qualified to form a judgment on the subject) that this alteration occasioned no increase of risk; but, unfortunately for the assured, no such application was made, as far as this individual underwriter was concerned; and though, undoubtedly, he would have been applied to if he had been in the way, and probably would have added his initials to the others, yet, as he has not done so, he contends he is not bound. However, we must decide on legal grounds, and the question then will be, whether the ship was or was not seaworthy at the time of sailing? Here, it must be observed, that the voyage insured was not a voyage from London to Cuba and back again from Cuba to London, in other words, a voyage out and home, but a voyage from Cuba to Liverpool, and that the words added to the policy were, "with leave to call off Jamaica," thereby showing that, in the opinion of the party who added them, liberty to touch at Jamaica was not within the terms of the original contract. Now it is clear that a ship must be seaworthy at the time when she sails; the assured warrants that, and whatever physical necessities may interpose, he is not allowed to deviate from the strict terms of his warranty. It is clear, too, that what was done by the captain in the present case was done without fraud and for the best; he went from Cuba to Montego Bay for the sole purpose of procuring more men: was he justified in doing this or not? If he had a sufficient crew for the voyage at Cuba, then this was an increase of risk; he had no right to go circuitously; and the touching at Montego Bay would thus be a deviation without necessity. Take it the other way, that he had ten men, a sufficient crew for the

voyage, but only eight of them engaged for Liverpool and two for Montego Bay, and that he went to Montego Bay to procure two others to supply the places of those who were to leave him, then the ship was not seaworthy when she sailed from Cuba, because the captain ought then to have had ten men for Liverpool, and not eight for Liverpool and two for Montego Bay. Either the ship was not seaworthy at the time of sailing, or there has been a deviation. The jury found that the captain put in to Montego Bay for a justifiable cause, even though there had been no alteration in the policy; but I go on the circumstance that the ship had not a sufficient crew at the time she sailed, and that the insurance had no inception, because the ship was not seaworthy at the time of sailing. The only way in which the defendant could be liable, he having subscribed a policy without the words "with leave to call off Jamaica" (a policy by which the assured was bound to go direct from Cuba to Liverpool), would have been by a loss happening in that direct course; so that a question would arise, whether the defendant could be liable in this case on his original contract, even though nothing had been done which could affect that contract: but here there is an alteration in the body of the policy.¹ . . .

First, then, the ship was not seaworthy at the time of sailing; and, secondly, there has been a material alteration of the policy; and on these grounds the defendant is entitled to have his rule made absolute.

PARK, J. It is with extreme reluctance that I agree in both points in the decision which has been pronounced, because the resistance in this case appears to be most unjust; but whatever feelings may arise on the occasion, we must keep our minds free from prejudice, and decide according to law. . . . This, therefore, is clearly a material alteration. As to the other point, I am now of opinion, though I was not so when I came into court, that this vessel must be considered to have been not seaworthy. Was she at the time she sailed seaworthy for her whole voyage? She had ten men, a crew sufficient in number, but only eight of them were engaged for the whole voyage; and if the captain might start with so imperfect a crew, and might supply the deficiency, as he did afterwards, he might equally be entitled to make a voyage from port to port, instead of a voyage direct from Cuba to Liverpool.

BURROUGH, J. . . . I am clearly of opinion that there has been a material alteration here. . . .

As to the other point, the ship sailed, it is true, with ten men from Cuba, but eight of them only were engaged for Liverpool: can it be said, then, that she sailed with a proper crew for the whole voyage? The captain was bound to have a proper complement when he started; and, as he failed in this, I am clearly of opinion that the ship was not seaworthy.

RICHARDSON, J. The first point to be considered is, whether there was in this case any valid contract on which the plaintiff could sue;

¹ In reprinting the opinions passages dealing with alteration have been omitted.—
ED.

and I am bound by the decisions to be of opinion that there has been here a material alteration which has avoided the policy as to the defendant. . . . I give no opinion on the point whether, in this instance, the ship was seaworthy at the time of her sailing.

Rule absolute.

DIXON v. SADLER.

EXCHEQUER, 1839. 5 M. & W. 405.¹

ASSUMPSIT on a policy of insurance, dated Jan. 22, 1838, on the ship "John Cook," and cargo, at and from Jan. 17, 1838, until July 17, 1838, at noon, in port and at sea, at all times and in all places, being for the space of six calendar months. The pleadings and the procedure at the trial, before PARKE, B., are sufficiently stated below. A verdict was entered for the defendants on the second issue, the learned judge giving the plaintiff liberty to move to enter a verdict on that issue.

Alexander, having obtained a rule to enter a verdict accordingly, or for judgment *non obstante veredicto*.

Cresswell and *S. Temple* showed cause.

Alexander and *W. H. Watson*, *contra*.

Cur. adv. vult.

The judgment of the court was now delivered by

PARKE, B. In this case the defendant, to a declaration upon a time policy for six months, stating a loss by perils of the seas, pleaded three pleas, on each of which issue was joined. On the first and third, the verdict was found for the plaintiff; on the second, for the defendant. This plea stated, "that, though the vessel was lost by perils of the sea, yet that such loss was occasioned wholly by the wilful, wrongful, negligent, and improper conduct of the master and mariners of the ship, by wilfully, wrongfully, negligently, and improperly throwing overboard so much of the ballast that the vessel became unseaworthy, and was lost by perils of the sea, which otherwise she would have safely encountered and overcome." On a motion for judgment *non obstante veredicto*, it occurred to the court to be questionable whether the plea was not at all events bad, inasmuch as the terms of it did not exclude the case of a loss by barratry, for which the underwriters would be clearly liable, and that on this declaration; and, as the fact certainly was, that the crew were not guilty of barratry, it was very properly agreed that the plea should be amended by inserting the words, "but not barratrously," after the words, "negligently and improperly." And the plea, therefore, in its present shape, raises the question whether the underwriters are liable for the wilful but not barratrous act of the master and crew, in rendering the vessel unseaworthy before

¹ The statement has been rewritten.—ED.

the end of the voyage, by casting overboard a part of the ballast. The case was very fully and ably argued, during the course of the last and present term, before my brothers Alderson, Gurney, Maule, and myself. We have considered it, and are of opinion that the plea is bad in substance, and that the plaintiff is entitled to judgment, notwithstanding the verdict. The question depends altogether upon the nature of the implied warranty as to seaworthiness, or mode of navigation, between the assured and the underwriter, on a time policy. In the case of an insurance for a certain voyage, it is clearly established that there is an implied warranty that the vessel shall be seaworthy, by which it is meant that she shall be in a fit state as to repairs, equipment, and crew, and in all other respects, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it. If the assurance attaches before the voyage commences, it is enough that the state of the ship be commensurate to the then risk, *Annen v. Woodman*, 3 Taunt. 30; *Hibbert v. Martin*, Park on Insurance, Vol. I. p. 299, n., 6th edition. and, if the voyage be such as to require a different complement of men, or state of equipment, in different parts of it, as, if it were a voyage down a canal or river, and thence across to the open sea, it would be enough if the vessel were, at the commencement of each stage of the navigation, properly manned and equipped for it. But the assured makes no warranty to the underwriters that the vessel shall continue seaworthy, or that the master or crew shall do their duty during the voyage; and their negligence or misconduct is no defence to an action on the policy, where the loss has been immediately occasioned by the perils insured against. This principle is now clearly established by the cases of *Busk v. Royal Exchange Company*, 2 B. & Ald. 72; *Walker v. Maitland*, 5 B. & Ald. 171; *Holdsworth v. Wise*, 7 B. & Cr. 794; *Bishop v. Pentland*, id. 219; and *Shore v. Bentall*, id. 798, note; nor can any distinction be made between the omission by the master and crew to do an act which ought to be done, or the doing an act which ought not, in the course of the navigation. It matters not whether a fire which causes a loss be lighted improperly, or, after being properly lighted, be negligently attended; whether the loss of an anchor, which renders the vessel unseaworthy, be attributable to the omission to take proper care of it, or to the improper act of shipping it, or cutting it away; nor could it make any difference whether any other part of the equipment were lost by mere neglect, or thrown away or destroyed, in the exercise of an improper discretion, by those on board. If there be any fault in the crew, whether of omission or commission, the assured is not to be responsible for its consequences. The only case which appears to be at variance with this principle is that of *Law v. Hollingsworth*,¹ in which the fact of the pilot, who had been taken on board for the navigation of the river Thames, having quitted the vessel before he ought (under what circumstances is not distinctly stated), appears to have been held to vitiate

¹ 7 T. R. 160 (1797). — Ed.

the insurance. In this respect, we cannot help thinking that the case, although attempts were made to distinguish it in some of the decided cases, must be considered as having been overruled by the modern authorities above referred to; and that the absence, from any cause to which the owner was not privy, of the master or any part of the crew, or of the pilot, who may be considered as a temporary master, after they had been on board, must be on the same footing as the absence, from a similar cause, of any part of the necessary stores or equipments originally put on board. The great principle established by the more recent decisions is, that if the vessel, crew, and equipments be originally sufficient, the assured has done all that he contracted to do, and is not responsible for the subsequent deficiency occasioned by any neglect or misconduct of the master or crew; and this principle prevents many nice and difficult inquiries, and causes a more complete indemnity to the assured, which is the object of the contract of insurance. If the case, then, were that of a policy for a particular voyage, there would be no question as to the insufficiency of the plea; and the only remaining point is, whether the circumstance of this being a time policy makes a difference. There are not any cases in which the obligation of the assured in such a case, as to the seaworthiness or navigation of the vessel, is settled; but it may be safely laid down that it is not more extensive than in the case of an ordinary policy, and that, if there is no contract as to the conduct of the crew in the one case, there is none in the other. Here it is clear that no objection arises, on the ground of seaworthiness of the vessel, until that unseaworthiness was caused by the throwing overboard a part of the ballast, by the improper act of the master and crew; and, as the assured is not responsible for such improper act, we are of opinion that the plea is bad in substance, and the plaintiff entitled to our judgment.

*Rule absolute to enter judgment for the plaintiff
non obstante veredicto.*¹

¹ This judgment was affirmed in the Exchequer Chamber, *sub nom.* Sadler v. Dixon, 8 M. & W. 895 (1841), where TINDAL, C. J., for the court, said: "No stress was laid, in the course of the argument before us, upon any distinction to be taken between the implied warranty on the part of the assured as to the seaworthiness of the ship, in the case of a policy on a particular voyage, and of a time policy; nor do we think any such distinction can be held to exist; at all events, no distinction by which the obligation, on the part of the assured, in the case of a time policy, can be held to be increased or extended. . . . We think, upon the later authorities, the rule is established, that there is no implied warranty on the part of the assured for the continuance of the seaworthiness of the vessel, or for the performance of their duty by the master and crew during the whole course of the voyage."

See *Copeland v. New England M. Ins. Co.*, 2 Met. 432 (1841).

In *Thompson v. Hopper*, 6 E. & B. 172, 181 (1856), ERLE, J., in speaking of "the warranty of seaworthiness implied in a voyage policy," said: "When once fulfilled, so that the policy has attached, it is not always at an end. The case of a policy on ship at and from London on a whaling voyage to the North is almost too trite to be quoted; the warranty is for four gradations: fit for dock in London; fit for river to Gravesend; fit for sea to Shetland; then fit for whaling. The policy attaches if the ship is fit for dock; but the warranty is broken if the other stages of fitness are not completed." — ED.

GIBSON, PLAINTIFF IN ERROR, v. SMALL AND OTHERS, DEFENDANTS IN ERROR.

HOUSE OF LORDS, 1853. 4 H. L. C. 353.

IN this case an action had been brought in the Court of Queen's Bench by Small and Others v. Gibson, on a policy of insurance effected on the 27th of November, 1843, by them, as agents, for Antonio Hypolite Gigual, on the ship "the 'Susan,' lost or not lost, in port or at sea, in all trades and services whatsoever and wheresoever, during the space of twelve calendar months, commencing on the said 25th day of September, 1843, and ending on the 24th day of September, in the year 1844, both days included." Gibson pleaded four pleas, of which the second alone is material: "That the said ship or vessel, in the said declaration mentioned, was not, at the time of the commencement of the said risk in the said policy of assurance mentioned, nor at the making of the said insurance, nor on the said 25th day of September, in the year of our Lord 1843, in the said declaration mentioned, seaworthy, or in a fit and proper condition safely to go to sea; but, on the contrary, was wholly unseaworthy;" verification. Replication *de injuriâ*, and issue thereon.

At the trial of the cause at the London Sittings after Trinity Term, 1848, it appeared that, about the beginning of September, 1843, the ship sailed from Madras for the Mauritius, with 288 coolies on board; encountered very bad weather, and put into Trincomalee, which place the captain was ordered to quit or to go into quarantine, as the small-pox was reported to be on board his vessel. He preferred the former alternative, and determined to try to return to Madras, in order to get repaired. He encountered bad weather on the voyage, and the vessel became still more damaged, but he arrived at Madras on the 25th of September; so that on the day on which the risk was to attach, the vessel was at sea, seriously injured, and endeavoring to make a port to get repaired. The necessary repairs could not be effected at Madras, and the captain therefore tried to reach Coringa, but met other misfortunes of a similar sort to those before experienced, and was obliged to put into Masulipatam. The coolies refused to stay on board any longer, the surveyors reported against the possibility of repairing the vessel, except at a very considerable expense, and finally it was sold, and the owners gave notice of abandonment.

The jury returned a verdict for the defendant, finding "that the said ship or vessel in the said declaration mentioned was not, at the time of the commencement of the said risk in the said policy of insurance mentioned, nor at the making of the said insurance, nor on the said 25th day of September, 1843, in the declaration mentioned, seaworthy, or in a fit and proper condition safely to go to sea, but, on the contrary thereof, was at those times, and each of them respectively, wholly unseaworthy."

A motion was afterwards made to enter judgment for the plaintiff, *non obstante veredicto*, but the rule was discharged and judgment given for the defendant.¹ A writ of error was then brought in the Exchequer Chamber, where the judgment of the Court of Queen's Bench was reversed, and judgment was given for the plaintiff *non obstante veredicto*.² The case was then brought by writ of error to this House.

The judges were summoned, and Lord Chief Baron *Pollock*, Mr. Baron *Parke*, Mr. Baron *Alderson*, Mr. Justice *Maule*, Mr. Justice *Erle*, Mr. Baron *Platt*, Mr. Justice *Williams*, Mr. Justice *Talfourd*, and Mr. Baron *Martin*, attended.

The *Attorney-General* (Sir *F. Thesiger*) and Mr. *J. P. Wilde*, for the plaintiff in error.

Sir *F. Kelly* and Mr. Serjt. *Shee* (Mr. *Unthank* was with them), for the defendants in error.

The LORD CHANCELLOR³ proposed the following questions to the judges:—

1. Adverting to the record and proceedings in this case, is the policy subject to an implied condition or warranty that the ship was seaworthy?

2. If yea, then did the condition of seaworthiness mean that the ship was seaworthy at the time it commenced the voyage, or at the making of the insurance, or when the liability of the underwriters commenced, that is, on the 25th of September, 1843?

3. Are there any, and if any, what qualifications in regard to such seaworthiness in a case like this which would affect the rights of either party under the policy?

4. And, lastly, whether the plea is a valid plea in law in answer to the action?

Lord Chief Baron *Pollock*, on behalf of the judges, requested time to answer these questions. The request was acceded to.⁴

¹ Before COLERIDGE, WIGHTMAN, and ERLE, JJ. Reported *sub nom.* *Small v. Gibson*, 16 Q. B. 128 (1849). The opinion of the court, after a *cur. adv. vult*, was delivered by COLERIDGE, J. There was no dissent.—ED.

² Before MAULE, CRESSWELL, and TALFOURD, JJ., and PARKE, ALDERSON, and PLATT, BB. Reported *sub nom.* *Small v. Gibson*, 16 Q. B. 141 (1850). The opinion of the court, after a *cur. adv. vult*, was delivered by PARKE, B. There was no dissent.—ED.

³ Lord ST. LEONARDS.—ED.

⁴ The questions were proposed Dec. 10, 1852. The answers were delivered April 28, 1853. The case was decided June 3, 1853.

The answers have been omitted on account of their length.

All the questions were answered negatively by MARTIN, B., TALFOURD, J., PLATT, B., MAULE, J., ALDERSON, B., PARKE, B., and POLLOCK, C. B. Two of these judges indicated what, in their opinion, would be the condition or warranty of seaworthiness if any such condition or warranty were to be implied in a time policy, PLATT, B., saying that it would be "a condition or warranty of seaworthiness at the inception of any voyage concluded or begun during the term, and in which, during the term, the loss assured against might happen," and ALDERSON, B., saying that it would be "a warranty that in whatever situation or adventure the ship may be during the period insured, it shall, whenever it is in the owner's power by himself or his agents abroad

Lord ST. LEONARDS (having stated the nature of the case and the difference of opinion upon it among the judges in the courts below and in this House) said : —

The opinion of the majority of the judges is that which I entertained at the close of the argument, and it has not been shaken by the arguments

to make it so, be so fitted and repaired as to be able to withstand all the ordinary dangers to which it may, by that situation or in that adventure, from time to time be exposed."

WILLIAMS and ERLE, JJ., answered the first and fourth questions affirmatively and the third question negatively; and they agreed that Sept. 25, 1843, was the date upon which the ship must be seaworthy, WILLIAMS, J., saying, "I am of opinion that the policy is subject to an implied condition of seaworthiness, such condition meaning that the ship was seaworthy when the liability of the underwriters commenced," and ERLE, J., saying, "the condition of seaworthiness applied to the 25th of September," and "seaworthiness at any other time appears to me irrelevant."

The answers contained these passages : —

MARTIN, B. "It is an established rule of law that a written contract (subject to certain known exceptions) shall be taken to contain and express the entire contract between the parties. . . .

"The terms of your Lordships' questions import that no such condition or warranty is expressed in the policy itself; and there are not any words in it, except the words 'good ship,' from which such a warranty could possibly be implied. I am aware it has been said that these words authorize such an implication; but the learned counsel for the plaintiff in error did not so contend; and I think it clear that the word 'good,' as there used, is merely a description of the ship, and not a warrant of seaworthiness, which includes a proper supply of stores, the fitness and sufficiency of the master and crew, and several other matters to which the words 'good ship' have no reference whatever; and I think it may be stated with certainty that if such a warranty arises by implication, it must be by an implication of law, or one of that character, and not from any words in the policy. This was the argument on behalf of the plaintiff in error at your Lordships' bar, and it was contended that the seaworthiness of the ship was by legal implication a condition precedent to the contract attaching, and that it must be taken as agreed between the parties, that the subject-matter of the insurance was a seaworthy ship. There can be no doubt that such a case might fall within the exception as to written contracts before referred to, and that it might be alleged and proved as an addition to the written contract that such a warranty was understood and known to exist by all persons engaged in the business of underwriting. There is no such allegation or proof in the present case, which arises upon the question of a judgment *non obstante veredicto* (a proceeding substantially the same as a demurrer), on a plea in which no warranty is averred. I think, however, that if such an understanding or custom had been long notoriously prevalent, and had been adopted and acted upon in courts of law, your Lordships would take judicial notice of it without requiring any averment or proof in the particular case, and act upon and apply it in precisely the same manner as a rule of law."

ERLE, J. "My answer to the first question of your Lordships is in the affirmative, that the policy was subject to a condition that the ship was seaworthy. It appears to me that this condition is involved in all contracts of marine insurance, it being necessarily the basis of the calculation on which the insurer relies in fixing the amount of the premium he is to receive. That amount depends on the degree of risk; in other words, on the chance of the ship encountering the perils insured against with safety; and unless it is given, that the ship is in some degree fit to meet those perils, the loss is certain.

"As the word 'ship,' in common use, may denote either a mere frame, or a ship with its apparatus ready for sea; so, in marine policies, it may be construed to express either the mere structure of timber, or all that must be combined therewith to make it fit to perform service as a ship; and its meaning in different policies may be made to

of the two learned judges who supported the judgment of the Court of Queen's Bench. In a voyage policy, where the contract shows the nature

vary according to the different nature of the services required of the ships insured thereby ; and the contract, so construed, contains the condition that the ship insured has the degree of fitness for the service it is engaged in, which is expressed by seaworthiness ; it being now settled that the term 'seaworthy,' when used in reference to marine insurance, does not describe absolutely any of the states which a ship may pass through, from the repairs of the hull in a dock till it has reached the end of its voyage, but expresses a relation between the state of the ship and the perils it has to meet in the situation it is in ; so that a ship, before setting out on a voyage, is seaworthy, if it is fit in the degree which a prudent owner uninsured would require to meet the perils of the service it is then engaged in, and would continue so during the voyage, unless it met with extraordinary damage. I have not found a definition of the word, but I gather its meaning, as above explained, from the decisions turning upon it. According to this view, the condition is derived from the construction of the words of the instrument. But whether it is said to be derived from this source, or from implication of law, founded on the nature of the contract, I am of opinion that time policies are subject to it as well as voyage policies. If the question turns on the construction of the instrument, time policies may be taken to be identical with voyage policies in all the terms, except those relating to the measure of the duration of the insurance. This, in voyage policies, is measured by the motion of the ship : in time policies, by the motion of the earth. Each contract is for an indemnity, and each for a limited time ; and there seems no reason for holding that an alteration in the terms relating to the time should alter the effect of terms relating to the indemnity."

MAULE, J. : "It may be, perhaps, contended that in a time policy the assured does warrant that the ship is seaworthy at the commencement of every voyage which may be undertaken during the time for which the insurance is effected. . . . I am, however, of opinion, though with some hesitation, that there is no such warranty in such a policy as this, whatever might be the case in a policy differently worded. I think this policy resembles, in this respect, a policy on a ship on a voyage with leave to make intermediate voyages ; in which case there is no warranty of seaworthiness respecting the state of the ship at the commencement of the intermediate voyages, supposing it to have been seaworthy at the beginning of the whole adventure."

PARKE, B. : "The policy is a written instrument, which contains a number of express stipulations, but none on the subject of seaworthiness ; for the notion that it was involved in the term 'good ship' in policies is, I think, put an end to. . . .

"If, then, there is any such warranty or condition, it must be added to the written policy, as an incident annexed to the contract ; and that, either by the usage of trade or by the common law of the land ; from the nature of the policy itself, there is no other way in which it can be added.

"The custom of trade, which is a matter of evidence, may be used to annex incidents to all written contracts, commercial or agricultural, and others, which do not by their terms exclude it, upon the presumption that the parties have contracted with reference to such usage, if it is applicable.

"This is explained in the case of *Hutton v. Warren*, 1 M. & W. 475. But in this case there is no evidence stated on the record of such usage ; and none such can be supposed to exist, unless there is evidence of it.

"Such a condition may, however, be annexed as a necessary incident by the common law. . . .

"In the common law of England . . . there is ample authority that a warranty or condition of seaworthiness at the commencement of the risk is implied in all voyage policies, whether it has been adopted originally from the law merchant, or implied from the very nature of the contract itself. So other conditions are implied ; as, not to deviate from the usual course of the voyage — to commence it in a reasonable time, — to disclose all material circumstances ; and the non-performance of these conditions avoids the policy, whether it arises from fraudulent motives or not. . . .

of the adventure, from which the intent of the parties may be collected, the law implies a consideration of seaworthiness to perform the voyage. This has long been a settled rule; but no such rule has ever prevailed in regard to time policies. There being no such rule, I think your Lord-

"The only warranty, then, as to seaworthiness in a voyage policy, recognized by our law, is, according to all the authorities, that the vessel was seaworthy at the commencement of the voyage. But it is equally clear that there is no satisfactory decision, *dictum* of a judge, or authority of a text-writer, that there is any such warranty of seaworthiness at the commencement of the term in a time policy. . . .

"If, however, precisely the same principle applied to both the case of a voyage and a time policy, if they were exactly analogous in this respect, less positive authority might be required; and it might be thought that these, at best, slender authorities would be sufficient. Perhaps even without them such a condition might be implied, if the cases were similar; but they certainly are not. In a voyage policy, the owner of a ship has, generally speaking, the power to make the ship seaworthy at the commencement of the voyage. In the ordinary course of navigation he always does so for his own sake; he is bound to do so for the safety of his crew, and for the safety of the cargo placed on board; he contracts with every shipper of goods that he will do so. The shipper of goods has a right to expect a seaworthy ship, and may sue the shipowner if it is not. Hence, the usual course being that the assured can and may secure the seaworthiness of the ship, — either directly, if he is the owner, or indirectly, if he is the shipper, — it is by no means unreasonable to imply such a contract in a policy on a ship on a voyage, and so the law most clearly has implied it.

"It may happen indeed, in some cases, from the want of proper materials, of skillful artisans, of proper docks in the port of outfit, of sufficient funds or credit, or from the hidden nature of defects, that the owner may not be able to fulfil the duty of making the ship seaworthy at the commencement of the voyage; but the law cannot regard these exceptional cases, *Ad ea quæ frequentius accidunt jura adaptantur*; and it wisely, therefore, lays down a general rule, which is a most reasonable one in the vast majority of voyage policies, that the assured impliedly contracts to do that which he ought to do on and before the commencement of the voyage; that is, to make the ship seaworthy at the commencement of it, and in part, *quoad hoc*, in the preparation for it. The contract contained in the policy imposes on him no duties which were not incumbent on him before. But how different is in general the case of one who insures for a time! He does not necessarily know the position of his vessel at the commencement of the term; if the term commences whilst the vessel is absent from a port, he cannot generally speaking, cause it thus to be repaired; and no care or expense of himself or agent could secure that object. The ship may have lost anchor, or sails, or rudder; part of the crew may have deserted, or be dead of malignant fever. All these deficiencies, generally speaking, are such that no care or expense could have prevented or cured. How unreasonable, then, would it be for the law to hold that there was in every case added to a policy, which is silent on the subject, a condition which, in most cases, it would be impossible for the assured to fulfil!

"These considerations render a time policy essentially different from one on a ship. They are powerful arguments against implying a condition of seaworthiness by a party who generally has it not in his power to fulfil it; nor is it satisfactory to say that the condition ought to be implied in all cases where it actually is in the power of the party to fulfil it, for the law usually acts by general rules, and the maxim which I have quoted is clearly applicable. . . .

"I therefore come to the conclusion, from these premises, that there is not, in the case of a time policy, an implied warranty or condition that the vessel must be seaworthy at the commencement of the term insured. . . . I am equally clear that there is no implied warranty or condition that the ship insured shall be seaworthy at the date of insurance. . . . And, indeed, the expression in this policy, 'lost or not lost,' which means lost or not lost when the policy was effected, totally excludes all idea of an implied warranty or condition that the ship was then seaworthy." — ED.

ships cannot imply a condition in this case, where there is nothing on the face of the contract to warrant it.

Assuming the ship to be on a voyage when the time insured in a time policy begins, all analogy fails between the case of a voyage policy and a time policy; and the very argument in this case proves that seaworthiness is not an implied condition in a time policy, warranted by custom and allowed by law. In such a policy neither party can be supposed to know the state of the ship when the risk commenced, and therefore it will be unreasonable to imply a condition of seaworthiness at that period. In the case of a policy for a voyage the condition implied is, that the vessel is seaworthy at the commencement of the voyage, not that it shall continue so. If, therefore, a time policy effected upon a ship, then on a voyage, should be held to be subject to an implied condition in analogy to the other case, it would seem to follow that the underwriter who undertook to indemnify the assured for the period named must take the risk of the state in which the ship is from the beginning of that period, if the ship should be then at sea. A voyage policy would cover the voyage, and any unseaworthiness during the voyage could not affect the policy. A time policy effected during the voyage, for a period beginning while the ship is on the voyage, should, I think, at all events, be held to cast the risk on the underwriter just as he must have borne it at the period in question under a voyage policy. The analogy could not be carried further, if even the time contract declared that the ship was then on a particular voyage.

If the assured was guilty of any fraud or concealment, that would of itself avoid the policy, and therefore the condition contended for in time policies is not necessary to guard against fraud or concealment.

If the ship had been lost after the commencement of the risk, viz. the 25th of September, 1843, though that was before the date of the contract, the underwriter would have been liable by the terms of his contract. It is clear, therefore, that no condition of seaworthiness at the date of the contract can be implied. Such a condition, therefore, if to be implied, could, in this case, only be implied at the commencement of the voyage; but there was no allegation as to any unseaworthiness at the commencement of this particular voyage, and courts of justice must act upon a rule general in its application.

If, however, a ship was about to sail upon a particular voyage, and a time policy was effected, instead of a policy on the intended voyage, as at present advised, I think that a condition could be implied that the ship was seaworthy at the commencement of the voyage. But that is not this case. Any supposed difficulty on the part of underwriters may readily be obviated by the insertion in time policies of an express warranty of seaworthiness at the commencement of the risk. I do not trouble your Lordships with the state of the pleadings, because it is admitted that the contention of the plaintiff in error cannot be maintained unless there is an implied condition in every policy for time, like that in this case, wherever the ship may be, that it was seaworthy at the commencement of the risk or the date of the policy. No such condition

can, I think, be implied; and therefore I advise your Lordships to affirm the judgment of the Court of Exchequer Chamber.

LORD CAMPBELL. My Lords, I entirely agree in the opinion of my noble and learned friend who presided on the woolsack when this case was argued at your Lordships' bar, that the defendant in error is entitled to our judgment. The allegations in the plea of want of seaworthiness, although proved to the satisfaction of the jury, do not appear to me to constitute a defence to the action. I do not proceed upon the literal meaning of the word "seaworthy" which was contended for. Without regard to its literal or primary meaning, I assume it to be now used and understood to state that the ship is in a condition, in all respects, to render it reasonably safe where it happens to be at any particular time referred to, whether in a dock, in a harbor, in a river, or traversing the ocean.

The question raised by this record is, whether upon a policy of insurance on a ship for time, in the form of that set out in this declaration, there is an implied condition that when the policy ought to attach and the risk to commence the ship shall be seaworthy, that is to say, in a proper state of repair and equipment with reference to the situation in which it may then happen to be? It is incumbent on the underwriter, who here denies his liability, to show that in every time policy there is such a condition; for neither the declaration nor the plea discloses any facts from which the condition is to be implied in this case, if it is not to be implied universally.

There is no custom or usage of trade respecting time policies, which we can take notice of, which affirms the existence of such an implied condition; and after an examination of all the authorities which have been cited on the subject, I think it quite clear that there is none to guide us to declare that such an implied condition does exist. The two decisions mainly relied upon, of *Sadler v. Dixon*, 5 M. & W. 405, and 8 id. 895, and *Hollingworth v. Brodrick*, 7 Ad. & E. 40, have no application to the question of seaworthiness under a time policy at the commencement of the risk; and some casual expressions which may have dropped in those cases from learned judges, when this question was not at all under their consideration, are entitled to no weight. Nor do the American or Continental Jurists, on the present occasion, afford us any aid.

The underwriter is therefore driven to contend, that because in policies on ship "from," or "at and from" a specified port to another specified port, or back to the port of outfit (commonly called "voyage policies"), there certainly is such an implied condition, the same condition is to be implied in policies from a particular day to a particular day (commonly called "time policies"), without reference to the local situation of the ship when the risk commences or terminates.

With regard to voyage policies, we have usage and authority establishing the implied condition as certainly as any point of insurance law. These being wanting as to the extension of the doctrine to time policies, the reasoning must be, that as far as this condition is concerned, the

contract by time policies rests on the same principles, and that no distinction can be made between them. The condition may have been implied in voyage policies from considering that probably both the contracting parties contemplated the state of the ship when the risk is to begin, that this state must be supposed to be known to the shipowner, that he has it in his power to put the ship into good repair before the voyage begins; that to prevent fraud, and to guard the safety of the crew and the cargo, this obligation ought to be cast upon him before he can be entitled to any indemnity in case of loss; and, above all, that this implied condition in voyage policies is essentially conducive to the object of marine insurance, by enabling the shipowner, on payment of an adequate premium, and acting with honesty and securing reasonable diligence, to be sure of full indemnity in case the ship should be lost or damaged during the voyage insured; but time policies are usually effected when the ship is at a distance, the risk being very likely to commence when it is actually at sea. Under those circumstances, is it at all likely that either party would contract with reference to the actual state of the ship at that time with respect to repairs and equipments? The shipowner probably knows as little upon this subject as the underwriter. Any information which he has received tending to show that the ship is in extraordinary peril he is bound to disclose, or the insurance effected by him is void; but is it reasonable to suppose that he enters into a warranty or submits to a condition which may avoid the policy with respect to a state of facts of which he can know nothing? We must further consider that this condition, in many cases, he may have no power to perform. Above all, if this condition was implied in time policies, their object might often be defeated, and the shipowner, acting with all diligence, and with the most perfect good faith, might altogether lose the indemnity for which he had bargained.

Take as an example this policy, which is on the ship "Susan," from the 25th of September, 1843, to the 24th of September, 1844.

This vessel may have been employed on the South Sea fishery. It may have sailed from an island in the beginning of September, 1843, in all respects in a seaworthy state; but before the 25th day of that month may have encountered a gale of wind in which the sails may have been carried away, and other damage may have been sustained, and the master may have died of a malignant fever; but the ship touches at another island on the 26th of September, is completely re-equipped, takes on board a new master of competent skill, and prosecutes the adventure. Afterwards, and before the 24th of September, 1844, the ship may be crushed between two icebergs. For anything that appears on the record, such may have been the history of the "Susan;" and these facts are consistent with all the allegations in the declaration and in the plea. On this hypothesis the owner could not be indemnified, because the ship was not seaworthy when the risk was to commence; namely, on the 25th of September, 1843. If there is a condition — an implied condition — that the ship must then be seaworthy, the policy neither attached then nor at any subsequent time, and the

owner's only remedy would be to recover back the premium he had paid to the underwriters. Thus your Lordships are called upon to imply a condition which the parties could not have contemplated, which the assured had no power to perform, and which would effectually defeat the object of the contract. If the loss is caused by any culpable negligence of the shipowner, that may be a defence to the underwriter; but if the shipowner acts with good faith and reasonable diligence, it is surely much more according to the principles of insurance laws, and of common sense, that the risk of the ship not being seaworthy when the liability of the underwriter ought to begin, should be cast upon him, who can easily indemnify himself by demanding an adequate premium for undertaking it.

The only consideration pointed out for extending the implied condition of seaworthiness to time policies, which made any impression upon me, is that it does extend to voyage policies on goods, although the assured can have no control over the repairs or equipment of the ship. But between the assured on goods and the underwriter there is the shipowner, who must be considered the agent of the assured, and he does undertake that the ship shall be tight, staunch, and strong, and every way fitted for the voyage. If this undertaking is broken, the merchant has no remedy against the underwriter, but he obtains a full indemnity by suing the shipowner, and thus, either with the shipowner or the underwriter, the merchant is secure; so that the implied condition in his policy in no respect interferes with the object of insurance, or with the interests of commerce.

If your Lordships shall be pleased, on the motion of my noble and learned friend, to affirm the judgment of the Court of Exchequer Chamber in this case, it will be definitively established that, by the law of England, in a time policy such as this, no special circumstances being stated in the declaration or the plea respecting the situation or employment of the ship, there is not an implied condition that the ship should be seaworthy on the day when the policy ought to attach.

The other questions which were debated at the bar, and which were propounded to her Majesty's judges, must be open for judicial consideration when they arise; but as your Lordships considered it expedient, for general information and for the advantage of the commercial world, that opinions should be given upon this very important subject, although they would not be binding, I think it right to say that, after great deliberation, I agree with those judges who think that in a time policy there is no implied condition whatever as to seaworthiness. I never for a moment could concur in the notion that there was an implied warranty that the ship was seaworthy when it sailed on the voyage during which the policy attached. To lay down such a rule would, I think, be a very arbitrary and capricious proceeding, and being wholly unsanctioned by usage or by judicial authority, would be legislating instead of declaring the law. I likewise think that it would be very inexpedient legislation, as constant disputes would arise in construing the rule; for in fishing adventures, and where ships are employed for years in trading

in distant regions from port to port, the instances in which time policies are chiefly resorted to, there would be infinite difficulty in determining what was the commencement of the voyage during which the policy attaches. There would be a similar difficulty as to the *terminus ad quem*, in considering what the voyage truly is for which the ship must be fit.

I have hesitated more upon the question whether, when a time policy is effected upon an outward-bound ship lying in a British port where the owner resides, a condition of seaworthiness is to be implied. This might be an exception to the general rule, that in time policies there is no implied warranty of seaworthiness, and it is free from some strong objections to the condition of seaworthiness being implied where the risk is to commence abroad. But in addition to the objection that as yet there has been no instance of an implied condition of seaworthiness in any time policy, and that the general rule is against such a condition, this would be a gratuitous and judge-made exception to the rule. I think it more expedient that the rule should remain without any exception, and, as at present advised, I should decide against the implied condition in all cases of time policies. There is a broad distinction which may always be observed between time policies and voyage policies; but when you come to subdivide time policies into such where the ship is in a British port and where the ship is abroad, and still more if the residence of the shipowner is to be inquired into and regarded, there would be a great danger of confusion being occasioned by the attempted classification. It is most desirable that in commercial transactions there should be plain rules to go by, without qualification or exception. Marine insurance has been found most beneficial, as hitherto regulated, and I am afraid of injuring it by new refinements. I should be glad, therefore, that it should be understood, according to my present impression of the law, that there is in all voyage policies, but that there is not in any time policies, framed in the usual terms, a condition of seaworthiness implied. This rule, I believe, is adapted to the great bulk of the transactions of navigation and commerce, and when any case occurs to which it is not adapted, this may be easily provided for by express stipulation. My observations upon this last point I offer with the greatest diffidence, after what has fallen from my noble and learned friend, for whose opinion, on all subjects within the whole range of the law of England, I entertain the most sincere respect. I am glad to think that one important question of insurance law is now finally settled.

*Judgment of the Exchequer Chamber affirmed.*¹

¹ *Acc.* : Jones v. Insurance Co., 2 Wall. Jr. 278 (1852); Capen v. Washington Ins. Co., 12 Cush. 517 (1853); Macy v. Mutual M. Ins. Co., 12 Gray, 497 (1859).

Contra : Hoxie v. Home Ins. Co., 32 Conn. 21 (1864).

See Thompson v. Hopper, 6 E. & B. 172 (1856); Fawcus v. Sarsfield, 6 E. & B. 192 (1856); Dudgeon v. Pembroke, 2 App. Cas. 284 (1877). — ED.

BICCARD AND OTHERS, TRUSTEES OF THE COMMERCIAL MARINE AND FIRE ASSURANCE COMPANY, APPELLANTS, *v.* SHEPHERD AND OTHERS, TRUSTEES OF THE NAMAQUA MINING COMPANY, RESPONDENTS.

PRIVY COUNCIL, 1861. 14 Moo. P. C. 471.¹

THIS was an appeal from the Supreme Court of the Cape of Good Hope, which had entered judgment for the assured, the respondents. The facts are sufficiently stated in the opinion.²

Mr. *Bovill*, Q. C., and Mr. *Phipson*, for the appellants.

Mr. *Lush*, Q. C., and Mr. *Hodgson*, for the respondents.

Judgment was delivered by

The Right Hon. Lord WENSLEYDALE. The respondents in this case sought to recover a total loss upon a policy for £4,000 subscribed on behalf of the defendants, an insurance company at the Cape of Good Hope, on copper ore, on a ship, the “Admiral Collingwood,” at and from the anchorages off Hondeklip Bay and Port Nolloth to Swansea, to commence upon the loading on board the ship at and from the above ports.

The respondents, under this policy, might have shipped what proportion of the copper ore they pleased at one anchorage or the other, probably the whole at one. They put on board at Hondeklip 154 tons. The vessel sailed to Port Nolloth with that quantity on board; arrived at Port Nolloth, there took on board the further quantity of 250 tons, and sailed for Swansea. In the way thither she sank, and the copper ore was lost.

On the trial before the judges of the Supreme Court of the colony of the Cape of Good Hope, who are judges both of fact and law, witnesses were examined on both sides, and the judges did not all take the same view of the evidence. On perusing that evidence, the probability, their Lordships think, is that the ship was seaworthy at Hondeklip, and when she arrived at Port Nolloth; but that she became unseaworthy when she was loaded with the additional copper at that place, and sailed with it for Swansea, the cargo being then too heavy for her. We think we may assume this to be the true state of the facts; and then follows the question of novelty and some nicety. Are the assured entitled to recover for the loss of the whole cargo; or, if not, are they entitled to recover for the loss of the 154 tons shipped at Hondeklip?

¹ The reporter's statement has been omitted. It included parts of the opinions delivered in the Supreme Court of the Cape of Good Hope. — ED.

² Present at the first hearing of the appeal: The Right Hon. Lord KINGSDOWN, the Right Hon. the Lord Justice KNIGHT BRUCE, the Right Hon. Sir EDWARD RYAN, and the Right Hon. the Lord Justice TURNER.

Present at the second argument: The Right Hon. Lord WENSLEYDALE, the Right Hon. Lord KINGSDOWN, the Right Hon. the Lord Justice KNIGHT BRUCE, the Right Hon. Sir EDWARD RYAN, and the Right Hon. the Lord Justice TURNER. — REF.

Their Lordships have had great difficulty in coming to a conclusion upon it, but after much consideration agree that the plaintiffs are entitled to recover for the latter, but for the latter only.

Some propositions in the doctrine of the implied warranty of seaworthiness, which forms a part of every contract of marine insurance on voyages (for to time policies it does not apply), are perfectly settled.¹ . . .

There is a warranty of a similar nature in an insurance upon goods with respect to the ship upon which they are loaded. Whether this warranty is to be qualified in the manner pointed out by Mr. Lush in his very able argument, it is not necessary to determine. He contended that when a shipment takes place in an intermediate open anchorage (not a port where there are means of repair), and in the course of a voyage from another terminus, all that the shipowner impliedly warrants to the shipper, and all that the shipper impliedly warrants to the assurer, as to the state of the ship, is that the ship was seaworthy at the commencement of the original voyage to the place of shipment. Whether this, which is a highly reasonable proposition, be correct or not, we need not inquire, because, upon the evidence, there appears no doubt that the ship was seaworthy at Hondeklip, where the first parcel of ore was put on board, as at the Cape.

What, then, is the commencement of the sea voyage in this case, which is to fix the time when the warranty is to attach, and when the vessel is to be fit in all respects for sea navigation? The appellants contend that the words "at and from the anchorages off Hondeklip Bay and Port Nolloth to Swansea," are equivalent to "at and from the coast of Africa to Swansea," and that the sea voyage began at Port Nolloth; and it was likened to an insurance at and from the island of Jamaica to England, in which, it was said, the sea voyage would begin with the departure from the island; and the case of *Bond v. Nutt*, 2 Cowp. 601, was referred to as proof of that proposition.

Their Lordships think that such a construction cannot be put on these words, and the case of *Bond v. Nutt* is only an authority to show that the departure from the island was within the meaning of a warranty to sail on or before a certain day, and not the commencement of a sea voyage within the meaning of a warranty of seaworthiness. The first voyage from port to port in the island, through the open sea, would answer that description.

The true construction of the words in question undoubtedly is "at and from Hondeklip to Swansea, or at and from Hondeklip to Port Nolloth, and at and from that port to Swansea," as the power to ship at one or more of these places might be exercised (whether the places are to be taken in their order is immaterial to this inquiry). It seems to their Lordships, therefore, as there were undoubtedly two risks insured, — one on the parcel of goods shipped at Hondeklip,

¹ The omitted passage contained a quotation from *Dixon v. Sadler*, *ante*, p. 475 (1839). — ED.

another on those shipped at Port Nolloth, — that the sea voyage may be considered as beginning at different times ; with respect to the first parcel at Hondeklip, with respect to the second, at Port Nolloth. As to the first part, the implied warranty of seaworthiness, being that the ship was in a proper state of repair and equipment, and sufficient for the carriage of the cargo then put on board to Swansea, was certainly complied with. It could not be that there was an implied warranty that the ship then was in a fit state to carry all that might be put on board at Port Nolloth, so that if the ship should be lost before it arrived at Port Nolloth, with the goods then shipped on board, nothing would be recovered on the policy ; for before the second shipment the vessel might have been put into a state fully sufficient to carry the whole cargo. The warranty being complied with at Hondeklip as to the 154 tons there put on board, the subsequent improper conduct of the master and crew in rendering the vessel unseaworthy at Port Nolloth cannot affect the right to recover *pro tanto*. The assured or their agents, though concerned in the shipment, probably knew nothing of the capacity of the ship to carry the goods they put on board ; and the fault was that of the master and crew, which would not avoid the policy, nor would it if the shipping agents were parties, as the ship was immediately lost by the perils insured against. *Redman v. Wilson*, 14 M. & W. 476.

Their Lordships, therefore, have come to the conclusion that for the first shipment the assured are entitled to recover.

But, with respect to the second parcel, that shipped at Port Nolloth, the implied warranty, that the ship should be there fit to carry the additional as well as the original cargo, was certainly, upon their Lordships' view of the evidence, not complied with, and therefore the respondents cannot recover.

The pleadings do not appear to have been framed very accurately to raise this defence ; but this objection has not been pressed upon their Lordships.

Therefore their Lordships, after much consideration, and not without some doubt, have determined to advise her Majesty to affirm the judgment as to the value of the 154 tons shipped at Hondeklip and reverse it as to the residue.

HOXIE v. PACIFIC MUTUAL INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1863. 7 Allen, 211.

CONTRACT on a policy of insurance dated September 14, 1860, by which the defendants insured the plaintiff in the sum of \$6,000, on the bark "Nimrod," at and from the 12th day of September, 1860, at noon to the 12th day of September, 1861, at noon.

At the trial in this court, before METCALF, J., it appeared that the bark sailed from Perth Amboy on the 27th of May, 1860, on a voyage to Aspinwall, laden with coal. A few days after she sailed she met with a severe gale, during which she sprung a leak, and leaked so badly that she was obliged to put back to Bermuda, which she had passed in the course of her voyage, as a port of distress. At Bermuda, by the order of surveyors, her cargo was discharged, and extensive repairs were made, continuing for more than three months. It was agreed that on the 1st of September, 1860, she was undergoing repairs which were not completed until the 17th of the same month, and that shortly afterwards she proceeded to Aspinwall, delivered her cargo, went from there in ballast to Kingston, Jamaica, where she discharged her ballast and took in some logwood, after which she went to St. Ann's Bay and took in some sugar, fustic, rum, and other articles, and sailed for London about the 25th of July, 1861. Shortly after sailing she began to leak, the sugar in her hold melted, she had a heavy list, and ultimately fell over and sunk.

It was in controversy whether injuries sustained on her passage to Bermuda, not sufficiently repaired, occasioned her loss, or whether the loss was attributable to perils occurring after the 12th of September, 1860; and the judge, in conformity to a request of the plaintiff, instructed the jury that "if the vessel was seaworthy when she left Perth Amboy, and if she was injured by the perils of the seas before putting into Bermuda, and if the master used all care and attention in making repairs, but left port with some injury not repaired, because the same was not after such care and diligence discovered either by him or the surveyors, the underwriters are not discharged by reason of the non-repair of such undiscovered injury, even if the loss was occasioned thereby."

The jury returned a verdict for the plaintiff, for \$5,741 damages, and the defendants alleged exceptions.

J. H. Clifford and *H. Gray, Jr.*, for the defendants.

S. Bartlett, for the plaintiff.

BIGELOW, C. J.¹ . . . As nothing is shown to the contrary, it must be assumed that, at the date of the policy and on the day when the risk began, the vessel was in such condition, undergoing repairs, that she was then seaworthy for port, so that the policy attached.

¹ The length of the opinion has made it impracticable to reprint the whole. — ED.

In this state of facts the question to be determined is, whether in a policy on time upon a vessel so situated there is an implied warranty of seaworthiness, similar to that which the law implies in case of a voyage policy, — that is, that the vessel is not only seaworthy for port, but also in a suitable condition for sea, by a breach of which the insurers are discharged from liability for loss, happening from any cause. This is an interesting and important question of commercial law, which has never yet been adjudicated in this commonwealth.¹ . . .

It cannot be denied that until the recent discussions arising in the cases of *Capen v. Washington Ins. Co.* and *Small v. Gibson*, it had always been assumed as a settled doctrine of the law of insurance that, in policies on ships and vessels, whether for a voyage or for time, there was an implied warranty of seaworthiness. If we turn to foreign jurists and commentators on the commercial codes of continental Europe, whence we derive most of the rules and principles which lie at the foundation of our law of marine insurance, we shall, it is believed, find no trace that any distinction was recognized in the application of the doctrine of seaworthiness to policies for a voyage or on time. That policies on time were not unknown contracts in the commercial communities of Europe prior to the year 1781, when Emerigon wrote his treatise, is manifest from his statement in c. 13, § 3, that he had seen insurances made for one year in which “the entire year forms the voyage insured.”² . . .

But although the doctrine of warranty of seaworthiness as applied to time policies was not doubted or called in question until the recent discussions already alluded to, it was nevertheless suggested long since that some modification of it, as it was usually understood in respect to voyage policies, might become necessary in certain cases where insurance was effected on a ship or vessel while at sea, for a limited time. Such seems to have been the intimation of the late chief justice of this court, in *Paddock v. Franklin Ins. Co.*, 11 Pick. 231, accompanied, however, with a distinct intimation that the warranty of seaworthiness, although it might be applied with great liberality in such cases, would not be wholly dispensed with.³ . . .

It is easy to see a good reason for holding that a policy on time, effected on a vessel when at sea, does not include any warranty of her

¹ Here were cited *Capen v. Washington Ins. Co.*, 12 Cush. 517 (1853); *Small v. Gibson*, 16 Q. B. 128, 141 (Ex. Ch., 1850); *Gibson v. Small*, ante, p. 478 (II. L., 1853); *Thompson v. Hopper*, 6 E. & B. 172 (1856); *Fawcus v. Sarsfield*, 6 E. & B. 192 (1856); *Marshall on Ins.* (Shee's ed.) 127. — Ed.

² Here were cited *Hucks v. Thornton*, Holt N. P. 30 (1815); *Hollingworth v. Brod-rick*, 7 Ad. & E. 40 (1837); *Sadler v. Dixon*, 8 M. & W. 895 (1841); 3 Kent Com. (6th ed.) 287, 307; 1 Phillips on Ins. §§ 695, 727; *Martin v. Fishing Ins. Co.*, 20 Pick. 389 (1838); and *Thompson v. Hopper*, 6 E. & B. 172, 179 (1856), where ERLE, J., dissenting, said: “It does not appear that any person ever expressed the opinion that there was no warranty in any time policy until Baron Parke spoke in the House of Lords.” — Ed.

³ Here was cited 1 Arnould Ins. (2d ed.) 411, 669. — Ed.

seaworthiness at the commencement of the risk. In such case, the insurance is on a "vessel in an unknown sea in an unknown state." The insured has no means of knowing her actual condition, or, if she is injured and out of repair, of restoring her to a condition of seaworthiness. Both parties enter into the contract with a full knowledge of these facts. It would not only be pushing a rule of law to an unreasonable extent to say that under such circumstances the assured undertakes to warrant his ship, of the condition and circumstances of which he can know nothing, to be then seaworthy for any purpose, but it would be contrary to the manifest intent and understanding of the parties. In such cases, the circumstances attending the making of the contract of insurance tend directly to rebut any implication of a warranty of seaworthiness at the inception of the risk. But when it is attempted to go further, and to say that, because in certain cases of insurance on time it cannot be reasonably held that there is an implied warranty of seaworthiness at the inception of the risk, there is no such implied warranty at all in any such policy, whatever may be the circumstances under which the contract was entered into, the reasoning is fallacious and unsound. Such a conclusion would be at variance with the authorities and principles on which the doctrine of seaworthiness as the basis of the contract of insurance is founded, and would wrest a particular class of policies from all the analogies which regulate and govern other contracts of insurance precisely alike in all respects except in the single particular that the limitation of the risk is regulated by a fixed period of time, instead of by the duration of a voyage, or, as it is sometimes expressed, by the motion of the earth instead of by the motion of the ship. Certainly it would be contrary to all the received canons of legal exposition to construe policies of this nature as if they were isolated contracts, having no connection with or affinity to other similar contracts under the law merchant, and to which only the general rules regulating the interpretation of ordinary written contracts are to be applied. These policies ought not to be taken out by the mere force of judicial construction from the class of contracts to which they belong, or from the rules and principles by which such contracts are interpreted, any further than is rendered absolutely necessary by the peculiar stipulation which distinguishes them from other contracts of marine insurance. . . .

Why, then, should the implied warranty of seaworthiness be wholly rejected as inapplicable to this large class of marine insurances? Most of the reasons on which the doctrine of such warranty is founded, and which led to its adoption and incorporation into our system of commercial law, apply with as much force to policies on time as to those for a voyage. So far as the rule rests on sound policy, having in view the benefit of commerce and the preservation of human life by guarding against the danger of carelessness and neglect on the part of the assured concerning the condition of the ship and the consequent safety of passengers and crew, all policies on time certainly ought not to be

exempted from its operation. So far as it is deemed to be of the essence of the contract that the subject of it shall be fit and suitable for the purpose for which the parties understand and intend that it is to be used, so that the insurer may have a fair chance of earning his premium, which he would not have if there was an original and inherent vice in the thing for the loss of which he agrees to indemnify the owner, the warranty that the ship is seaworthy would seem to form as essential a part of the contract of insurance in a time policy as in a policy for a voyage. Equally necessary, too, is such warranty in both classes of policies, in order to prevent fraudulent insurances effected with a design to obtain compensation for losses not happening from perils of the sea. Nor can we see anything in the nature of the warranty itself which renders it incapable of being applied to most policies on time, substantially with the same effect as to voyage policies. Such warranty in case of a voyage policy is not necessarily implied at the date of the policy or the commencement of the risk, nor does it always extend to or cover a period of time anterior to those dates, if the vessel is at sea when the policy is effected. In a policy, for instance, for a voyage, effected after a ship has sailed, and to commence on a designated day after her departure, the warranty of seaworthiness is satisfied if she was seaworthy when she departed from port, bound on her voyage. Nor does the warranty in a voyage policy depend on the question whether the owner knows of the defect or want of seaworthiness, or can discover it by the use of due diligence, nor yet on the port where the vessel may happen to be. It is implied, although the insured may have been ignorant of the condition of the ship when the insurance was effected, and although she may at the time be in a distant and foreign port. The warranty is not that the vessel is seaworthy for the voyage on which the vessel is bound, but for that portion of it which is covered by the policy. It is the voyage insured, the *viaggium*, not the *iter navis*, to which the implied warranty extends. These may be and often are the same; but they may be wholly distinct. A vessel may be bound on a succession of voyages. If the policy insures the vessel for all the voyages, the warranty is that she shall be seaworthy for all, and the aggregation of the voyages constitutes in such case the voyage insured. But a policy may be effected to cover only one of the whole number of such voyages, in which case the warranty would be that she was seaworthy for that voyage only, and it would not extend so as to include the passage of the vessel from any previous port, nor embrace any subsequent portion of her route. No one of these leading characteristics of the doctrine of warranty of seaworthiness, as usually applied in cases of voyage policies, can be said to be inapplicable to a policy on time. If a vessel is in port when a policy on time is made and takes effect, the warranty would be of seaworthiness at that time and place; if she is at sea, it would relate back to the time when she was last in port, and could have been made seaworthy before the commencement of the *terminus a quo* of time when the risk commenced. The knowledge or

ignorance of the owner or his agent of the condition of the ship in port, or the fact that she was, when last in port, abroad and distant from the place of her owner's residence, can have no greater force as an argument against such warranty in a policy on time than in one on a voyage. As the warranty may be for part of a voyage, or for one only of a succession of voyages on which a vessel is bound, so by parity of reasoning it may be for a term of time, though not identical with and either longer or shorter than that which may be requisite to complete the actual voyage on which the vessel is bound, or in the prosecution of which she may be engaged at the commencement of the risk.

It is, however, urged, and this is the strongest argument against the analogy between time and voyage policies in respect to the warranty of seaworthiness, that in the application of it to the latter, as the nature, extent, and necessities of a specific and designated voyage are known and can be anticipated, a vessel can be prepared and fitted for the service for which she is destined, so as to be seaworthy in the broadest sense of that term, as understood in the modern practice and law of insurance; but that in case of a time policy, in which no limits or *termini* are given except the days named which fix the time, and no specific service or voyage is designated, and the insured is left at liberty to employ his vessel during the time covered by the policy according as his interest or necessities may dictate or require, it would be impracticable to make her seaworthy for the voyage insured, that is, for the time during which the risk is to continue, and that it would be unreasonable to imply a warranty of seaworthiness under such circumstances. It seems to us that this objection is rather theoretical than practical. There is no doubt that the warranty, if one is implied, is for the voyage insured — using this phrase as *nomen juris*, to designate the term covered by the policy, whether its *termini* are fixed by points of place or time — and that seaworthiness imports, in the law of insurance, a relation between the condition of the ship and the perils she may have to encounter in the situation in which she may be placed; so that before departure on a voyage, whether limited by designated ports or places, or only by a fixed period of time, she must be fit in a degree which a prudent owner if uninsured would require, to meet the perils of the service she is engaged in, and to continue so during the voyage, unless exposed to extraordinary damage. Now the alleged want of analogy between time and voyage policies, as respects the practicability of making a vessel seaworthy in this sense for a specific voyage, and for one the duration of which is marked by time, is often greatly overstated. In the first place, it is not correct to say that all the necessities and perils of a voyage described by ports or places can in every case be foreseen and provided for. . . . In the next place, in a great number if not in a majority of cases of insurances on time, the prospective voyages of the ship or vessel are frequently well known and understood, and a policy on time is resorted to as a matter of convenience, to save the enumeration of the several ports or places which it may be necessary

to visit in the course of a voyage, or to avoid the risk of some slight deviation, which would invalidate a voyage policy. . . . And even when the precise course or kind of business in which a ship or vessel may be engaged is not known at the time when insurance is effected, there would be little or no difficulty in making her seaworthy for any service in which she was likely to be employed during the time for which she was insured, or in ascertaining whether she was so in case of disaster. . . . In the practical business of insurance the exception would be a rare one in which it would be impracticable to make a vessel seaworthy for a voyage insured, although designated only by limitations of time. Such exceptional cases form no valid reason for exempting all time policies from a condition of so much importance and value to the insured, which has always hitherto been held to form the basis of the contract of insurance. *Ad ea quæ frequentius accidunt jura adaptantur.*

Nor ought it to be overlooked, in the consideration of this question, that the introduction into the law of insurance of a rule which would exempt all policies on time from the implied warranty of seaworthiness would lead to incongruities and to a want of harmony in the application of well-established principles to the different classes of contracts of marine insurance, which ought, if possible, to be avoided. This may be illustrated by a case . . . of a ship bound on a voyage to India or China. Suppose that she is insured by the same or two different owners, by two separate policies, one half of her value by a policy on time, the other half by a policy for the voyage, the former covering substantially the same period of time as that requisite to complete the voyage, so that the risk in both policies is essentially the same. If a ship thus insured should be lost in the prosecution of the voyage, after having been put in repair so far as due diligence by the owner or master should render it necessary, and it should turn out that she was unseaworthy at the commencement of the voyage, it would certainly seem to be contrary to all the received rules of interpretation to construe the two contracts, which are substantially alike in all respects, so as to arrive at results precisely opposite; that is, so as to cast the loss on the insurers in the case of the time policy, and on the insured in the case of the voyage policy. . . .

It was suggested by the counsel for the plaintiff that if any warranty of seaworthiness was implied in the policy declared on, it was fully complied with by proof of the fact that the vessel was seaworthy at Perth Amboy on her departure thence in the prosecution of the adventure during the continuance of which the policy was effected and the vessel was lost. But we are unable to appreciate the soundness of this suggestion. It confounds the voyage insured with the actual voyage on which the vessel happens to be bound at the date of the policy. As has been already said, these two have no necessary connection. Looking to the analogy of a policy for a voyage, the doctrine suggested certainly finds no support or sanction. In a policy effected on a vessel

in port, whether domestic or foreign, whether at the beginning of an adventure or after a part of it is completed, there is no warranty that the vessel was seaworthy at the commencement or during any antecedent portion of the voyage in the prosecution of which she is then engaged. The warranty in such case applies only to the inception of the risk, and to the prospective part of the adventure which is covered by the policy and thus forms the voyage insured, as distinguished from the voyage or voyages in the prosecution of which the vessel happens to be engaged. It is only when the vessel is at sea at the inception of the risk that the warranty of seaworthiness, in the case of a voyage policy, relates back to the time when the voyage insured commenced. But such a case affords no analogy for determining the point of time at which such warranty is to be implied, when a policy is effected on a vessel in port, where full repairs can be made at the inception of the risk, and the commencement of the term of time covered by the policy. . . .

These considerations have led our minds to the conclusion that, on the facts disclosed at the trial (and we do not mean to decide anything beyond the precise case before us), there was an implied warranty of seaworthiness in the policy declared on, in analogy to that which would exist under similar circumstances in a policy for a voyage; and that the insurance having been effected on a vessel while in port, to take effect from a certain day, which was before she sailed thence, the warranty includes seaworthiness for port as well as seaworthiness in setting out therefrom, as in a policy at and from a particular place. . . .

As the instructions given to the jury negatived the existence of any such warranty, the order must be *New trial granted.*¹

¹ *Acc.*: Rouse v. Insurance Co., 3 Wall. Jr. 367 (1862).

Contra: Thompson v. Hopper, 6 E. & B. 172 (1856); Fawcus v. Sarsfield, *ib.* 192 (1856); Merchants' Ins. Co. v. Morrison, 62 Ill. 242 (1871); Dudgeon v. Pembroke, 3 App. Cas. 284 (1877).

See Hoxie v. Home Ins. Co., 32 Conn. 21 (1864).

On seaworthiness in general, see also:—

Bell v. Reed, 4 Binney, 127 (1811);

Wilkie v. Geddes, 3 Dow, 57 (H. L. Sc. 1815);

Treadwell v. Union Ins. Co., 6 Cow. 270 (1826);

Phillips v. Headlam, 2 B. & Ad. 380 (1831);

Cincinnati Mutual Ins. Co. v. May, 20 Ohio, 211 (1851);

Knill v. Hooper, 2 H. & N. 277 (1857);

Merchants' Ins. Co. v. Algeo, 31 Pa. 446 (1858);

Draper v. Commercial Ins. Co., 21 N. Y. 378 (1860);

Bouillon v. Lupton, 15 C. B. n. s. 113, 132-137 (1863);

Walsh v. Washington M. Ins. Co., 32 N. Y. 427, 434-439 (1865);

Lane v. Nixon, L. R. 1 C. P. 412 (1866);

Queen's M. Ins. Co. v. Commercial Bank, L. R. 3 P. C. 234 (1870);

Anderson v. Morice, L. R. 10 C. P. 58 (1874);

Pickup v. Thames and Mersey M. Ins. Co., 3 Q. B. D. 594 (C. A., 1878). — Ed.

SECTION I. (*continued*).

(C) ILLEGALITY OF VOYAGE.

Assurances se peuvent faire sur toute sorte de marchandises, pourveu que le transport ne soit pas prohibé par les edicts et ordonnances du Roy: toutesfois, en prenant congé ou licence de Sa Majesté, assurance se peut faire sur marchandises défendues; auquel cas la licence doit notifiée à l'assureur, et spécifiée en la police, autrement l'assurance sera nulle.

Guidon de la Mer,¹ c. ii., art. ii. (1556-1600).

PLANCHÉ AND ANOTHER v. FLETCHER.

KING'S BENCH, 1779. 1 Doug. 251.

THE plaintiffs, Planché and Jacquery, merchants in London, insured goods, "on board the Swedish ship called the 'Maria Magdalena,' lost or not lost, at and from London and Ramsgate to Nantz, with liberty to call at Ostend, being a general ship in the port of London for Nantz." There was a declaration in the policy that the insurance was made on account of "certain persons carrying on trade under the name and firm of Vallée & du Plessis Monsieur Lasseau le Jeune, Guillaume Albert, et Poitier de la Gueule." The defendant underwrote the policy for £300 at three guineas per cent. The ship's clearances from the custom-house in London, and her other papers, were all made out as for Ostend only, but the ship and goods were intended to go directly from London to Nantz, without going to Ostend. Bills of lading, in the French language, dated the 18th of July, 1778, were signed by the captain in London, but purporting to be made at Ostend, and that the goods were shipped there to be delivered at Nantz. The policy was subscribed by the defendant on the 7th of July, and the lading was taken in between the 24th of July and the 17th of August. The proclamation for making reprisals on French ships, &c. bore date the 29th, and appeared in the Gazette on the 31st of July. Two underwriters had signed the policy after the proclamation, at the same premium of three guineas; one on the 31st of July, and the other on the 7th of August. The ship sailed on the 24th of August, and was taken by a King's cutter on her way to Nantz. After her departure from Gravesend, the captain threw overboard all the papers he had received from the custom-house at London. They had been obliterated by the custom-house officers at Gravesend, and were no longer of any

¹ From the version given by Pardessus, in *Collection de Lois Maritimes*, vol. 2, p. 379. — ED.

use. The ship was released by the Admiralty, but the goods were condemned. The plaintiff had no connection or share in the ship. Such were the material facts of this case, as they were stated this day, by Lord MANSFIELD in his report, upon a rule to show cause why there should not be a new trial. The cause had been tried at the last Sittings at Guildhall, and a verdict found for the plaintiffs. The grounds of the application for a new trial were two: 1. That there was a fraud on the underwriters, the ship having been cleared out for Ostend, and yet never having been designed for that place. 2. That, as hostilities were declared after the policy was signed, and before the ship sailed, the defendant ought to have had notice, that he might have exercised his discretion whether he would choose for a peace premium to run the risk of capture. Besides the facts above mentioned, his Lordship stated that the plaintiffs had produced evidence to show that all ships going with goods of British manufacture to France clear out for Ostend without meaning to go thither, and that this is universally understood by persons concerned in that branch of commerce. The reason suggested for clearing out for Ostend, and afterwards making bills of lading as from that place, were, that the lighthouse duties are saved, which are payable when the voyage is known to be directly down the Channel, and that the French duties are less upon goods from Ostend than from England.

The *Solicitor-General* and *Bower*, for the plaintiffs.

Dunning and *Davenport*, for the defendant.

For the defendant, the fabrication of false and colorable papers, and the suppression of the true destination of the ship, were urged as circumstances of fraud, tending to mislead the underwriter, as to the voyage intended to be insured, and the nature of the risk. But the second objection was chiefly relied upon, and it was said that it was the duty of the insured to have given the underwriter information that the ship continued in the River after the proclamation. It was also contended, that in time of war the exportation of enemy's property, even in neutral bottoms, was illegal, and that an insurance upon such goods was void.

In answer to this, it was said, in the first place, that there was no compulsion, by the terms of the insurance, for the ship to go to Ostend. If her fixed destination, as understood by the underwriters, had been from England to Ostend, and from Ostend to Nantz, the policy would have been otherwise worded; and the course of the trade being notorious, the defendant could not be deceived or misled by her being cleared out for Ostend. As to the second objection, the rupture with France was impending and expected by all the world at the time when the policy was signed. The proclamation did not contain an interdiction of commerce between the two nations; the packets and mails passed regularly between Dover and Calais long afterwards. There was nothing illegal in exporting or insuring French property in neutral bottoms after the proclamation, and the premium on such goods in

neutral ships did not rise for a long time after the commencement of hostilities. If the transaction had not been strictly legal, there were cases where the court had refused to grant a new trial on that ground when the objection was against the justice and conscience of the case.¹

LORD MANSFIELD. This verdict is impeached upon two grounds: 1. It is said, there was a fraud on the underwriters in clearing out the ship for Ostend when she was never intended to go thither. But I think there was no fraud on them, — perhaps not on anybody. What had been practised in this case was proved to be the constant course of the trade, and notoriously so to everybody. The reason for clearing for Ostend, and signing bills of lading as from thence, did not fully appear. But it was guessed at. The *Fermiers Généraux* have the management of the taxes in France. As we have laid a large duty on French goods, the French may have done the same on ours, and it may be the interest of the farmers to connive at the importation of English commodities, and take Ostend duties, rather than stop the trade, by exacting a tax which amounts to a prohibition. But, at any rate, this was no fraud in this country. One nation does not take notice of the revenue laws of another. With regard to the evasion of the lighthouse duties, the ship was not liable to confiscation on that account. 2. The second objection is, that the policy was made before, and the ship sailed after, the proclamation for reprisals. But every man in England and France, on the 17th of July, expected the immediate commencement of a war. I will not say it was actually commenced; but the ambassadors of both countries were recalled; the *Pallas* and *Licorne* were taken; the fleets at sea; and, as it appeared afterwards, waiting for each other to fight. It does not appear that the goods were French property;² an Englishman might be sending his goods to France in a neutral ship. But it is indifferent whether they were English or French. The risk insured extends to all captures,³ and as to other underwriters signed at the same premium, after the proclamation, it appears that the war risk was in view when the defendant signed. Shall he avail himself of an event which increases the risk, but which he had in contemplation when he underwrote the policy? I am of opinion that there should not be a new trial.

*The rule discharged.*⁴

¹ They cited *Deerly v. The Duchess of Mazarine*, B. R. H. 8 W. 3, 2 Salk. 646; *Smith v. Page*, M. 8 W. 3. B. R. *ibid.* 644; *Sparkes v. Spicer*, B. R. H. 10 W. 3, 2 Salk. 648; s. r. recognized in *Allen v. Peshall*, C. B. M. 18 Geo. 3, 2 Blackst. 1177. — REP.

² It was assumed by the counsel for the defendant, from the names of the persons in whom the interest was declared being French, and from the condemnation at the Admiralty. — REP.

³ The description of the risk was in the usual printed form. — REP.

⁴ In *Atkinson v. Abbott*, 11 East, 135, 141 (1809), Lord ELLENBOROUGH, C. J., said: "There is nothing illegal, so as to avoid a policy, in the mere circumstance of a ship taking out a clearance for a place named in the policy to which there is no intention of going. The Stat. of Car. II. only gives a penalty of £100 for taking out a false clearance: but there is nothing in that to make the voyage illegal. That was

JOHNSTON AND ANOTHER v. SUTTON.

KING'S BENCH, 1779. 1 Doug. 254.

THIS was an action on a policy of insurance on goods on board the ship "Venus," lost or not lost, "at and from London to New York, warranted to depart with convoy from the Channel for the voyage."

The cause was tried before Lord MANSFIELD, at the last Sittings at Guildhall, and a verdict found for the plaintiffs. The defendant obtained a rule to show cause why there should not be a new trial, which came on to be argued immediately after the foregoing case of *Planché v. Fletcher*. The facts, upon his Lordship's report, appeared to be these: The ship was cleared for Halifax and New York. She had provisions on board, which she had a license to carry to New York, under a proviso in the prohibitory act of 16 Geo. 3. c. 5. But one half of the cargo, including the goods which were the subject of this policy, was not licensed, and was not calculated for the Halifax market, but for New York. There had been a proclamation by Sir William Howe to allow the entry of unlicensed goods at New York, and though there were bonds usually given at the custom-house here, by which the captain engaged to carry the goods to Halifax, those bonds were afterwards cancelled, on producing a certificate from an officer appointed for that purpose at New York, declaring that they were landed there. The commander-in-chief had no authority under the act of Parliament to issue such proclamation, or to permit the exportation of unlicensed goods. The "Venus" was taken in her passage to New York,¹ by an American privateer.

Dunning and Peckham, for the plaintiffs.

The *Solicitor-General* and *Lee*, for the defendant.

On the part of the plaintiffs, it was contended that a verdict agreeable to the justice and conscience of the case, although the transaction might not be strictly legal, would not be set aside by the court. The cases cited on this point in *Planché v. Fletcher* were insisted upon, and a modern case of *Burton v. Thompson*, 2 Burr. 664, was also mentioned in support of the same doctrine.

determined in *Planché v. Fletcher*; and though the particular statute is not referred to in the report of the case, yet the provision of it was probably in the contemplation of the court."—ED.

¹ The statute (§ 1) prohibits all commerce with the province of New York, (amongst others), and confiscates all ships and their cargoes which shall be found trading, or going to, or coming from trading with them. Then there is a proviso (§ 2) excepting ships laden with provisions for the use of his Majesty's fleets or garri-sons, or the inhabitants of any town possessed by his Majesty's troops, provided the master shall produce a license, specifying the voyage, &c. and the quantity and species of provisions; but by the same proviso it is declared that goods not licensed, found on board such ship, shall be forfeited.—REP.

On the other side, it was said that the plaintiff's counsel were so well convinced that the objection was fatal, that they called for the cryer to non-suit their clients, but the jury delivered their verdict before he could be found. That there was no imputation on the defendant in making this defence, because, on the face of the policy, it was lawful; for licensed goods might be legally carried to New York. He was to presume that the goods insured were licensed. The insurer has no opportunity of seeing the clearances.

LORD MANSFIELD. The whole of the plaintiffs' case goes on an established practice, directly against an act of Parliament. If the defendant did not know that the goods were unlicensed, the objection is fair as between the parties. If he did, he would not deserve to be favoured. But, however that may be, it was illegal to send the goods to New York, and, *in pari delicto, potior est conditio defendentis*. It is impossible to bring this within the cases which have been cited, because here there was a direct contravention of the law of the land. — As to the nonsuit, if it had been recorded, I should have set it aside, that the plaintiffs might not imagine themselves injured by the admission of their counsel. *The rule made absolute.*¹

POTTS v. BELL AND OTHERS.

KING'S BENCH, 1800. 8 T. R. 548.

UPON a writ of error brought from the Court of Common Pleas it appeared that Bell and others brought an action against Potts upon a policy of insurance on the ship "Elizabeth" and goods on board at and from Rotterdam to Hull, with liberty to touch and stay at any ports or places, &c. and declared as for a loss of the goods loaded on board by capture by enemies. There were other counts for money had and received, and upon an account stated; to which the general issue was pleaded.

At the trial a verdict was found for the plaintiffs below; and a bill of exceptions was tendered and allowed on the part of the plaintiff in error, whereby it appeared that at the trial the plaintiffs below proved in evidence the policy of assurance in the declaration mentioned, subscribed by Potts and dated the 7th of December, 1797; and that the policy was effected in London by Barrett and Company, insurance brokers there, by the orders and for the benefit and risk of the plaintiffs then and still being British merchants resident in London and interested in the goods insured to the value mentioned. That the ship "Elizabeth" was a neutral ship belonging to H. Bannermann and Son

¹ Acc.: Camden v. Anderson, 6 T. R. 723 (1796); s. c. affirmed in 1 B. & P. 272 (Ex. Ch., 1798). — ED.

of Greetings and Embden in Prussia, bound on the voyage insured from Rotterdam to Hull; and that the clearance of the ship was ostensibly from Rotterdam to Norden, because the persons then exercising the powers of government in the United Provinces would not permit the ship to be cleared out from Rotterdam to Hull or any other port of Great Britain; and that the goods insured, consisting of sixty casks of madders, were laden on board the "Elizabeth" at Rotterdam, to be conveyed from thence to Hull by one Robert Twiss, then being the agent of the plaintiffs below and residing at Rotterdam by their orders and for their use, and were consigned by him to Messrs. Hewson and Gunnes at Hull, who then were the agents of the plaintiffs below, by their order and for their sole account and risk. That the ship "Elizabeth" having the goods insured on board afterwards on the 18th of December, 1797, sailed from Rotterdam for Hull, and was captured on her voyage the next day by a French ship, an enemy to the King. Whereupon the counsel for the plaintiff in error, on his part, proved in evidence that the said sixty casks of madders, before the lading of them on board the "Elizabeth" and before the policy was subscribed, were purchased for the defendants in error by Twiss, their agent resident at Rotterdam, in order to be sent from Rotterdam to Hull on their account and risk at London, and were afterwards laden on board the ship at Rotterdam for that purpose. That six bills of exchange were drawn by Twiss in payment for the madders at Rotterdam, but dated at Hamburg, upon the defendants in error, and which bills having been indorsed by the payees thereof respectively, were afterwards duly accepted and paid by the said defendants in error in London. That before and at the time of the said purchase of the said sixty casks of madders by Twiss, and of the loading of them on board the "Elizabeth" in order to be conveyed from Rotterdam to Hull for and on account of the defendants in error, and also before and at the time that the plaintiff in error subscribed the policy of assurance thereon, and before and at the time of the ship's departure from Rotterdam towards Hull and of the capture of the said ship and madders as aforesaid, hostilities had commenced and still existed between Great Britain and the persons exercising the powers of government in the said United Provinces. That the plaintiff in error also proved the payment of the premium into court in this action. Whereupon the counsel for the plaintiff in error insisted at the trial that upon the matter so proved in evidence the plaintiffs below were not entitled to recover against him; that the policy upon the said madders was void, for that it is not lawful for British subjects to carry on trade with any nation which at the time is in a state of open war and hostilities with Great Britain, nor to purchase any goods in such nation and import them from thence to Great Britain. The bill of exceptions then stated the Judge's direction to the jury to find a verdict for the plaintiffs below, the finding of such verdict accordingly, and the assignment of errors thereon in the usual form.

This case was first argued in Michaelmas Term last.

Gibbs, for the plaintiff in error.

Wigley, *contra*.

In the course of the argument the counsel on both sides referred to some cases which had been decided at the Admiralty Court, and at the Cockpit; and this court, considering that the subject was more frequently discussed there than in Westminster Hall, desired to hear a second argument by Civilians. Accordingly in Hilary Term last the case was argued by

Sir *John Nicholl*, the King's advocate, for the plaintiff in error.

Dr. *Swabey*, *contra*.

Cur. adv. vult.

LORD KENYON, C. J., now said that the court had very fully considered the question immediately after the very learned argument which had been made by the King's advocate in the last Term. That the reasons which he had urged and the authorities he had cited were so many, so uniform, and so conclusive to show that a British subject's trading with an enemy was illegal, that the question might be considered as finally at rest. That those authorities, it was true, were mostly drawn from the decisions of the Admiralty courts: and that after all the diligence which had been used there was only one direct authority on the subject to be found in the common-law books, and that one was to the same effect;¹ but that the circumstance of there being that single case only was strong to show that the point had not been since disputed, and that it might now be taken for granted that it was a principle of the common law that trading with an enemy without the King's licence was illegal in British subjects. That it was therefore needless in this case to delay giving judgment for the sake of pronouncing the opinion of the court in more formal terms; more especially as they could do little more than recapitulate the judgment with the long train of authorities, already to be found in the clearest terms in the printed report of the case of the *Hoop*, published by Dr. Robinson:²—That the consequence was that the judgment of the Court of Common Pleas must be reversed.

Judgment reversed.

¹ The allusion was probably to Anonymous, 2 Rolle's Abr. 173, *sub voc. Prerogative le Roy*, (L) *Guerre*, pl. 3 (1320).

² See *The Hoop*, 1 Rob. Adm. 196 (1799); *Furtado v. Rodgers*, 3 B. & P. 191 (1802).

In *Richardson v. Maine F. & M. Ins. Co.*, 6 Mass. 102, 111–115 (1809), PARSONS, C. J., for the court, said:—

“We will first consider the supposed nullity of a policy, arising as it is said from insuring goods on illicit voyages.

“Illicit voyages may be ranked in several classes, some of which we will mention.

“When the sovereign of the country to which the ship belongs shall prohibit his subjects from trading with a foreign country or port, whether the prohibition be a consequence of his declaring war against the foreign country, or be made by an express ordinance for any cause at the will of the sovereign, a voyage to that country for the purpose of trade is illicit, and all insurances on such voyages by his subjects

are void, whether the assurers had, or had not, knowledge of the prohibition. For the law will not allow any effect to a contract made to protect a traffic which it has prohibited. A prohibition of this kind is considered by Emerigon, c. 12, § 31, vol. i. 542, under the head of "Interdiction of Commerce."

"Another class of illicit voyages are those which are prohibited by the trade laws of a foreign state, whether those laws wholly exclude the merchant ships of other states from its ports, or only prohibit the importation or exportation of particular species of goods. Because the municipal laws of any state have not the force of laws without its jurisdiction, voyages prohibited in one state are not in any other state deemed for that reason to be illegal. These voyages may, therefore, be the subjects of insurance in any state in which they are not prohibited. And if the assurer will expressly insure against seizure for illicit trade, or if, with a full knowledge of the nature of the voyage, he will insure it without making any exception, he will be bound to indemnify the assured for the losses arising from the breaches of the trade laws of the foreign state. But although he may not take upon himself these losses, and thus be irresponsible for them, yet he is answerable for any other losses insured against, because the policy is not void.

"The last class we shall mention is the transportation by a neutral of goods contraband of war to the country of either of the belligerent powers. And here it is said that these voyages are prohibited by the law of nations, which forms a part of the municipal law of every state, and, consequently, that an insurance on such voyages, made in a neutral state, is prohibited by the laws of that state, and therefore, as in the case of an insurance on interdicted commerce, is void.

"That there are certain laws, which form a part of the municipal laws of all civilized states, regulating their mutual intercourse and duties, and thence called the law of nations, must be admitted; as, for instance, the law of nations, affecting the rights and the security of ambassadors. But we do not consider the law of nations, ascertaining what voyages or merchandise are contraband of war, as having the same extent and effect. It is agreed by every civilized state, that if the subject of a neutral power shall attempt to furnish either of the belligerent sovereigns with goods contraband of war, the other may rightfully seize and condemn them as prize. But we do not know of any rule, established by the law of nations, that the neutral shipper of goods contraband of war is an offender against his own sovereign, and liable to be punished by the municipal laws of his own country.

"When a neutral sovereign is notified of a declaration of war, he may, and usually does, notify his subjects of it, with orders to decline all contraband trade with the nations at war, declaring that if they are taken in it, he cannot protect them, but not announcing the trade as a violation of his own laws. Should their sovereign offer to protect them, his conduct would be incompatible with his neutrality. And as, on the one hand, he cannot complain of the confiscation of his subjects' goods, so, on the other, the power at war *does not impute to him* these practices of his subjects. A neutral merchant is not obliged to regard the state of war between other nations; but if he ships goods prohibited *jure belli*, they may be rightfully seized and condemned. It is one of the cases where two conflicting rights may exist, which either party may exercise, without charging the other with doing wrong. As the transportation is not prohibited by the laws of the neutral sovereign, his subject may lawfully be concerned in it; and as the right of war authorizes a belligerent power to seize and condemn the goods, he may rightfully do it.

"We will mention one other case. A neutral ship may lawfully be laden with the property of one of the hostile powers; but the other may seize her, carry her into port, and lawfully take from the ship his enemy's goods. Here are conflicting rights, which are admitted by the power who shall seize; for he will pay the neutral his freight, when he acts fairly, attempting no improper concealment.

"But we know of no case where the neutral merchant has been punished by his own sovereign for his contraband shipments. If he will adventure on the trade, and his effects are seized and condemned as prize, — to this penalty he must submit, for his sovereign will not interfere, because the capture was lawful. And it may be further observed, that if the exportation of contraband goods, from a neutral country

POLLEYS v. OCEAN INSURANCE COMPANY.

SUPREME JUDICIAL COURT OF MAINE, 1837. 14 Me. 141.

THIS is an action of assumpsit on a policy of insurance, bearing date July 17, 1833, upon the schooner called the "Mary," and owned by the plaintiff, for the term of one year, commencing on the 11th of said July, the sum insured being \$3,000. The schooner, during the year, viz., June 10, 1834, was totally lost.

It appeared on trial, that a sloop was built in 1816, and was enrolled by the name of the "Sophronio," and was again enrolled in the Custom House in Portland, by the same name, March 24, 1832; that the said schooner "Mary" was built upon the keel, floor-timbers, and naval-timbers of the sloop "Sophronio," and the size enlarged nearly twelve tons, and the name of the "Mary" given to her after being so enlarged; and that this was known to the defendants at the time of executing the policy; and that the certificate of the builder of the vessel was procured by the plaintiff and presented to the Custom House, to obtain the enrolment of the schooner "Mary," without any intent to deceive or defraud, but with fair and honest intentions, as the jury believed; but that the enrolment of the sloop "Sophronio" was not first sur-

to a port of either of the powers at war, is a trade which, from its nature, is prohibited by the laws of the neutral sovereign, then the policy on such goods would be void, and the assurer would be exempted from any loss or damage arising even from the danger of the sea. But an exemption of this kind is not founded on any sound principle, nor is it supported by any usage.

"We do not, therefore, discover any just distinction between an interloping trade in a foreign port, illicit *lege loci*, and a trade in transporting contraband goods, which is illicit *jure belli*, so far as either may be an object of insurance by neutrals in a neutral country. And we are satisfied that an insurance, effected in the country of a neutral prince, by his subjects, against capture and condemnation of their goods, because they are contraband of war, is not prohibited by his laws, merely because the capture and condemnation are justified by the laws of war. But if goods contraband of war are on cargo, the assurer is not responsible for their capture and condemnation on that account, unless, either with a full knowledge of the nature of the goods, and of the voyage, or by an express undertaking, he shall insure them against such capture. So an insurer is not answerable for a seizure and confiscation of goods, for the violation of the trade laws of a foreign port, unless, with a full knowledge of the trade, or by an express undertaking, he shall insure them against such seizure. But in both cases, where no such special insurance is made, the policy is not void because the ship is bound on an interloping or contraband voyage, but the assurer will be answerable for the other risks, against which he has insured.

"Goods contraband of war are of two descriptions, — munitions of war, the property of a neutral, bound from a neutral port to the territory of either of the belligerents, after the existence of the war is known; and every species of neutral goods, bound from a neutral port to a port belonging to either of the powers at war, and known to be blockaded by the other power. The principle, therefore, on which a belligerent will capture and condemn as prize the goods of a neutral, bound to a port known by him to be blockaded, arises from the consideration that all such goods are contraband of war." — Ed.

rendered and delivered up at the Custom House before the issuing of the enrolment of the "Mary," which was on the third day of June, 1833.

The counsel for the defendants objected to the admission in evidence of the said enrolment of June 3, 1833, as contrary to the laws of the United States; but EMERY, J., before whom the trial was, overruled the objection, and it was admitted. And the same counsel further insisted, that said schooner, on the voyage on which she was lost, was sailing under circumstances rendering her liable to forfeiture for the violation of said laws; and that therefore a policy on a vessel, pursuing such a voyage, was not valid or legal, or binding; but the Judge also overruled this objection, as insufficient to bar said action.¹ . . .

The cause was thereupon submitted to the jury, who returned their verdict in favor of the plaintiff. To these opinions and rulings of the Judge, the counsel of the defendants excepted.

Mellen and Daveis, for the defendants.

Fessenden & Deblois, for the plaintiff.

SHEPLEY, J. One of the questions presented by this bill of exceptions is, whether the contract declared on was, under the circumstances, a legal contract. To enable us to come to a right conclusion, it is desirable that the principles by which we must be guided should be, if possible, clearly stated.

Neither the law nor the court can degrade itself by becoming the minister of evil. The consideration of a contract, or the matter out of which it arises, must therefore be legal. The object to be accomplished, or the act required to be performed by it, must also be legal. And although by itself considered the objects or acts required by it may be legal, yet if the design of the contract be to aid or assist in the accomplishment of an illegal purpose, it partakes of the character of the transaction with which it thus connects itself, and becomes tainted by it and illegal. To prove property in anything, it must be shown that the law allows that thing to be the subject of property in the character and under the circumstances in which the claim is asserted; otherwise one can establish no right of property in it. When a contract is formed upon a consideration legal at the time, its validity will not be impaired, though the law should afterwards declare the matter forming the consideration to be illegal. So if the act required to be performed be at the time legal, and the law afterward make the performance illegal, that does not render the contract illegal, though it prevents the performance of it.

These are principles alike valuable to the community, as they are necessary to maintain the character of the law and of judicial tribunals. But while they are by no means to be infringed, they must not be pushed to such extremes as to interrupt, or embarrass the complicated transactions of society. The principles do not, nor would it be consistent with

¹ In reprinting the statement and the opinion, passages on the admissibility of evidence have been omitted. — ED.

the ordinary transactions of life that they should, require all contracts to be considered illegal which grow out of some matter, or property, in which there had been incorporated, or to which had before attached, some illegal act. The law may declare, that on account of such former illegal ingredient, the article shall no longer be considered the subject of property, and in such case it cannot afterward form the basis of a legal contract. But if, notwithstanding the illegal act or ingredient attaches to it, the law permits it to be the subject of property, either absolutely or conditionally, until forfeited by some act yet to be performed, it may form the basis of a legal contract.

When contracts are formed upon new or collateral considerations, and when they partake of the original illegal act, was much considered, and the cases were collected in *Armstrong v. Toler*, 11 Wheat. 258. The Chief Justice says: "How far this principle [that of illegality] is to affect subsequent or collateral contracts, the direct and immediate consideration of which is not immoral or illegal, is a question of considerable intricacy, on which many controversies have arisen and many decisions have been made." This remark must be understood rather as referring to the difficulty of applying the rule of law to the complicated transactions of business, than to any difficulty in comprehending the rule itself. In that case the consignee of goods, introduced contrary to law by collusive capture, and afterward decreed forfeit, was allowed to recover the money paid on a bond, given for their appraised value. And the rule is there stated to be, that "if the promise be unconnected with the illegal act, and is founded on a new consideration, it is not tainted by the act, although it was known to the party to whom the promise was made." That case may serve to illustrate the application of the rule where the new contract does not connect itself with the illegal act. And the case of *Cannan v. Bryce*, 3 Barn. & Ald. 179, as an illustration of the application of it, when the new contract is connected with the original act. The act of 7 Geo. 2, ch. 8, relating to stock jobbing, prohibits the payment of any money on account of not transferring stocks in such cases; and it was decided that one who lent moneys for the purpose of enabling a person to make such unlawful payment with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object, could not recover. Here the lending of the money, by itself considered, was an independent and legal act, but being for the very purpose of assisting to do an illegal act, it became connected with it and thereby illegal.

In the law of insurance an exception to these rules has been established in the most commercial countries of modern times, by declaring those contracts to be legal which are made with the intention to violate the laws of trade of a foreign country. Such an exception breaks in upon the morality and harmony of legal science; and since the reasonings of Pothier, and of Story, and of Kent, and of other eminent jurists, the exception can only be sustained by allowing private interest to overcome the sense of moral and legal right. Whether the question

can be presented so as to enable a court to act upon it *de novo*, or whether it must remain a blot upon the law, may be doubtful.

The policy, in this case, was not upon any particular voyage, but for the term of one year. There is nothing in the case which shows that any illegal voyage was contemplated by the contract, or that any such was in fact undertaken. The contract cannot therefore be illegal by reason of any act required by it, nor by reason of any aid intended to be given by it to the performance of an illegal adventure. The consideration was, then, the payment of the premium on the one hand for, and the assumption on the other of, the risk of the legal employment of the vessel for one year. There being nothing illegal in the consideration of the contract, or in the employment of the vessel to be aided by it, the contract can only be illegal by being in some way connected with the prior illegal act, which had, by the manner of building and by the use of the enrolment, attached to the vessel. Is there any such connection shown? By the act of Congress concerning the registering and recording of ships and vessels, ch. 146, sec. 14, it is provided, that when a vessel "shall be altered in form or burthen by being lengthened or built upon," she shall be registered anew by her former name; and that her former certificate of registry shall be delivered up, under a penalty of five hundred dollars. The twenty-seventh section of the same act provides, "that if any certificate of registry or record shall be fraudulently or knowingly used for any ship or vessel not then actually entitled to the benefit thereof, according to the true intent of this act, such ship or vessel shall be forfeited to the United States." By the act for enrolling and licensing ships and vessels, ch. 153, sec. 2, vessels enrolled are put upon the same footing as to qualifications, and are subjected to the same requisites as registered vessels. The jury found that the enrolment by the new name was procured by the plaintiff, "without any fraudulent intent to deceive or defraud;" but that finding does not extend to the after use of it; and the vessel may be regarded as having been liable to seizure and forfeiture. This liability was for a cause in no manner connected with the contract of insurance. It had existed, and its influence had been as great upon the vessel as it could at any time be, before this contract of insurance was made. The act was complete. It neither required, nor could it receive, aid from the new contract. In this respect it was more entirely free from all connection with the new contract than the illegal act in the case of *Armstrong v. Toler* was. It would be very detrimental to the commerce of the country to hold that a vessel was not the subject of a lawful insurance because she was liable to seizure and forfeiture for a cause not connected with the policy. The laws of the United States contemplate that vessels are thus liable for causes arising without wilful negligence or intention of fraud. Cases of that kind are not of unfrequent occurrence, and the Secretary of the Treasury is authorized by law to remit the forfeiture. It could never have been the design of the statute under such circumstances to destroy the

legal title, or lawful right of employment, until the forfeiture was exacted. The risk is not increased, nor is the loss for such cause within the policy. The assurers cannot place themselves in the situation of the government and claim to act for it. None can claim a forfeiture but those authorized by law. Nor can this matter be properly tried collaterally, and by a common law court. The jurisdiction belongs to another tribunal. It is a matter between others, in which the defendants are not interested, and with which they have no concern.

There is another aspect in which the same transactions are presented. It is insisted that the enrolment should not have been admitted in evidence in proof of property, because an unlawful document cannot be used as proof. In considering this question, it will be necessary to bear in mind that it does not appear in the case that the vessel was insured as a vessel of the United States. Her national character does not appear to have entered into the contract. If such had been the fact, the plaintiff could not recover, because the laws of the United States declare that if not registered by the former name, in case she has been built upon, "she shall cease to be deemed a ship or vessel of the United States." As she was not insured as a vessel of the United States, and as the laws do not for such cause destroy the title to the property, their effect being only to take from that title the particular character of being a vessel of the United States, the document was properly admitted.

It is also contended, that not being properly and legally documented, she was not seaworthy, and that she was not the proper subject of insurance. It is necessary here again to notice a distinction. If, for the want of legal documents, the voyage is, by the laws of the country, rendered illegal, then the policy is void on account of the illegality of the voyage. Upon this principle alone, the case of *Farmer v. Legg*, 7 Term R. 186, could have been decided. But if, as in the present case, the laws do not declare the voyage to be illegal on account of the want of the proper documents, then the consequences are left to be determined by the mercantile law. And by that law, where the national character of the vessel is not made a part of the contract, the want of such documents is not material, unless it appears that the risk was enhanced, or that the loss happened in consequence of the want of them; in which case the insured cannot recover. 7 East, 367, *Dawson v. Atty*; 14 East, 374, *Bell v. Carstairs*; 2 Johns. 157, *Elting et al. v. Scott et al.* Nothing appearing in this case to bring it within this rule, these objections cannot prevail. . . .

Judgment is to be entered upon the verdict.¹

¹ The case was taken to the Supreme Court of the United States upon writ of error, and is reported *sub nom.* *Ocean Ins. Co. v. Polleys*, 13 Pet. 157 (1839), where STORY, J., for the court, in the course of an opinion holding that the writ of error must be dismissed for want of jurisdiction, said:—

"Then as to the other point. The objection made by the counsel for the Insurance Company was, that the schooner ("Mary"), on the voyage on which she was lost, was sailing under circumstances rendering her liable to forfeiture for a violation of the laws of the United States; and that therefore a policy on a vessel pursuing such a voyage

was not valid, or legal and binding. But the Judge also overruled this objection, as insufficient to bar the action. The objection was founded on the 27th section of the ship registry act of 1792, ch. 45, above referred to, which declares that if any certificate of registry or record shall be fraudulently or knowingly used for any ship or vessel not then actually entitled to the benefit thereof, according to the true intent of this act, such ship or vessel shall be forfeited to the United States, with her tackle, apparel, and furniture. The objection then, as insisted on by the counsel for the Insurance Company, involved two distinct propositions. The first was, that the schooner was sailing on the voyage under circumstances which render her liable to forfeiture. The second was, that the policy on her was therefore void. Now, the first might have been most fully admitted by the court, and yet the second have been denied, upon the ground that the policy was a lawful contract in itself, and only remotely connected with the illegal use of the certificate of registry, and in no respect designed to aid, assist, or advance any such illegal purpose. We all know that there are cases where a contract may be valid, notwithstanding it is remotely connected with an independent illegal transaction, which, however, it is not designed to aid or promote. The case of *Armstrong v. Toler*, 11 Wheat. R. 258, presented a question of this sort, and was decided in favor of such a contract. But cases might easily be put where the doctrine itself would admit of a far more simple and easy illustration. Suppose the "Mary" had been repaired in port, and the shipwrights had known the circumstances under which she had obtained the new certificate of registry; would they, in consequence of such knowledge alone, have lost their title to recovery for their own work and labor? Suppose a vessel had been actually forfeited by some antecedent illegal act, are all contracts for her future employment void, although there is no illegal object in view, and the forfeiture may never be enforced?"

On illegality of voyage in general, see also:—

- Delmada v. Motteux*, 1 Park Ins. 8th ed. 503 (1784);
- Barker v. Blakes*, 9 East, 283 (1808);
- Pollock v. Babcock*, 6 Mass. 234 (1810);
- Carruthers v. Gray*, 15 East, 35 (1812);
- Hagedorn v. Bell*, 1 M. & S. 450 (1813);
- Bell v. Reid*, 1 M. & S. 726 (1813);
- Simeon v. Bazett*, 2 M. & S. 94 (1813);
- Hagedorn v. Bazett*, 2 M. & S. 100 (1813);
- Gibson v. Service*, 1 Marsh. 119 (1814); s. c. 5 Taunt. 433;
- Parker v. Jones*, 13 Mass. 173 (1816);
- Russell v. Le Grand*, 15 Mass. 35 (1818);
- Pond v. Smith*, 4 Conn. 297 (1822);
- Andrews v. Essex F. & M. Ins. Co.*, 3 Mason, 6, 18-20 (1822);
- Archibald v. Mercantile Ins. Co.*, 3 Pick. 70 (1825);
- Clark v. Protection Ins. Co.*, 1 Story, 109 (1840);
- Redmond v. Smith*, 7 M. & G. 457 (1844);
- Cunard v. Hyde, E., B. & E.* 670 (1858);
- Cunard v. Hyde*, 2 E. & E. 1 (1859).—Ed.

SECTION II.

Fire Insurance.

(A) ILLEGALITY OF BUSINESS.

BOARDMAN AND ANOTHER v. MERRIMACK MUTUAL FIRE INS. CO.

BOARDMAN v. MERRIMACK MUTUAL FIRE INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1851. 8 Cush. 583.

SHAW, C. J. These are actions on policies of insurance, one on a building, the other on personal property, consisting of leather and other materials for the manufacture of shoes, and manufactured stock in the same building. It is admitted that the building was burnt down, and the stock in it, within the time, and that the defendants are liable, unless they are discharged by the circumstances set forth in the facts agreed, on which the case is submitted. These circumstances are, that on the evening preceding the fire, a lottery of two hundred and sixty tickets, at one dollar each, was drawn in one of the rooms in the building, and that about fifty persons were present in the course of the evening. This use of the building was with the consent of the plaintiffs, both of whom were present, and each held a ticket, received of the persons to whom such consent was given. The part of the building used was a single room, in the second story, sixteen by twenty feet, in which no stock was kept. It further appears, that the tickets not having been all disposed of, those remaining were raffled for, at the drawing of the lottery, but no consent was given by the plaintiffs to that, nor had they any knowledge of any such raffling.

It is then agreed, that upon a trial there would be conflicting testimony as to whether or not there was dissatisfaction at the meeting as to the proceedings in the drawing. There was no open altercation, nor was there any disturbance whatever. It is agreed, if admissible, that one Duffy set the fire which consumed the building; and that it took place between three and four o'clock in the morning, after the drawing of the lottery; that Duffy attended the drawing, and had a ticket.

The court are unable to perceive in these circumstances any ground of defence to this suit on a contract made by the defendants to indemnify the plaintiffs against loss by fire.

In the first place, this contract of insurance was made on good consideration, and made to accomplish a good and lawful purpose. It does not therefore come within that class of cases where the consideration is a violation of law or good morals, or where the object and

effect of the contract will be to promote or advance some unlawful purpose or business which would itself be a violation of law or immoral; as that of letting a house to a woman of ill fame, thereby aiding, exciting, and encouraging a violation of the law, as in the case of *Commonwealth v. Harrington*, 3 Pick. 26. So here, if the suit were for the rent of rooms, to be used for drawing lotteries, or a single lottery, the allowing a plaintiff to recover judgment would be to lend the aid of the law to enable one to reap the fruits of an unlawful bargain.

But the ground taken distinctly is, that the building insured was used for a purpose not contemplated by the policy, and also for an unlawful purpose. In regard to the first, the argument proceeds on the ground, that as the building described in the policy was described as a shoe manufactory, the occupation, or even the temporary use of it, for another purpose, would annul and vacate the policy. On the contrary, we suppose the law to be, that the assured may occupy and use his estate for any other lawful business or purpose not restrained by any provision or condition in the contract, and which does not increase the risk. And we understand that it is not suggested in this case that any such change was made in the structure or use of the building, as within its terms to vacate the policy; and if any such change had been made and relied on, it was a fact to be distinctly put in issue and tried by a jury. But the argument is, that being insured as a shoe manufactory, a business well understood, it presumes no assemblage of persons on the premises, but the contrary; because the resort there of numbers must interrupt labor, and may endanger the security of the stock by exposing it to depredation. This appears to us to be taking too limited a view of the nature of the contract of insurance and the rights of the assured. Suppose in a spare large room, like the one described, a periodical auction sale of shoes and boots, their own and others, were made, which would bring an assemblage of persons there, creating no increased risk of fire, would it avoid the policy? Suppose that such spare room was let, occasionally or periodically, for a school, a lyceum, or a conference meeting, it could not affect the policy.

But it comes back to the original ground, that the building was used for an unlawful purpose, and so there was an unlawful and unwarranted use of the building. This is not speaking with strict accuracy; the law, which forbids the setting up or drawing of any lottery, and which renders it penal for any person who shall knowingly permit the drawing of any lottery in any house, shop, or building owned or occupied by him, does not subject the building to any forfeiture; it renders such person guilty of a misdemeanor, and personally liable for a penalty. It is therefore an unlawful use of the house only in the sense in which every person may be said to make unlawful use of his house who commits an offence under its roof against good morals or positive law. There is no natural, probable, or actual connection between the offence committed and the loss by fire. If indeed it were in the direct com-

mission of some unlawful act, by the assured, that the fire was kindled, so that the relation of cause and effect could be shown between the unlawful act done and the loss occasioned, it would present a very different question.

The cases cited in the argument for the defendants do not tend to sustain the defence.

Richardson v. Maine Ins. Co., 6 Mass. 102. The cases of a policy on the realty against loss by fire and of one on a vessel or cargo, personal property, are not very analogous, because the direct use and employment of the latter may be infinitely various, to be controlled and directed by the owner or manager. The case cited recognizes the distinction between a policy made to protect a traffic, prohibited by the sovereign of the parties, and that which might violate the law of another country, or the law of nations. In case of its being a voyage in violation of a municipal law by which they are bound, the voyage is illicit, and all insurances on such voyages are void; for the law will not allow any effect to a contract made to protect a traffic which it has prohibited. In that case, the very contract sought to be enforced was void in its inception, because illegal in its inception. The case of *Warren v. Manufacturers' Ins. Co.*, 13 Pick. 518, is not more in point. On the contrary, it was there held that a non-compliance with a positive law of the United States, in the conduct of the voyage, did not avoid the policy.

The distinction between cases where contracts are or are not void, as against law, is well stated by MARSHALL, C. J., in *Armstrong v. Toler*, 11 Wheat. 271. The principle established is, that where the consideration is illegal, immoral, and wrong, or where the direct purpose of the contract is to effect, advance, or encourage acts in violation of law, it is void. But if the contract sought to be enforced is collateral and independent, though in some measure connected with acts done in violation of law, the contract is not void.

In the present case, it appears to us that the illegal conduct of the plaintiffs, in assisting at the drawing of a lottery, or in permitting one to be drawn on their premises, although it subjected them personally to a penalty, did not affect their contract with the insurance company, but was wholly independent of it and disconnected; as if they had committed any other misdemeanor or indictable offence under the same roof; and therefore did not avoid the policy, or afford any ground of defence to the company. Any other rule would extend the penalty for a violation of the law much beyond that prescribed by the law itself, and deprive the party of his civil rights, in favor of third parties in no degree affected by such unlawful acts.

Judgment for the plaintiffs in both cases.

O. P. Lord, for the plaintiffs.

N. J. Lord and *N. W. Hazen*, for the defendants.

NIAGARA FIRE INSURANCE COMPANY v. DEGRAFF.

SUPREME COURT OF MICHIGAN, 1863. 12 Mich. 124.¹

ERROR to Lenawee Circuit.

C. A. Stacy and *C. I. Walker*, for plaintiffs in error.*A. L. Millerd*, *H. D. Condict*, and *T. M. Cooley*, for defendant in error.

CAMPBELL, J. Plaintiffs in error insured DeGraff upon his stock of goods, described in his application as a "stock of dry goods, groceries, &c.," dividing the risk into specific sums on dry goods, groceries, hardware, and other things specifically mentioned. There was evidence tending to show that he had in his store a few bottles of spirituous liquors, and a barrel of alcohol. Alcohol was among the articles mentioned in the second class of hazards in the second subdivision of extra hazards. Grocers' stocks generally were in the first subdivision of the same class. Bottled spirituous liquors were not classed as extra hazardous, but were included in the first class of ordinary hazards in the second division of hazardous. There was evidence tending to show that the insurance agent, who drew up the application, was informed of the presence of the liquors and alcohol, which was, however, denied by the agent. The property being destroyed, a suit was brought on the policy, and judgment was recovered. Error is brought on the rulings upon the trial. The points taken refer mostly to a clause in the policy which declared that if the store should be used "for storing or keeping therein any articles, goods or merchandize, denominated hazardous, or extra hazardous, or specially hazardous, in the second class of the classes of hazards annexed to this policy, except as herein specially provided for, or hereafter agreed to by this corporation, in writing upon this policy, from thenceforth, so long as the same shall be so used, this policy shall be of no force or effect." There was a further clause annulling the policy whenever gunpowder or any other article subject to legal restriction should be kept in greater quantities or in a different manner than prescribed by law.

The court below refused to charge, as requested, that, since the passage of the Prohibitory Liquor Law, alcohol and spirituous liquors are not included in the term "groceries" as used in referring to goods kept for sale; and charged that the question whether they were so included was one of fact for the jury. To this exception is taken.

It was claimed on behalf of the plaintiffs in error, that if these liquors can be allowed to be included in a policy, the policy will be to all intents and purposes insuring an illegal traffic; and several cases were cited involving marine policies on unlawful voyages, and lottery insurances, which have been held void on that ground. These cases are

¹ The reporter's statement has been omitted. — ED.

not at all parallel, because they rest upon the fact that, in each instance, it is made a necessary condition of the policy that the illegal act shall be done. The ship being insured for a certain voyage, that voyage is the only one upon which the insurance would apply, and the underwriter becomes thus directly a party to an illegal act. So insuring a lottery ticket requires the lottery to be drawn in order to attach the insurance to the risk. If this policy were in express terms a policy insuring the party selling liquors against loss by fine or forfeiture, it would be quite analogous. But this insurance attaches only to property, and the risks insured against are not the consequences of illegal acts, but of accident. Our statute¹ does not in any way destroy or affect the right of property in spirituous liquors, or prevent title being transmitted, but renders sales unprofitable by preventing the vendor from availing himself of the ordinary advantages of a sale, and also affixes certain penalties. *Hibbard v. People*, 4 Mich. 125; *Bagg v. Jerome*, 7 Mich. 145. If the owner sees fit to retain his property without selling it, or to transmit it into another state or country, he can do so. By insuring his property the insurance company have no concern with the use he may make of it, and as it is susceptible of lawful uses, no one can be held to contract concerning it in an illegal manner unless the contract itself is for a directly illegal purpose. Collateral contracts, in which no illegal design enters, are not affected by an illegal transaction with which they may be remotely connected. In the case of *The Ocean Insurance Co. v. Polleys*, 13 Pet. 157, an insurance upon a ship known by the insurance company to be liable to forfeiture under the registry laws of the United States was held valid, and a recovery was permitted for a loss while sailing under papers known to be illegal. The case of *Armstrong v. Toler*, 11 Wheat. 258, is still stronger. It is difficult to perceive how public policy can be violated by an insurance of any kind of property recognized by law to exist.

The question then arises whether the court rightly left it to the jury to say, as a matter of fact, whether the term "groceries" included spirituous liquors and alcohol. That it may include them in the absence of such a statute is not denied; the recognized definitions embracing them clearly, so that it may be doubted whether it might not, in that case, require evidence of usage to exclude that meaning if such articles existed in an insured stock of groceries. See *New York Equitable Insurance Co. v. Langdon*, 6 Wend. 623. There was evidence before the jury in the case before us that these things did in fact form a part of the stock, and evidence tending to show a knowledge of that fact by the agent. The statute does not prohibit the sale of all

¹ 1 Compiled Laws of Michigan (ed. 1857), c. 52, as amended by Michigan Laws of 1861, p. 472.

"If any person by himself, his clerk, agent, or servant, shall, directly or indirectly, sell, or keep for sale, contrary to law, any such liquor, he shall forfeit and pay, on the first conviction, ten dollars, and the cost of suit or prosecution, and shall be at once committed to the common jail of the county until the same be paid."—1 Compiled Laws of Michigan (ed. 1857), c. 52, s. 1663. — ED.

kinds of liquors, but, as to some, expressly recognizes the right in every one. Whatever may be the *presumption*, under our present statute, as to the extent of the term "groceries," — a question not raised in the case, and upon which, therefore, it would be improper to pass, — we think the instruction asked was altogether too broad, in claiming that alcohol and other liquors could not possibly be included. The question was properly left to the jury.

If the jury found — as their verdict shows they must have done — that the term "groceries" included the liquors in question, then the other instructions complained of, which held that by insuring such a stock the liquors were embraced, although extra hazardous, were clearly correct. By the use of a term including them they are "*specially provided for in writing on the policy*." Insuring a class of goods includes what is usually contained in it, whether extra hazardous or not. See *Bryant v. Poughkeepsie Mutual Insurance Co.*, 17 N. Y. 200; *Harper v. Albany Mutual Insurance Co.*, 17 N. Y. 194; *Harper v. N. Y. City Insurance Co.*, 22 N. Y. 441; *Delonguemare v. The Tradesmen's Insurance Co.*, 2 Hall, 589. In these instructions the jury were directed to include the articles only if satisfied that they were commonly kept and sold as part of a grocer's stock. This qualification was sufficiently broad to prevent any improper inferences.

The clause of the policy vitiating it if gunpowder and other articles subject to legal restrictions should be kept in greater quantities or in a different manner than is provided by law was not pressed very strongly on the argument, and evidently refers only to articles of an intrinsically dangerous nature, as liable to cause injury accidentally or by carelessness. It has no reference to any risks except such as render the property more likely to be destroyed. There are no statutory provisions concerning liquors analogous to the laws restricting the use of powder.

Our attention has been called to the fact that the other charges given on the one side, and refused on the other, are inconsistent with those complained of. So far as this is the case, however, they favored the plaintiffs in error, — those excepted to being the only ones which could damnify them. Had the verdict been for them, the discrepancies would have been more important in determining the rights of the other party. The question whether the jury did not find against evidence, or perversely, could only be presented in the Circuit Court.

The judgment should be affirmed, with costs.

MANNING, J., concurred. CHRISTIANCY, J., also concurred in the result. MARTIN, C. J., was absent.

KELLY v. WORCESTER MUTUAL FIRE INSURANCE
COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1867. 97 Mass. 284.

CONTRACT upon a policy of insurance on a building comprising the plaintiff's store, stable, and carriage-house, for one year from January 1, 1866. Upon the face of the policy were printed these provisions: "*Provided*, always, that whenever a building hereby insured shall be unoccupied, or shall be occupied or used for the manufacture of wool, cotton, hemp, oil, paper, machinery, iron or wood work of any kind, or any other business or purpose alike hazardous (unless herein specially provided for), or for the storage of wool, cotton, hemp, or wool or cotton waste, or if unoccupied or used for unlawful purposes, or if wood ashes are allowed in wooden vessels, or if the heating apparatus for any purposes are not well secured by incombustible materials, this policy shall be void; *and provided* that if, without the consent of this company, expressed in this policy, the assured shall now have, or hereafter make, any other contract of insurance against loss by fire on the property, or any part thereof, hereby insured, whether such other contract shall be valid or not as against the parties thereto, or either of them; or if the risk shall be increased by any means whatever within the control of the assured; or if the title to the property insured, or any part thereof, shall be alienated, or this policy, or any interest therein, shall be assigned without the written consent of the company within thirty days from the time of such alienation; or if smoking is allowed in any barn or stable insured or containing property hereby insured; or if the assured shall in any way attempt to defraud said company, then, and in either such case, this policy shall be void."

The case was submitted to the decision of the court upon a statement of facts, the material part of which was as follows: "The building insured was totally destroyed by fire May 7, 1866, and due notice thereof and of the amount of the loss was given to the defendants. For some months previous to the fire, and at that time, Thomas F. Kelly, a brother of the plaintiff, had the care of the building. In February, 1866, Thomas hired of the plaintiff the store for the alleged purpose of storing in it a quantity of whiskey, and immediately afterwards the whiskey was put into the store by Thomas, and remained there till the time of the fire, except so much thereof as was sold at the store. While the whiskey was so stored in the building, Thomas from time to time sold to various individuals in the store quantities of whiskey, varying from one glass to two gallons, and delivered the same in the store without any license so to do. The store was generally kept locked, and the purchasers were admitted to it by Thomas. No other property was kept there for sale. At the time of the fire there were about nineteen barrels of whiskey in the store, all of which was destroyed. The

plaintiff knew that Thomas hired the store for the purpose of storing whiskey in it, that the whiskey was stored there, that Thomas kept said liquors with the intent to sell the same in said store, and that he had no license to sell intoxicating liquors, but the plaintiff did not know that any sales of said whiskey were made in said store."

T. G. Kent, for the plaintiff.

G. F. Hoar and *S. Uiley*, for the defendants.

GRAY, J. We have not found it necessary to consider the question, which was much discussed at the bar, whether, by the fair construction of the agreed statement, the plaintiff must be taken to have known that the building insured was used for unlawful purposes; because we are of opinion that upon the undisputed facts such knowledge need not be shown in order to sustain the defence.

The plaintiff's tenant, for two or three months before the fire, stored a number of barrels of intoxicating liquors in the building, with intent to sell such liquors in it, and did in fact from time to time sell the same there by retail without license, in violation of the Gen. Sts. c. 86, §§ 28-34, and did not sell or keep for sale on the premises any other property. This habitual use of the building for an unlawful purpose by the tenant, even if unknown to the owner, avoided his policy by the terms of the first proviso, the manifest object of which is to define certain risks which the insurers will not assume, without regard to the question whether they arise or exist by the act or with the knowledge of the assured; and the omission of any reference to him in this proviso is made the more marked by the repeated mention of his action and control in the proviso which immediately follows. The clause in the first proviso, which might most plausibly be argued to involve his knowledge or permission, is that next after the clause "if occupied or used for unlawful purposes," by which it is further stipulated that "if wood ashes are allowed in wooden vessels," the policy shall be void. But it has been decided by this court that a policy containing a clause almost precisely like this was avoided by the placing of ashes in a wooden barrel by a servant, without any direction of the assured. *Worcester v. Worcester Insurance Co.*, 9 Gray, 27. See also *Mead v. Northwestern Insurance Co.*, 3 Selden, 533; *Fire Association of Philadelphia v. Williamson*, 26 Penn. State, 196; *Howell v. Baltimore Equitable Society*, 16 Maryland, 377.

In some of the cases cited for the plaintiff, the prohibited use was not so constant or habitual, or of such a nature as to fall within the terms of the provision, and in the others the knowledge or assent of the assured was expressly required in order to avoid the policy.

Judgment for the defendants.

KELLY v. HOME INSURANCE COMPANY.
KELLY v. CROTON INSURANCE COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1867. 97 Mass. 288.

CHAPMAN, J. Both of the policies on which these actions are brought insure the plaintiff on his stock of liquors and casks in a certain building in Southborough occupied as a liquor store and private stable.

It appears that the stock consisted of nineteen barrels of whiskey; and at the time of the insurance, and thereafter to the time of the loss, it was intended for sale in this Commonwealth. At various times after the insurance was made, the plaintiff did sell to various individuals quantities of the whiskey, varying from one glass to two gallons, without license or authority. The insurance was made March 3, 1866, and the loss occurred May 7, 1866. It thus appears that the property was kept for sale illegally in violation of Gen. Sts. c. 86.¹ It was liable to be seized and confiscated as a nuisance, and the place where it was kept was made a nuisance by the plaintiff's intent to sell it illegally. By thus keeping it, and also by thus selling it, the plaintiff committed an offence which was punishable by fine and imprisonment. The defendants contend that a contract to insure such property thus kept is void, because it is in contravention of the policy of the law. It was so ruled in the Superior Court, and the plaintiff alleged exceptions.

The general rule of law on this subject is stated in *Boardman v. Merrimack Insurance Co.*, 8 Cush. 583. "When the direct purpose of the contract is to effect, advance, or encourage acts in violation of law, it is void. But if the contract sought to be enforced is collateral and independent, though in some measure connected with the acts done in violation of law, the contract is not void." No cases have been cited in which this test has been applied to contracts of insurance against fire, but its application to marine insurance is well settled. In marine insurance there is held to be an implied stipulation that the voyage shall be conducted legally in reference to the laws of the country where the vessel belongs. 1 Phil. Ins. (5th ed.) § 736. And Phillips states as a general principle that a contract of indemnity is void if incurring the risk or permitting indemnity against it is in contravention of the provisions or obvious policy of the law. *Ib.* § 906. See also 1 Arnould on Ins., part 2, c. 5. Chancellor Kent thus states the general doctrine: "An insurance on a voyage undertaken in violation of a blockade, or of an embargo, or of the provisions of a treaty, is illegal, whether the policy be on the ship, freight, or goods embarked in the illegal traffic. An

¹ "No person shall own, possess, or keep any spirituous or intoxicating liquor, with intent to sell the same in this state, and no owner of such liquor shall permit or suffer any other person to keep the same for the purpose of selling it in this state, unless authorized as provided in this chapter." General Statutes of Massachusetts, c. 86, s. 29. — ED.

insurance on property intended to be imported or exported contrary to the law of the place where the policy is made, or sought to be enforced, is void. The illegality of the voyage in all cases avoids the policy, and the voyage is always illegal when the goods or trade are prohibited, or the mode of its prosecution violates the provisions of a statute." 3 Kent Com. (6th ed.) 262.

This court has held that when the government prohibits trade with a foreign country or port, for any cause whatever, a voyage to that country or port is illicit, and all insurances on such voyages are void, whether the assurers had or had not knowledge of the prohibition. The reason is that the law will not give effect to a contract made to protect a traffic which it has prohibited. *Richardson v. Marine Insurance Co.*, 6 Mass. 111. See also *Breed v. Eaton*, 10 Mass. 21.

The case of *Cunard v. Hyde*, 2 El. & El. 1, was an action upon a policy on a cargo to be shipped from Miramichi, a port in Canada, to a port in the United Kingdom. The defence was, that, by the customs consolidation act, before any clearing officer permits a ship, wholly or partly laden with timber, to clear out from any port in North America or Honduras, after September 1 or before May 1, in any year, he shall ascertain that the whole cargo is below deck, and give the master a certificate to that effect; and the master shall not allow any part of the cargo to be upon deck, or sail without such certificate, under penalty of £100. It was held that, as part of the cargo was loaded upon deck with the previous knowledge of the assured, in violation of this act, the voyage was so far illegal that the insurance upon the cargo was void, though the terms of the act applied the prohibition and the penalty to the master only, and did not declare the voyage illegal. It had been decided, the previous year (1858), in *Cunard v. Hyde*, El. Bl. & El. 670, that such an insurance would not be void as against the assured unless he was privy to the illegal act of the master. These cases were affirmed in *Wilson v. Rankin*, 34 L. J. (N. S.) Q. B. 62, and s. c. in Exch. Ch. 35 L. J. (N. S.) Q. B. 87. Thus it appears that the law will not enforce a contract for the insurance of goods against the perils of the sea if, with the knowledge of the assured, they are carried on deck contrary to the provisions of a statute which requires the captain to carry them below deck, and subjects him to a penalty for the offence.

The principles above stated are fully recognized in *Clark v. Protection Insurance Co.*, 1 Story, 109, and were applied to a time policy. The defence in that case rested on the ground that the voyage from Waldoborough, Maine, to New Orleans, and thence to Liverpool, was illegal, because the captain took on board at New Orleans a chain cable which had been smuggled into the United States in another vessel, by the procurement of the captain, for the purpose of being used on this voyage. But the offence of the captain in respect to the smuggling was connected with the other vessel; and taking on board and carrying an article which had been smuggled in another voyage was not an offence against our revenue laws. Therefore the voyage was not illegal. The

cable was liable to seizure, and it was held that if from this cause the vessel had been subject to loss by detention, the insurance would have been void as to such loss; but as the loss was caused by the perils of the sea on the voyage to Liverpool, the insurance was held to be valid. But it was affirmed by the court, among other things, that if a voyage at its inception is founded on any illegality, in which only one of the owners participates, it is utterly void as to all, and that a statute imposing a penalty imports a prohibition, and makes the prohibited act illegal.

The same principle upon which it is held that goods which are carried for an illegal purpose, or in an illegal manner, cannot be the subject of a valid insurance against the perils of the sea, applies, with at least equal force, to an insurance against fire upon goods which are so unlawfully kept in a store that the owner is liable to fine and imprisonment, the store made a nuisance, and the goods subject to seizure and forfeiture. In the present case the insured was the guilty party; and his direct purpose in taking the policies was that he might continue his offence with the greater safety. His contract was in contravention of law, and void as to him, because he entered into it in order to protect himself in his illegal acts.

*Exceptions overruled.*¹

T. G. Kent, for the plaintiff.

G. F. Hoar and *S. Utley*, for the defendants.

¹ *Acc.*: *Johnson v. Union M. & F. Ins. Co.*, 127 Mass. 555 (1879); *Lawrence v. National F. Ins. Co.*, 127 Mass. 557, *u.* (1880).

On illegality, in general, see also:—

Carrigan v. Lycoming F. Ins. Co., 53 Vt. 418 (1881);

Ilinckley v. Germania F. Ins. Co., 140 Mass. 38 (1885);

Pollard v. Phoenix Ins. Co., 63 Miss. 244 (1885);

Erb v. German American Ins. Co., 98 Iowa, 606 (1896);

Erb v. German Ins. Co., 99 Iowa, 398 (1896);

Erb v. Fidelity Ins. Co., 99 Iowa, 727 (1896);

Phenix Ins. Co. v. Clay, 101 Ga. 331 (1897);

Springfield F. & M. Ins. Co. v. Cannon, 46 S. W. Rep. 375 (Tex. Civ. App. 1898).—*Ed.*

SECTION II. (*continued*).

(B) CONDITIONS PROHIBITING THE KEEPING OF CERTAIN THINGS.

DOBSON v. SOTHEY AND OTHERS.

NISI PRIUS, KING'S BENCH, 1827. MOO. & M. 90.

ASSUMPSIT upon a policy of insurance against fire, against the defendants, three of the directors of the Beacon Insurance Company.

The policy was effected upon "a barn, situate in an open field, timber built and tiled," at the premium of 1s. 6d. per £100.

The conditions indorsed upon the policy required the insurer to deliver to the company a description of the property to be insured, and provided that all insurances effected on property falsely described, so that the same might be charged at a lower rate of premium than would otherwise have been charged, should be void, and the premiums paid forfeited to the company.

The rate of premium paid by the plaintiff was the lowest rate, and was only payable for buildings of a certain description, wherein no fire is kept, and no hazardous goods are deposited. There were other articles fixing a higher rate of premium for buildings of other descriptions, with the same proviso against hazardous goods; and a proviso that "if buildings of any description insured with the company shall, at any time after such insurance, be made use of to stow or warehouse any hazardous goods," without leave from the company, the policy should be forfeited.

The premises were agricultural buildings, but not such as were strictly to be described as a barn; but they were of such a nature that they would have been insured by the company at the same rate, if they had been more accurately described. They required tarring; and a fire was consequently lighted in the inside, and a tar-barrel was brought into the building, for the purpose of performing the necessary operations. In the absence and by the negligence of the plaintiff's servant, the tar boiled over, took fire, communicated with that in the barrel, and the premises were burnt down.

F. Pollock, for the defendant, contended, that the plaintiff could not recover; first, because the premises were incorrectly described as a barn; secondly, because the lighting a fire within the building was a contravention of the terms of the policy, which required that no fire should be kept in buildings on which the rate of insurance in the present case was paid; thirdly, that the tar-barrel came under the description of hazardous goods, and, therefore, that bringing it within the premises was also a breach of the conditions of the policy; and that all, or any of these circumstances, occasioned a forfeiture of the insurance.

LORD TENTERDEN, C. J., said: If the property insured has not been correctly described, the defendants certainly are not liable; but I do not think there is, in this case, any mis-description which will discharge them. The word "barn" is not the most correct description of the premises; but it would give the company substantial information of their nature: there would be no difference in the risk, and the insurance would have been at the same rate, whether the word "barn," or a more correct phrase, had been used; I think, therefore, that they are substantially well described. Nor do I think that the other circumstances relied on furnish any answer to the action. If the company intended to stipulate, not merely that no fire should habitually be kept on the premises, but that none should ever be introduced upon them, they might have expressed themselves to that effect; and the same remark applies to the case of hazardous goods also. In the absence of any such stipulation, I think that the condition must be understood as forbidding only the habitual use of fire, or the ordinary deposit of hazardous goods, not their occasional introduction, as in this case, for a temporary purpose connected with the occupation of the premises. The common repairs of a building necessarily require the introduction of fire upon the premises, and one of the great objects of insuring is security against the negligence of servants and workmen. I cannot, therefore, be of opinion that the policy in this case was forfeited; and certainly, if it is valid, the circumstance that the fire happened through the negligence of the plaintiff's servant furnishes no answer to the action.

*Verdict for the plaintiff.*¹

Scarlett, A. G., Gurney, and Tomlinson, for the plaintiff.

F. Pollock and Patteson, for the defendants.

MEAD v. NORTHWESTERN INSURANCE COMPANY.

COURT OF APPEALS OF NEW YORK, 1852. 7 N. Y. 530.

THIS action was brought upon five policies of insurance, executed by the defendants upon five stores owned by the plaintiffs in Brooklyn, forming a single block of buildings. The stores insured by three of the policies were described as "his brick dwelling and store not coped, with tin roof;" and those covered by the other two policies as "his four-story brick and framed dwelling and store filled in with brick, roof part tin and part shingles." No other description of the buildings and none of the business to be carried on in them was contained in the policy. Each of the policies contained the following clause: "In case the above-mentioned premises shall at any time after the making, and

¹ See *Shaw v. Robberds*, 6 Ad. & E. 75 (1837); *Glen v. Lewis*, 8 Ex. 607, 619 (1853). — Ed.

during the time this policy would otherwise continue in force, be appropriated, applied, or used to or for the purpose of carrying on or exercising therein any trade, business, or vocation denominated *hazardous or extra hazardous*, or specified in the memorandum of special rates in the proposals annexed to this policy, or for the purpose of storing therein any of the articles, goods, or merchandise in the same proposals denominated *hazardous or extra hazardous*, or included in the *memorandum of special rates*, unless otherwise specially provided for, or hereafter agreed to by this company in writing, to be added to or indorsed upon this policy, then and from thenceforth, so long as the same shall be so appropriated, applied, or used, these presents shall cease and be of no force or effect. And it is moreover declared that this policy is made and accepted in reference to the proposals and conditions hereunto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for."

In the proposals and conditions referred to and which were printed upon the same sheet of paper with each policy "spirituous liquors" are included in the list of "trades, goods, wares, and merchandise considered hazardous," and it is declared that "camphene cannot be used in the building where insurance is effected unless by special permission in writing."¹ . . . The cause was tried in April, 1851, at the circuit in Kings County, before Justice Morse. Upon the trial the plaintiff proved the making of the policies and the destruction of the buildings insured by fire in June, 1850, and their value and rested. The defendants then gave evidence, that camphene was used for light in the buildings by their occupants, and offered evidence that in one of the buildings articles denominated hazardous and extra hazardous were kept, which was excluded. It was, however, proved that in one of the buildings a grocery was kept, in which spirituous liquors were kept and sold, but it appeared that the fire did not originate from the camphene or spirits, and that they were removed before the fire reached the buildings. The remaining facts of the case, together with the ruling of the justice at the circuit, and the exceptions, appear sufficiently in the opinion of the court. A verdict was taken for the plaintiff, subject to the opinion of the court upon a case, with leave to convert it into a bill of exceptions, upon which judgment was given for the plaintiff at a general term held in the city of Brooklyn, in April, 1852. The defendants appealed therefrom.

J. Neilson, for appellants.

D. E. Wheeler, for respondent.

WELLES, J. Upon the trial the defendants' counsel offered to prove by the witness Halliday, who occupied one of the buildings insured at the time of the fire, that he *did business* and kept articles in said building denominated *hazardous and extra hazardous*, at the time of the fire. The evidence was objected to, and the objection sustained by the

¹ A requirement as to a survey has not been reprinted. — Ed.

judge, to which the defendants' counsel excepted. In this I think there was error.¹ . . . The offer was nearly in the language of one of the above provisions, to show its violation.

The answers given by the respondent's counsel to this point are, first, that the fire did not originate in the store occupied by the witness; second, that no knowledge of the business carried on was shown in the respondent; third, that there was no proof that the business had been changed from the time the insurance was effected to the time of the fire; and fourth, that this point was not reserved by the appellants' counsel at the close of the case, and is not among the objections then raised. None of these answers are sufficient. The provision of the policy referred to amounted to a prospective or promissory warranty, and was as obligatory as if it had been retrospective or concurrent. It was therefore of no consequence that the fire was not produced by its violation or breach (*Murdock v. Chenango Co. Mut. Ins. Co.*, 2 Comst. 210). It is equally unimportant that the respondent was ignorant that such business was carried on. The question whether a warranty has been broken can never depend upon the knowledge or ignorance or intent of the party making it, touching the acts or the fact constituting the breach. It was undoubtedly competent for the parties to contract in relation to the future business to be carried on in the building insured, without reference to the previous business, and such was the case here. That the business prohibited had been carried on up to the time the policy was made, was no excuse for a violation of the contract. And finally, it was not necessary or proper for the counsel to do more than to except to the decision of the judge at the circuit, overruling the evidence offered. He was in fact precluded from making the point in any other stage of the case by the exclusion of the evidence. . . .

Lawrence Flynn, a witness for the defendants, testified that he lived in one of the buildings insured, and which was consumed by the fire; that he sold candles, oil, camphene, and lamps; that he had less than a gallon of camphene when the fire took place; that he took the camphene and oil out before the fire; that he went into possession May 1st, 1851, and remained there until the fire; that the building was used for a milliner's shop before he went there. The defendants' counsel offered to prove by this witness that camphene was used in this building by the person who occupied it previous to May 1st, 1850. This evidence was objected to, and the objection was sustained, to which the defendants' counsel excepted. Each of the policies contained a clause to the effect that they were made and accepted in reference to the proposals and conditions thereto annexed, which were to be used and resorted to to explain the rights and obligations of the parties thereto in all cases not therein specially provided for; and in the proposals annexed was

¹ In reprinting the opinion, passages have been omitted that repeated the facts given in the statement or that bore exclusively upon matters as to which no error was found. — Ed.

the following provision: "Camphene cannot be used in the building where insurance is effected, unless by special permission in writing, and is then to be charged an extra premium."

The bill of exceptions states that "in each case the policy itself and the conditions and proposals annexed were on the same sheet of paper, *physically attached*." The prohibition, therefore, in relation to the use of camphene, must be taken and regarded as a part of the policy or contract of insurance (*Jennings v. The Chenango Mut. Ins. Co.*, 2 Denio, 75); and it seems to me also that the provision in question on that subject was a warranty that camphene should not be used in the building insured. The only question in my mind is, whether the use of the prohibited article at one period of the time for which the policy should by its terms continue, will avoid the policy in a case where the loss occurred at a time subsequent to such use. For the purposes of this question it should be treated the same as if the use of the camphene had been permanently discontinued before the occurrence of the fire which destroyed the property. A warranty in a contract of insurance is in the nature of a condition precedent. It is settled by numerous decisions, that if the warranty is violated, it avoids the policy, and that it is immaterial whether the breach affects the risk or is connected with the loss or not. It would seem, in theory, that it was equally immaterial whether the act or thing to which the warranty related continued up to the time of the loss, or had ceased or been discontinued before. The amount of it is, the defendants undertook to indemnify the plaintiff against damage or loss by fire, &c., upon condition that certain stipulations were observed and kept by and on behalf of the plaintiff and not otherwise. If the plaintiff failed to perform those stipulations, the defendants' liability to indemnify ceased; could the plaintiff revive it at pleasure by fulfilling his agreement — in this case, by removing the camphene? If he could in one instance he could, for aught I see, in any number of cases. I incline to the opinion that this could not be done in any case without the consent of the defendants, and that the only safe rule is to hold the contract of insurance at an end the moment the warranty is broken, and that it cannot be revived again without the consent of both parties, unless the insurer has by some act or line of conduct waived the breach or violation of the warranty.

If this be so, the judge erred in excluding the evidence offered. *Weir v. Aberdeen*, 2 B. & Ald. 320; *McLanahan v. Universal Ins. Co.*, 1 Pet. 170. . . .

For the errors at the circuit before mentioned, I think the judgment below should be reversed, and a new trial ordered with costs to abide the event.

All the judges present, except MORSE, J., who gave no opinion, concurring.

*Judgment reversed and new trial ordered.*¹

¹ See *Turnbull v. Home F. Ins. Co.*, 83 Md. 312, 321 (1896). — ED.

HYNDS ET AL. v. SCHENECTADY COUNTY MUTUAL
INS. CO.COURT OF APPEALS OF NEW YORK, 1854. 11 N. Y. 554.¹

ACTION upon a policy dated June 10, 1848, by which the defendant insured the plaintiffs against loss by fire to the amount of \$1,500 on their flouring mill and machinery and \$500 on their carding machine and machinery. The case was tried at the Schoharie County Circuit before WRIGHT, J., and a jury. The policy contained a provision against using the premises for the purpose either of storing or of keeping therein any of the articles denominated hazardous in the terms annexed to the policy. Flax was among the articles thus denominated hazardous. Prior to May 27, 1848, the carding machine building had been used for the business of dressing flax. Before June 10, 1848, this business was discontinued, and the building was appropriated for a carding machine. When the change was made, the refuse flax and tow were removed; but some unbroken flax, being in bulk about two and a half feet high, three feet wide, and of the length of the flax, was left in one room, where it remained at the time of the fire. On June 12, 1848, a fire originated in the carding machine building and consumed all the property insured.

The counsel for the defendant moved for a nonsuit, and excepted to the court's overruling of this motion.

The counsel for the defendant requested the court to charge the jury: 1. That if they believed that there was flax kept in the lower room of the carding machine building at the time of the fire, the policy would be of no effect. The court refused to charge upon this proposition other than as is hereafter stated; to which refusal the defendant's counsel excepted. 2. That if the jury should believe that there was flax in the lower story of the carding machine building for safe keeping and not for the purpose of consumption, or in the usual course of business for which the building was occupied, the plaintiffs were not entitled to recover. The court refused to charge upon this proposition, other than as is hereafter stated; to which refusal the defendant's counsel excepted. 3. That if the jury believed that the fire originated in the flax or tow in the lower room of the carding machine building, the plaintiffs are not entitled to recover. The court refused so to charge, and the defendant's counsel excepted.

The court then, amongst other things, charged the jury, that if, at the time the fire occurred, the building was appropriated, applied, or used for the storage of flax, the policy was of no force, and the plaintiff should not recover; but if the building was not devoted to or used for that purpose, and the small pile of undressed flax, said to have

¹ The statement has been rewritten. — Ed.

been in the lower room of the carding machine building, was there but temporarily, and with no intention of having it regularly stored or kept there, then the policy would not be avoided. To the last branch of this paragraph of the charge the defendant's counsel excepted.

The jury rendered a verdict in favor of the plaintiffs for \$2,289.20, upon which judgment was entered. The defendant made a bill of exceptions, and on appeal the judgment was affirmed by the Supreme Court sitting in the Third District, at General Term. (See 16 Barb. 119). The defendant appealed to this court.

P. Potter, for the appellant.

N. Hill, Jr., for the respondents.

GARDINER, C. J. The language of the condition of the policy in question, so far as it is applicable to the case before us, is "that in case the premises insured shall be *appropriated, applied to or used for the purpose*, either of *storing or keeping* therein any of the articles, goods, &c., denominated hazardous, &c., then, from thenceforth, so long as the same shall be so appropriated, applied, or used, these presents shall be of no force or effect." It is not enough, according to this phraseology, that hazardous articles are upon the premises. They must be there for the purpose of being stored or kept; and the premises must be appropriately applied or used to effect that purpose. This is the definition that has been settled by repeated decisions in reference to the word "storing;" and there is no reason why it should not be applied to "keeping," a word of more extensive signification undoubtedly, but which, in this connection, seems to demand a continued occupation of the whole, or a part of the premises insured, in pursuance of a design for that specified purpose. Thus, the storing of gunpowder implies the user of the premises for that purpose, and such a condition would not be violated by keeping that article for sale at retail. But such a "keeping" would be a breach of the condition of this policy, because it would require a continued user of some part of the premises to effect that purpose. But if the insured, on his return from hunting, should leave his flask, containing powder, in a desk in a building covered by the policy, for an hour, or a day, this would not be within the prohibition, for the act would not involve the notion of the appropriation, application, or user of the premises for the purpose of storing, or keeping gunpowder. The counsel for the appellant was probably right in his suggestion that the word "keeping" was introduced into these policies after the decisions in 1 Hall, 226, and other cases which restricted the term "storing" to its ordinary commercial meaning. The alteration was designed to reach a class of cases where hazardous goods were kept for retail, or other purposes, which presupposed a continued deposit, and which were excluded from the condition by the construction given by the courts to the policies in the cases mentioned. But it is not to be presumed that the company in this case intended by a formal condition to prohibit the insured from bringing a match upon the premises for the purpose

of lighting a fire, or a bottle of oil to apply to the machinery, although both might remain in the building for a brief period, and although it might be said that in the broadest sense of the term that both were *kept* upon the premises, while they remained there. There is a manifest distinction between a deposit of hazardous goods and a deposit for the purpose of keeping them. A distinction which is recognized by the terms of the condition, and which is necessary to prevent the policy from being altogether worthless as an indemnity, if not a mere imposition on the insured.

This is the only point presented of any importance. It was raised on the motion to nonsuit and in the request to the judge for specific instructions to the jury. The charge was in conformity to the views above suggested. The judgment of the Supreme Court should be affirmed.

RUGGLES, DENIO, JOHNSON, and EDWARDS, JJ., concurred in the foregoing opinion.

SELDEN, PARKER, and ALLEN were in favor of reversing the judgment. *Judgment affirmed.*¹

HARPER AND OTHERS v. ALBANY MUTUAL INS. CO.

COURT OF APPEALS OF NEW YORK, 1858. 17 N. Y. 194.

APPEAL from the Supreme Court. The action was upon a policy of insurance against damage by fire, issued by the defendant, upon the plaintiffs' printing and book materials, stock, paper, and stereotype plates and printed books, contained in certain buildings in the city of New York, therein described, "and privileged for a *printing office, bindery, and bookstore*, also for a *steam-boiler* in the yard.

The policy contained provisions that "if the premises should at any time be altered, appropriated, applied, or used to or for the purpose of carrying on or exercising therein any other trade, business, or vocation denominated hazardous or extra hazardous, or specified in the memorandum of special rates in the proposals or conditions annexed to the policy, or for the purpose of storing or keeping therein any of the like hazardous goods, wares, or merchandise, unless as therein specially provided for or thereafter agreed to by the company, otherwise to be added or indorsed upon the policy in writing, then and from thence-

¹ *Acc.*: Mears v. Humboldt Ins. Co., 92 Pa. 15 (1879). — ED.

On "storing," see Langdon v. New York Equitable Ins. Co., 1 Hall, 226 (1828); s. c. on error, *sub nom.* New York Equitable Ins. Co. v. Langdon, 6 Wend. 623 (1831); City F. Ins. Co. v. Corlies, 21 Wend. 367 (1839); Rafferty v. New Brunswick F. Ins. Co., 18 N. J. L. (3 Harr.) 480 (1842); O'Niel v. Buffalo F. Ins. Co., 3 N. Y. 122 (1849); Renshaw v. Missouri State Mut. F. & M. Ins. Co., 103 Mo. 595, 605 (1890). — ED.

forth, so long as the same should be so appropriated, applied, or used, the policy should cease and be of no force or effect."

In the conditions annexed to the policy, in the class of goods specified as hazardous were spiritous liquors, and in the class specified as extra hazardous were spirits of turpentine and stocks of booksellers. Under the head of special rates were classed bookbinders, camphene on sale, printers of books, and job printers. Under this head was also this provision: "Camphene, spirit gas, or burning fluid cannot be used in the building where insurance is effected, unless permission for such use be indorsed in writing upon the policy, and is then to be charged an extra premium." The policy was a printed blank, filled up in the usual form, and the above provisions were contained in the printed part of the policy.

The trial was at the New York Circuit, before Mr. Justice ROOSEVELT and a jury. The plaintiffs proved a loss by fire exceeding the amount of insurance; and it appeared, by the evidence on their part, that the fire was occasioned by the act of a plumber engaged in making some repairs, who accidentally threw a lighted match or paper into a pan containing a small quantity of camphene, used for the purpose of cleaning the rollers employed by the plaintiffs in inking their forms of type, wood-cuts, etc.

It also appeared that the plaintiffs carried on an extensive book printing establishment, and that they used camphene for cleaning rollers, and for cleaning wood-cuts and electrotypes plates in the course of their business of book making; and that the use of it was limited to the necessary purposes of their business as printers. It also appeared that this application of camphene was, and for many years had been, ordinary and usual among printers, and that such use was necessary and indispensable.

It was insisted, on the part of the defence, that such use of camphene was prohibited by the clause in the policy respecting the use of "camphene, spirit gas, or burning fluid." The judge charged the jury, under exception by the defendant, that the policy of insurance gave the plaintiffs the privilege of carrying on the printing business, and that if they should find that camphene was a necessary and ordinary material used in the business of printing, and that it was a general custom in such establishments as the plaintiffs' to employ that material and that the plaintiffs used it for that purpose, then there was no breach of the contract, and the plaintiffs were entitled to a verdict. The plaintiffs had a verdict, subject to the opinion of the court at General Term; and the Supreme Court, at General Term in the First District, having ordered judgment upon the verdict, the defendant appealed to this court.

A. Thompson, for the appellant.

William M. Evarts, for the respondents.

PRATT, J. The judgment of the Supreme Court, I think, should be affirmed.

First. The exclusion of the use of camphene in the building where

insurance is effected has reference to its use in lighting the premises. This is evident, I think, from the connection in which it is found with other articles used alone for that purpose. I know of no other use to which spirit gas and burning fluid are applicable except for the purpose of lighting buildings. And that is the ordinary and more general use to which camphene itself is applied. The three articles for lighting buildings being thus placed together in the prohibition, in connection with the consideration that such use is extremely hazardous, raises a strong presumption that its use for lighting alone was designed to be prohibited in this clause.

But, taken in connection with the other provisions of the policy, the presumption becomes conclusive. In the class of special rates we find enumerated camphene on sale, without any such special prohibition; and in the same class is found printers of books and job printers, the very articles which the policy by its terms covers. Its use for cleaning rollers is clearly no more hazardous than keeping it for sale. I am satisfied, therefore, that it was not the mere presence of the article which was designed to be prohibited by this special clause in the policy, but its common though hazardous use for lighting buildings.

Second. But if that clause should be deemed to include any and every use of camphene, it would not avoid the policy. The insurance in this case is upon the stock in trade used in the business of printers of books and bookbinders, and covers all such articles as are necessarily and ordinarily used in such business. The term "stock in trade" in a specified business, when used as matter of description in a policy of insurance, "includes, besides materials, everything necessary for carrying on that business." (1 Phil. Ins., § 489.) They are just as clearly, therefore, embraced in the policy as if each article thus necessarily used was enumerated at length. (2 Hall, 589; Wall v. Howard Ins. Co., 14 Barb. 383, affirmed in this court December, 1854.) And the underwriters must be deemed to have been acquainted with the business, and with the materials ordinarily and necessarily used by the trade in prosecuting it. In issuing the policy they must be deemed to have intended to include all such materials in the risk. In construing the policy, therefore, it is to be treated as if the article of camphene for the use to which it was in fact applied, had been enumerated with the other articles covered by the policy. Thus considered, the rulings at the Circuit were clearly right.

A policy of insurance, like any other contract, should be construed so as to give it effect rather than to make it void. The company have received a premium adequate, it is presumed, to the risk which they have taken, and hence nothing but the most stern legal necessity should constrain the court to give it a construction which would nullify it and render it a mere deception instead of the protection which the parties to it designed.

It is a well settled point that the written part of a policy shall always prevail over the printed part, in cases of repugnancy. (2 Hall, 622.)

The printed forms are very general in their terms. The prohibitions inserted therein are more particularly applicable to the ordinary and more common policies of insurance upon non-hazardous property, for the purpose of protecting the insurers against any increased hazard in consequence of a change of business or the use of any material more hazardous than that insured against. In much the greater portion of insurances there would be no repugnancy between the written and printed part of the policy; and effect, in such cases, should undoubtedly be given to every part of the instrument. Still the substance of the contract is in the written part of the policy; and when the insurance is upon hazardous or extra hazardous goods or trades, or upon those specified in the memorandum of special rates, these printed portions are not applicable, or at most only in a limited degree. Even in such case some effect may be given to these printed prohibitions. They would be held probably to prohibit a change of business from the one designated to another not designated, although the latter should be no more hazardous. In such cases they would not be entirely useless.

But when the insurance is directly upon the stock in trade, as for example in the business of manufacturing and sale of camphene, to hold that a general printed prohibition (contained in every policy of insurance) against keeping or using it, unless permission be specially given and indorsed upon the policy, would have the effect to nullify its direct and positive stipulations, would be preposterous. Indeed, presented in this form, no one would contend for such a proposition. And still that is substantially the point presented in this case. For if I am right in the proposition that if the article was necessarily and ordinarily used in the business it is included in the term "stock" used in the policy, it is as plainly within the risk assumed by the defendants as if written in at length. Upon the whole I think the rulings at the Circuit were correct and the judgment must be affirmed.

All the judges concurring.

*Judgment affirmed.*¹

¹ *Acc.*: Leggett v. Ætna Ins. Co., 10 Rich. S. Car. Law, 202, 208 (1856); Bryant v. Poughkeepsie Mut. Ins. Co., 17 N. Y. 200 (1858); Whitmarsh v. Conway F. Ins. Co., 16 Gray, 359 (1860); Phoenix Ins. Co. v. Taylor, 5 Minn. 492 (1861); Niagara F. Ins. Co. v. De Graff, 12 Mich. 124 (1863); Pindar v. Kings County Ins. Co., 36 N. Y. 648 (1867); Viele v. Germania Ins. Co., *post*, pp. 1046, 1058-1059 (1868); Collins v. Farmville Ins. & Banking Co., 79 N. Car. 279 (1878); Carrigan v. Lycoming F. Ins. Co., 53 Vt. 418, 425-427 (1881); Carlin v. Western Assurance Co., 57 Md. 515 (1881); Barnard v. National F. Ins. Co., 27 Mo. App. 26 (1887); Maril v. Connecticut F. Ins. Co., 95 Ga. 604 (1894); Yoch v. Home Mut. Ins. Co., 111 Cal. 503 (1896); Phoenix Ins. Co. v. Fleming, 65 Ark. 54 (1898).

See Harper v. N. Y. City Ins. Co., 22 N. Y. 441 (1860); Commercial Ins. Co. v. Mehlman, 48 Ill. 313 (1868); Archer v. Merchants' and Manufacturers' Ins. Co., 43 Mo. 434 (1869); Hall v. Ins. Co. of North America, 58 N. Y. 292 (1874); Buchanan v. Exchange F. Ins. Co., 61 N. Y. 26 (1874); Lancaster Silver Plate Co. v. National F. Ins. Co., 170 Pa. 151 (1895); Lancaster Silver Plate Co. v. Manchester F. Assurance Co., 170 Pa. 166 (1895); Mascott v. First National F. Ins. Co., 69 Vt. 116 (1896).

Compare Macomber v. Howard F. Ins. Co., 7 Gray, 257 (1856); McEwen v. Guthridge, 13 Moo. P. C. 304 (1860); Whitmarsh v. Charter Oak F. Ins. Co., 2 Allen, 581 (1861); Pindar v. Continental Ins. Co., 38 N. Y. 364 (1868); Birmingham F. Ins. Co.

WHEELER v. TRADERS' INSURANCE COMPANY.

SUPREME COURT OF NEW HAMPSHIRE, 1882. 62 N. H. 326.¹

ASSUMPSIT on a policy of insurance on a woollen mill and its contents. The policy contained the provision that "if the assured shall keep or use gunpowder, fireworks, nitroglycerine, phosphorus, saltpetre, nitrate of soda, petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish, or keep or use camphene, spirit gas, or any burning fluid or chemical oils, without written permission in this policy, then and in every such case this policy is void, and all insurance thereunder shall immediately cease and determine." About an hour before the fire the assured carried a barrel of naphtha into the mill, poured some of it into a watering-pot, and sprinkled it upon the wool for the purpose of killing moths. The naphtha had been bought for the purpose of killing the moths, and the intention was to take the remainder outside the building and there clean the windows, which had already been taken out, but the fumes of the naphtha mixed with the air made an explosive and inflammable compound, and thus the fire arose.

The case was submitted to the court upon agreed facts.

Marston & Eastman and *J. S. H. Frink*, for the plaintiff.

S. C. Eastman, for the defendants.

DOE, C. J. Whether the expression "keep or use" means a keeping or use on a single occasion, or frequently repeated, or continued for several days or months, depends upon the subject-matter of the contract, and the intention of the parties proved by competent evidence. If the plaintiff had walked through his mill with a vial of naphtha in his pocket, the transit might not have involved the insured property in the danger which he had agreed should annul the policy. A drop of the liquid carried into the mill, and instantly used there as medicine, might create no appreciable hazard of fire. The policy covered certain risks; but the danger of fire where naphtha is kept or used is such that the defendants expressly refused to assume it, and the plaintiff agreed to at least as much as this, — that his keeping or using naphtha, if it involved the mill in substantial danger, should terminate the insurance. Whether his agreement is broader than that, we need not inquire.

Naphtha was several times drawn from the cask into a watering-pot holding about two quarts, carried across the room, and sprinkled upon the wool. Thus mixed with the air in a manner favorable to rapid evaporation, its bulk was quickly multiplied five or six hundred times,

v. Kroegher, 83 Pa. 64 (1876); *Cobb v. Ins. Co. of North America*, 17 Kans. 492 (1877); *Lancaster F. Ins. Co. v. Lenheim*, 89 Pa. 497 (1879); *Beer v. Insurance Co.*, 39 Ohio St. 107 (1883); *Pittsburgh Ins. Co. v. Frazee*, 107 Pa. 521 (1884); *Western Assurance Co. v. Rector*, 85 Ky. 294 (1887). — Ed.

¹ The case has been restated. — Ed.

and it became explosive and very inflammable. Penetrating all sources of combustion, it flowed over the mill, and exposed it and its contents to imminent danger of destruction. Unaware of the dangerous nature of the material he was using, the plaintiff put all the insured property in an enormous peril, which continued as long as the property existed. He had agreed that if he should do this, the whole fire risk should be his, and not the defendants', and he does not contend that his ignorance of the hazardous character of his act is material. In pursuance of his agreement the insurance ceased when the naphtha risk began.

There was no contract that the defendants should bear any risk a year or a day after he wittingly or unwittingly introduced such a danger as that which resulted from his use of naphtha. If he had intended to use it every day for a year, as he used it on the day of the fire, and the fire had been caused by its use a moment after the first act of sprinkling the wool, the policy would have been invalidated by the dangerous use, and not by the consequent fire. It would not be material whether the fire started the first moment of the use intended to be continued a year, or the last moment of the year's actual use. It was not a mere intention to use naphtha once or many times, nor a fire resulting from, or made irresistible by, its use, nor a naphtha risk prolonged an unreasonable time, but a use of naphtha exposing the property to substantial danger, that was to put an end to the defendants' liability. "If the assured shall keep or use . . . naphtha, . . . this policy is void, and, all insurance thereunder shall immediately cease." The immediate cessation of the insurance when the plaintiff used naphtha does not mean that under such a naphtha risk as enveloped the mill when the fire broke out, the insurance would continue down to the last moment of the undefined period at the expiration of which that risk would become a habit of the plaintiff, and a customary condition of the property. On the facts stated, the plaintiff cannot recover.

*Case discharged.*¹

WHEELER v. TRADERS' INSURANCE COMPANY.

SUPREME COURT OF NEW HAMPSHIRE, 1883. 62 N. H. 450.

MOTION for rehearing *Wheeler v. Traders' Insurance Company*, *ante*, p. 534.

Marston & Eastman and *J. S. H. Frink*, for the plaintiff.
S. C. Eastman, for the defendants.

¹ See *Williams v. Fireman's Fund Ins. Co.*, 54 N. Y. 569, 572-573 (1874); *Bayly v. London & Lancashire Ins. Co.*, 4 Ins. L. J. 503 (U. S. C. C., D. La., 1875); s. c. 2 Fed. Cas. 1087; *Matson v. Farm Buildings Ins. Co.*, 73 N. Y. 310 (1878).

Compare *Farmers' and Mechanics' Ins. Co. v. Simmons*, 30 Pa. 299 (1858); *Mears v. Humboldt Ins. Co.*, 92 Pa. 15, 20 (1879); *La Force v. Williams City F. Ins. Co.*, 43 Mo. App. 518, 530-532 (1890). — ED.

ALLEN, J. The stipulation in the policy, that "if the assured shall keep or use . . . petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish, or keep or use camphene, spirit gas, or any burning fluid or chemical oils without written permission in this policy, then and in every such case this policy is void, and all insurance thereunder shall immediately cease and determine," was a part of the contract of insurance entered into by the plaintiff with the defendants, without any apparent mistake, deception, or fraud. The plaintiff expressly agreed that a violation of the condition should of itself be a forfeiture of all insurance under the policy. Having voluntarily entered into the contract thus restricted, the plaintiff cannot reasonably complain of the enforcement of the forfeiture for a violation of the condition. *Mead v. N. W. Ins. Co.*, 7 N. Y. 530; *Lee v. Howard Ins. Co.*, 3 Gray, 583; *Kelly v. Home Ins. Co.*, 97 Mass. 288.

There is no ambiguity in the meaning of the words used, or the sense in which they were employed, by which the plaintiff might have the benefit of a doubt. *Smith v. Ins. Co.*, 32 N. Y. 399. The contract must be interpreted, and the terms used must be defined in the light of the mischief intended to be avoided by the restriction. The prohibition of the keeping or use for any purpose, or for any measurable time, of an article so inviting to fire as that described in the case, was a reasonable prohibition, the violation of which, in any degree and for any time, would expose the insured premises to an extreme degree of danger; and to give the restrictive clause in the policy a construction which would permit the introduction into the premises of naphtha or benzine, and its use there for any dangerous purpose for any time, would be a practical nullification of that part of the contract. If it could be said that merely "keeping" it, not for sale, nor for any general use in the business of manufacturing, but for temporary storage, could not be within the prohibition intended by the parties to the contract, certainly the "use" made of it was one subject to the prohibition of the use of an article hazardous to an extraordinary degree, if the use of any combustible material ever could be.

The cases in which a disregard of the prohibition of keeping or using extraordinarily hazardous articles had not been held to work a forfeiture of the policy are those where the use made was one incident to the business of the insured, adopted from necessity or custom, and recognized by the insurer, so that a waiver of the prohibitory clause followed. Such cases are: *Carlin v. Assurance Co.*, 57 Md. 515, in which the prohibited oil was, at the time of the insurance, known by the insurers to be commonly used by the insured to lubricate machinery; *Buchanan v. Ins. Co.*, 61 N. Y. 26, where the oil was known to be commonly used for illuminating purposes; and *Whitmarsh v. Ins. Co.*, 16 Gray, 359, in which the inhibited article was known to be usually kept and dealt with as a part of a stock of goods in a country store insured. The use by the plaintiff of the benzine or naphtha did not come within the doctrine of any of these cases, nor was

it a use in a small quantity as a medicine, or for other special and not dangerous purpose, as in *Williams v. Ins. Co.*, 54 N. Y. 569.

The plaintiff claims that the policy was not forfeited by the use of the naphtha, because the use was not habitual, but temporary, and confined to a single occasion. The cases relied on as authority for this position are cases, for the most part, where there was no express stipulation or warranty against the use of the particular dangerous article or material in question, but only a prohibition in general terms of keeping hazardous things on the premises or of carrying on a different or more dangerous trade. *Dobson v. Sotheby, M. & M.* 90; *Shaw v. Robberds*, 6 A. & E. 76. But where there is a stipulation that the policy shall be avoided on the use of an article expressly named, and there is nothing in the policy from which a permission to use the article, in a partial, limited, or temporary way, can be inferred, full effect has usually been given to the prohibitive clause by a forfeiture of the policy for its violation. *Glen v. Lewis*, 8 Exch. 607; *Faulkner v. Central Ins. Co.*, 1 Kerr, N. B., 279; *Worcester v. Ins. Co.*, 9 Gray, 27; *Matson v. Ins. Co.*, 73 N. Y. 310; *Birmingham Ins. Co. v. Kroegher*, 83 Pa. St. 64; *Cerf v. Home Ins. Co.*, 44 Cal. 320.

No reason has been suggested by the plaintiff why the restrictive clause in the policy of insurance in this case should receive a construction by rules different from those applied to ordinary business contracts. The terms of the prohibitive clause are simple, well known, and in common use. There is nothing ambiguous about them, and there can be no doubt as to their meaning. The stipulation was a plain, unqualified agreement that the policy should be forfeited if naphtha were used in the premises insured. It was a reasonable restriction against the use of a very dangerous and combustible material; and a construction which would uphold the policy, in spite of a plainly hazardous use of any substantial quantity of so dangerous a fluid "on the premises, for any substantial time, would defeat the object for which the restriction was made. *Motion denied.*

McFARLAND v. ST. PAUL F. & M. INS. CO.

SUPREME COURT OF MINNESOTA, 1891. 46 Minn. 519.

APPEAL by plaintiff from an order of the District Court for Ramsey County, WILKIN, J., presiding, refusing a new trial after verdict directed for defendant, in an action to recover \$1,450 on a fire insurance policy.

Johns, Michael & Johns, for appellant.

George L. Bunn, for respondent.

COLLINS, J. Although the policy of insurance upon which plaintiff seeks to recover in this action, for a loss caused by the explosion of a

gasoline stove, contained a clause which provided that, if the assured should keep or use gasoline upon the insured premises — a dwelling-house — without the written permission of the defendant company, the policy should be void, it is contended by him that, as the house was insured without an application in writing, and without any representations being made, after the company's agent had full opportunity to examine the premises, by which examination he would have discovered that the gasoline stove was in common use for cooking purposes, it was chargeable with such knowledge as an investigation would have disclosed; and that therefore it assumed the risk as it actually existed when the policy was issued, subject to any use as a dwelling-house not so exceptional and peculiar that the defendant company could not be supposed to have anticipated. To put the plaintiff's proposition in another form, it is that when an insurance company issues a fire policy without inquiry, or without application or representations, it consents to any existing use of the insured property which it could have ascertained by reasonable investigation, although by the terms of the policy such a use is expressly prohibited, and there is nothing about the description of the property which necessarily implies or indicates that it may be used in the prohibited manner.

On the trial, testimony was offered and received in plaintiff's behalf which tended to prove that the practice of using gasoline stoves in dwelling-houses had become quite prevalent in the city wherein the insured property was located. Undoubtedly, the purpose of this testimony was to show that the use of the forbidden article in dwellings was not exceptional or peculiar, but, on the contrary, had become established by custom. Its sufficiency in this respect we need not stop to consider, for all of this class of testimony should have been excluded as immaterial. The policy, which had gone into plaintiff's hands, and the contents of which he is presumed to have known, was unequivocal on this point, and declared that if gasoline was used on the premises the contract for insurance should be void. There was no language in the instrument from which a different or contrary intention — an intent to permit the use of gasoline — could be gathered. The clause wherein its use was forbidden was not repugnant to any other provision, nor were there elsewhere terms or conditions from which it could be implied that the defendant company waived the prohibition. The plaintiff has not brought his case within an application of the rule laid down in *Phœnix Ins. Co. v. Taylor*, 5 Minn. 393 (492), in which it was held that printed conditions in an insurance policy prohibiting the keeping of gunpowder in the building containing the merchandise insured were controlled and governed by the written portion, describing the property covered by the policy as a "stock of goods, consisting of . . ., and such goods as are usually kept in a general retail store," — it having been shown that gunpowder was usually kept in such a store. By the use of general terms in the written part of the policy, — terms which would ordinarily include the forbidden article, — the insurance

company was deemed to have waived the invalidating printed clause as effectually as if the article had been expressly insured. We think it may be said, safely, that none of the well-considered cases go beyond this, proceeding strictly upon the principle that the written portion of the contract must be given the controlling force where a conflict or want of harmony arises between it and a printed stipulation. But in the case at bar there was no conflict or want of harmony. The defendant insured the plaintiff's dwelling-house upon an express condition that the use of gasoline should terminate the contract. The defendant did not use ambiguous language, or insert in one portion of its policy a clause at variance with, or repugnant to, a clause found elsewhere, and thus mislead the insured as to the burdens or restrictions imposed upon him; but, on the other hand, it emphatically notified him that if he used gasoline, as well as other well-known hazardous articles, his policy became void. The cases cited by appellant where there were ambiguous and conflicting clauses and terms in the policies, in line with Phoenix Ins. Co. *v.* Taylor, *supra*, have no application to the facts now before us.

Nor can it aid the plaintiff that he made no application for insurance, and no representations as to the use or non-use of gasoline on the premises. This is not a case where, there being no conditions in the policy governing the matter, it might be held that the insured need not disclose facts incident to the risk, such as an incumbrance upon it, unless required to do so; nor is it a case where the conditions are predicated upon, or referable to, an application made by the insured. The general rule is well stated to be that, where there is no application, the insured is bound by the conditions found in the policy which he has accepted and retained without objection. *Swan v. Watertown Fire Ins. Co.*, 96 Pa. St. 37; *May, Ins.* 167. Exceptions may be found to this rule, but there are none which can be of service to appellant; for the policy alone, unmodified by representations or in any other manner, was the contract existing between the parties. The conclusive effect of a condition in an insurance policy, under like circumstances, was in fact determined in the recently decided case of *Collins v. St. Paul F. & M. Ins. Co.*, 44 Minn. 440 (46 N. W. Rep. 906). The plaintiff therein was not allowed to recover as against an explicit condition in the policy that the company should not be liable if the interest of the assured in the property was not one of absolute and sole ownership, because it appeared beyond controversy that plaintiff had but a life-estate. There was no attempt on the trial of that case to show that the plaintiff's application for insurance contained any question or answer in respect to the title. The right to recover was successfully resisted by the insurance company solely upon the condition found in the policy.

*Order affirmed.*¹

¹ *Acc.* : *Reeve v. Phoenix Ins. Co.*, 23 La. Ann. 219 (1871).

In *Heron v. Phoenix Mut. F. Ins. Co.*, 180 Pa. 257 (1897), the policy insured household goods, etc., and provided that it should be void "if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks," etc. The

FAUST, APPELLANT, v. AMERICAN FIRE INS. CO.,
RESPONDENT.SUPREME COURT OF WISCONSIN, 1895. 91 Wis. 158.¹

APPEAL from a judgment of the Circuit Court for Dane County.

The action was upon a fire insurance policy of the Wisconsin standard form. The written part said: "Joseph Faust: Four hundred dollars on his two-story frame, shingle-roof building . . . occupied as a furniture store and repair shop. . . . Four hundred dollars on the stock of furniture, upholstery goods, and other merchandise, not more hazardous, usual to a retail furniture store, while contained therein." The printed part said: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises benzine," etc. There were also provisions as to proofs of loss and as to waiver.

The defence was a breach of the condition forbidding the keeping or using of benzine, and also a failure to furnish the requisite proofs of loss. The evidence showed that both at the issue of the policy and at the time of the fire the assured kept benzine on the premises, that the amount was small, that it was kept solely for use in the repair shop, and that it was necessary for such use. The evidence also showed that after the fire the insurance company's adjuster investigated the loss, discovered the use of benzine, thereupon notified the assured that this use avoided the policy, and took away and retained a list of the destroyed items which had been furnished by the assured, and that no communication had been received from the company thereafter.

The defendant moved for a nonsuit on the ground that the policy was avoided by the keeping or use of the benzine. SIEBECKER, J., granted the motion, and judgment was rendered accordingly, whereupon the plaintiff appealed.

Burr W. Jones and E. R. Stevens, for the appellant.

Bashford, O'Connor, & Aylward, for the respondent.

MARSHALL, J. The main question presented on this appeal is whether the presence of a small amount of benzine on the premises

assured caused fireworks to be placed in the house, on the morning of July 3, for use on the following evening. The fireworks took fire on the afternoon of July 3, and caused the loss for which action was brought. The facts being undisputed, it was held that the jury should have been instructed to find for the defendant, STERRETT, C. J., for the court, saying: "There is no ground for a presumption that the parties here contemplated even the temporary presence of fireworks in the insured building in the face of an express contract to the contrary." — ED.

¹ The statement has been rewritten; and the provisions as to proofs and waiver have not been reprinted. — ED.

for use in the repair shop rendered the contract of insurance void. Keeping in mind the undisputed evidence that the prohibited article was not kept as an article of merchandise for sale, but as an article usually and necessarily kept in operating the business of the repair department of the furniture store, which the policy expressly covered, we find abundant authority to support the general rule, which we adopt, that where a contract of insurance, by the written portion, covers property to be used in conducting a particular business, the keeping of an article necessarily used in such business will not avoid the policy, even though expressly prohibited in the printed conditions of the contract. To that effect are *Mears v. Humboldt Ins. Co.*, 92 Pa. St. 15; *Viele v. Germania Ins. Co.*, 26 Iowa, 9; *Collins v. Farmville Ins. & B. Co.*, 79 N. C. 279, — cited by appellant's counsel, to which many may be added: *Carrigan v. Lycoming F. Ins. Co.*, 53 Vt. 418; *Stout v. Comm. U. Ass. Co.*, 11 Biss. 313; *Franklin F. Ins. Co. v. Updegraff*, 43 Pa. St. 350, 353; *Plinsky v. Germania F. & M. Ins. Co.*, 32 Fed. Rep. 47; *Bryant v. Poughkeepsie Mut. Ins. Co.*, 17 N. Y. 200; *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492; *Whitmarsh v. Conway F. Ins. Co.*, 16 Gray, 359; *Franklin F. Ins. Co. v. Chicago I. Co.*, 36 Md. 102; *Carlin v. Western Ass. Co.*, 57 Md. 515; *Harper v. Albany Mut. Ins. Co.*, 17 N. Y. 197; *Hall v. Ins. Co. of N. A.*, 58 N. Y. 292; and many others.

In the early case of *Harper v. Albany Mut. Ins. Co.*, 17 N. Y. 197, it was held that the underwriters must be presumed to have been acquainted with the business and with the materials necessarily used in prosecuting it, and to have included such materials in the risk, the same as if each article had been particularly mentioned in the written portion of the policy; that the written portion in that regard will control the printed portion prohibiting the keeping of such articles. This case has been frequently cited and approved, and may be said to be strictly in line with the great weight of authority on the subject. In *Hall v. Ins. Co. of N. A.*, 58 N. Y. 292, the court referred to *Harper v. Albany Mut. Ins. Co.*, 17 N. Y. 197, and several others of like character, stating, in effect, that they were all cases where the use of the prohibited article was necessary in the business; while in the case then under consideration it was only said to be usually used. It was sought by the insurance company to avoid the policy, notwithstanding, by distinguishing between necessary and customary use, but the court held that, under a policy covering a business, permission to use all articles ordinarily, as well as articles necessarily, used must be held to be given and covered by the contract of insurance. In *Carlin v. Western Ass. Co.*, 57 Md. 515, the policy covered a factory and machinery, and prohibited the keeping or use of petroleum. The court held, in effect, that if the engine room and machinery were included in the description of the insured premises, the keeping of petroleum, although among the prohibited articles, would not avoid the policy if the evidence showed that it was an appropriate and cus-

tomary article used in the assured's trade for lubricating machinery, and that he kept it solely for that purpose; that the insurance company, when it issued the policy, knew that the factory could not be run without machinery, and it must be supposed to have contracted with reference to such use as an ordinary incident of the business; that if petroleum oil was usual and necessary, then such use must have been contemplated, though prohibited in the printed portion of the policy. The court concluded that the rule in respect to the question under consideration as stated is well settled.

It must be recognized that there is some conflict in the authorities on this subject, but the great weight of authority fully sustains the rule as above stated.

In the light of the foregoing, obviously the contract of insurance which covered the building to be used as a repair shop in connection with the furniture store permitted all things necessary to the enjoyment of the property for such use. The clause in the written portion of the policy, "Four hundred dollars on the stock of furniture, upholstery goods, and other merchandise, not more hazardous, usual to a retail furniture store," must be construed to cover merchandise kept in the trade in the furniture store, and the words "not more hazardous" to refer to such merchandise only, and have no reference to the necessary articles kept for use in the repair shop. The words "any usage or custom of trade or manufacture to the contrary notwithstanding," contained in the printed portion of the policy, so far as they would otherwise prohibit the necessary use of benzine in the repair shop, must be held to be controlled by the written portion of the policy, which expressly insures the building in part as a repair shop; this upon the presumption, that must exist, that the parties intended that the repair shop as it was, and as it must necessarily continue to be if it continued at all, must be carried on with all usual and necessary incidents, and that as such it was protected by the contract of insurance; also by force of the well-established rule, that the written special description of the particular subject-matter, wherever inconsistent with the printed clauses of the policy, must control. *Citizens' Ins. Co. v. McLaughlin*, 53 Pa. St. 485; *Cushman v. N. W. Ins. Co.*, 34 Me. 487; *Archer v. Merchants' & M. Ins. Co.*, 43 Mo. 434. The construction we thus give the policy renders the contract just and reasonable, and carries out the obvious intention of the parties to it. Any other construction would lead to the absurd result that the prohibitory clause of the policy would absolutely prevent the carrying on of the business expressly permitted in the written portion. No such absurdity can be held to have been contemplated by the parties, unless the terms of the contract are such as not to permit of any other reasonable construction. As said in *Carlin v. Western Ass. Co.*, 57 Md. 515: "Where the contrary is not expressly made to appear, it is not to be presumed that, when an insurance is effected with reference to an established and current business, whose protection is really the object of the insurance,

such a narrow and stringent construction of the provisions of the policy was intended as will necessarily cause its serious embarrassment or suspension."

The only other question which requires consideration is whether there has been a failure to comply with the condition requiring proofs of loss, so as to defeat a recovery on the policy.¹ . . .

*Judgment reversed and new trial granted.*²

LONDON AND LANCASHIRE FIRE INS. CO. v. FISCHER.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT, 1899.
92 Fed. R. 500.³

ERROR to the Circuit Court of the United States for the District of Kentucky.

This was an action on a policy of fire insurance of \$3,000, "on stock of merchandise, principally hardware and cutlery, stoves and tinware, and materials used in his business, contained in frame metal-roof building occupied by assured as dealer in above-described goods, with privilege to manufacture tinware by hand power, and upper floors occupied and known as 'Highland Hall,' and situate No. 1627 Baxter Avenue, Louisville, Ky."

The defence rested upon violations of three conditions of the policy, one of which was: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed, on the above-described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitroglycerine, or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard." . . .

As to the condition quoted, the charge to the jury was as follows:

"Did the plaintiff in this case, between the 7th of October, 1895, and the 31st of May (the time of the fire), 1896, — did he, in the language of the policy, 'keep, use, or allow in the premises, to wit, the main

¹ The remainder of the opinion dealt with this question. — ED.

² See *Lancaster Silver Plate Co. v. National F. Ins. Co.*, 170 Pa. 151 (1895); *Lancaster Silver Plate Co. v. Manchester F. Assurance Co.*, id. 166 (1895); *American Central Ins. Co. v. Green*, 16 Tex. Civ. App. 531 (1897); *Davis v. Pioneer Furniture Co.*, 102 Wis. 394 (1899). — ED.

³ S. C. 34 C. C. A. 503. The statement has been rewritten with the aid of the opinion of BARR, J., in *Fischer v. London & Lancashire F. Ins. Co.*, 83 Fed. R. 807 (U. S. C. C., D. Ky., 1897). In the statement and the opinion, matters bearing on other insurance, chattel mortgage, and waiver have been omitted. — ED.

building, gasoline'? If you conclude that he did 'keep, use, or allow' to be used, or kept, gasoline in the premises, thus described, why, then, you should find for the defendant, because by the very terms of the policy the plaintiff agreed that the policy should be void, if he did this thing, which was prohibited. You must keep in mind, now, this proposition refers only to the main building, which excludes the shed behind. Now, this language here is not used in any technical sense, either. It is for you to say whether, from the evidence, this plaintiff kept, used, or allowed to be kept or used, gasoline between the 7th of October, 1895, and the 31st of May following. You must consider the whole evidence on that subject."

The jury found for the plaintiff.

Augustus E. Wilson, for plaintiff in error.

John Barret, for defendant in error.

The opinion of the court (TAFT and LURTON), circuit judges, was delivered by

TAFT, Circuit Judge. . . . The second assignment is based upon the construction which the court gave of the word "allowed" in the clause providing that the policy should be void "if there be kept, used, or allowed" on the premises gasoline. The court construed the word "allowed" to mean "allowed to be kept or used." The evidence tended to show that gasoline was carried through the store from a shed in the back yard, not connected with the main building, where the stock of goods was insured. It was conceded that such carrying of gasoline through the store without leaving it there permanently did not come within the adjudicated meaning of the terms "kept and used;" but it was contended that the word "allowed" embraced more than "kept or used," and was sufficiently broad to include the carrying of gasoline through the store for immediate delivery to customers, even though gasoline was not allowed to be stored on the premises, or to remain there longer than the time required to carry it from the back door to the customer, and to deliver it to him. The court construed the word "allowed" as if inserted for the purpose of making it clear that the condition would be broken, whether the keeping and using was done by the insured himself, or was allowed or permitted by him to be done by some one else. The argument made on this construction is that under it the word "allowed" is merely redundant, and adds nothing to the meaning of the other two words, because it has often been adjudicated that they are broad enough to cover, not only the act of the insured, but also the act of any person whom the insured may permit or allow to keep or use gasoline upon the premises, and in some cases even the act of a tenant in keeping gasoline against the express command of the insured. The mere fact that the words "kept or used" might, by construction, be made wide enough to include "allowed," does not require of us, when the word "allowed" is expressly made a part of the policy, to give it any different meaning from what it would have when it was

implied from the use of other words. The habit of using apparently redundant expressions in statutes and contracts and deeds, for the purpose of excluding any possibility of a misconstruction, is very frequent. It justifies us in giving the word "allowed" its ordinary meaning, instead of attributing to it a strained and vague significance, which will defeat the policy. The duty of the court, where the meaning is ambiguous, is to construe the words used against the insurer, who framed them, so as to validate the policy, rather than destroy it. *London Assurance v. Companhia De Moagens Do Barreiro*, 167 U. S. 157, 17 Sup. Ct. 785; *Imperial Fire Ins. Co. v. Coos Co.*, 151 U. S. 462, 14 Sup. Ct. 379; *National Bank v. Insurance Co.*, 95 U. S. 673. This disposes of all the assignments of error made by the plaintiff in error, and leads to an affirmance of the judgment.¹

¹ On "kept, used, or allowed," and the like, see also:—

Duncan v. Sun F. Ins. Co., 6 Wend. 488 (1831);

Faulkner v. Central F. Ins. Co., 1 Kerr, N. B. 279 (1841);

Westfall v. Hudson River F. Ins. Co., 12 N. Y. 289 (1855);

Bowman v. Pacific Ins. Co., 27 Mo. 152 (1858);

Cerf v. Home Ins. Co., 44 Cal. 320 (1872);

Arkell v. Commerce Ins. Co., 69 N. Y. 191 (1877);

State Ins. Co. v. Hughes, 10 Lea, 461, 467-469 (1882);

Tischler v. California Farmers' Mut. F. Ins. Co., 66 Cal. 178 (1884);

Liverpool & London Ins. Co. v. Gunther, 116 U. S. 113, 128-131 (1885);

Frost's Detroit Lumber and Wooden-Ware Works v. Millers' and Manufacturers' Mutual Ins. Co., 37 Minn. 300 (1887);

Snyder v. Dwelling-House Ins. Co., 59 N. J. L. 544 (1896). — Ed.

SECTION II. (*continued*).

(C) CONDITIONS PROHIBITING INCREASE OF HAZARD.

MERRIAM v. MIDDLESEX MUTUAL FIRE INSURANCE COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1839. 21 Pick. 162.

ASSUMPSIT upon a policy of insurance against fire, to recover for a loss which happened on March 3, 1836. Trial before MORTON, J. The building insured was in Lowell. It was a block of wooden houses, divided into two parts by a brick wall, running east and west. The fire originated in the southerly part, which was consumed down to the ground floor. The northerly part was but slightly burnt.

The defendants insisted that the fire was occasioned by the gross carelessness and negligence of the plaintiff, and that he had altered his building after effecting insurance, in such a manner as to make it more hazardous in regard to fire, and so had avoided the policy.

There was evidence tending to show, that after the insurance had been effected, stoves were put up in the northerly part of the block; that the tenants applied to the plaintiff to put up stoves in their rooms, but that he refused, saying they had fireplaces, and if they wanted stoves, they must procure them at their own expense; and that the tenants put in the stoves themselves and in a careless and unsafe manner.

The jury were instructed, that an alteration of the building, after insurance, without the consent of the insurers, so as to make the building more exposed to fire, would render the policy void; but that the alteration must be such that a higher rate of premium would be demanded to insure the building in the altered state than would be demanded before such alteration; otherwise the alteration would not be material.

The jury found a verdict for the defendants.

The plaintiff moved for a new trial, because the jury were misinstructed, and because the verdict was against the evidence and the weight of the evidence.

H. H. Fuller, in support of the motion.

Hosmer and *J. Keyes*, for the defendants.

WILDE, J., delivered the opinion of the court. The plaintiff moves for a new trial for a supposed misdirection to the jury in matter of law, and because the verdict is against the weight of the evidence.

The defendants, at the trial, relied on several grounds of defence, only one of which, however, is material in the decision of the present motion.

The ground on which the jury found their verdict was, that after the plaintiff had effected the insurance, and before the fire, the building in-

sured had been altered by the tenants of the plaintiff, and with his consent, in such a manner as to expose it more to the hazard of fire, and that thereby the policy, by the terms of it, was rendered null and void. The evidence reported has a tendency to show that such an alteration had been made with the knowledge and the permission of the plaintiff, and thereupon the jury were instructed, that if they should be satisfied that any such alteration had been so made, it would avoid the policy ; “ but that the alteration must have been such that a higher rate of premium would have been demanded, to insure the building in its altered state, than would be demanded before such alteration ; otherwise the alteration would not be material.” To these instructions the plaintiff's counsel excepted, and they contend that no such alteration would avoid the policy, unless it could be shown that the loss was occasioned by the alteration. In support of this exception, the case of *Stebbins v. The Globe Ins. Co.*, 2 Hall (New York), 632, and other authorities, are relied on ; but they are not applicable, as the terms of the policies in those cases and the present materially differ.

This policy was made in pursuance of § 13 of the defendants' act of incorporation (St. 1825, c. 141), which provides, “ that if any alteration should be made in any house or building by the proprietor thereof, after insurance has been made thereon with said company, whereby it may be exposed to greater risk or hazard, from fire, than it was at the time it was insured, then, in every such case, the insurance made upon such house or building shall be void, unless an additional premium and deposit, after such alteration, be settled with, and paid to, the directors ; but no alterations or repairs in buildings not increasing such risk or hazard shall in anywise affect the insurance previously made thereon.”

This being the contract between the parties in this particular, there can be no question that the instructions to the jury were perfectly correct.

In respect to the motion to set aside the verdict, as one against the weight of the evidence, we are of opinion that the weight of the evidence is in favor of the verdict, and certainly not against it. The most that can be said in favor of the motion is, that the evidence was in some respects conflicting, and upon such evidence the finding of the jury is not to be disturbed.

*Judgment on the verdict.*¹

LOUD AND ANOTHER v. CITIZENS' MUTUAL INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1854. 2 Gray, 221.

ACTION of contract on a policy, whereby the plaintiffs were insured, under the conditions and limitations expressed in the rules and regulations thereto annexed, \$2,500 against loss or damage by fire, for one

¹ *Acc.* ; *Lyman v. State Mut. F. Ins. Co.*, 14 Allen, 329 (1867). — Ed.

year from the 18th of January, 1853, on lumber, lime, nails, and lead in their two stores on their wharf at Weymouth. One of the rules and regulations annexed to the policy was this: "Art. 10. Whenever the circumstances disclosed in any application shall become so changed as to increase the risk, the policy thereon shall be void, unless the insured make a new and full representation to the directors, and pay such further premium and deposit as they shall determine."

The plaintiffs, in their application for insurance, which was expressly made a part of the policy, represented that the stores were used for storing lumber, &c., and that one room in one of them was used as a counting-room. The application also contained the following question and answer: "How are the buildings warmed, and how are the stove-pipes secured? Number of stoves, if any?" *Answer.* "Counting-room warmed with coal stove. One stove. Funnel and stove well secured. No lights used in the building, evenings."

The question of the liability of the defendants was submitted to the court upon the following facts: On the 17th of September, 1853, the schooner "Statira," having on board a cargo of lumber of the plaintiffs, when near their wharf, got aground and filled. The beds and bedding on board, having been brought on deck, and being wet with the rain, were, by the plaintiffs' permission, removed into the store in which the counting-room was. The vessel was then lightened, hauled into the wharf, and made fast. About midnight, one of the plaintiffs, at the request of the captain and crew, gave them permission to sleep in the counting-room, but told them that they should not make or use any fire or light, or even smoke. There was a stove in the counting-room, the funnel of which passed through the loft overhead, used for storing lumber, but was not then in a safe condition. The captain and crew, being wet and cold, disregarded the prohibition of the plaintiffs, and made a fire in the stove, which, in consequence of the defect in the funnel, quickly communicated to the building and lumber above, and so destroyed the property insured.

J. J. Clarke, for the plaintiffs.

T. S. Harlow, for the defendants.

METCALF, J. The representation made by the plaintiffs in their application for insurance was, that the counting-room was warmed with coal by one stove, and that the funnel and stove were well secured. And there is nothing in the case to show that this was not a true representation when it was made. At the time of the fire, however, that part of the funnel which was in the loft over the counting-room was not in a safe condition. And the first question is whether, upon the facts of the case, the unsafe condition of the funnel, at that time, avoided the policy.

It is contended by the defendants, that as the funnel of the stove was not in a safe condition when the loss happened, the circumstances disclosed in the plaintiffs' application were so changed as to avoid the policy, under the tenth of the rules and regulations annexed thereto.

This might be so, if the plaintiffs had continued to warm the counting-room by fire in the stove. But if they used no fire in the stove, the risk was not increased by the insecurity of the funnel, nor even by its being wholly detached from the stove. It is a common practice to remove a funnel from its connection with a stove, during the months when a fire is unnecessary and would be oppressive. And this does not, of itself, enhance the risk assumed by underwriters on the contents of the building. It is the use of fire in a stove, and that alone, which makes it necessary that the stove and funnel should be well secured. And the representation that the counting-room was warmed by a stove and funnel thus secured, must be understood to mean, that when it was warmed at all, it was thus warmed; and not that the stove and funnel were well secured during the summer season, when there was no occasion to warm the room.

It does not appear, from the papers in the case, how the funnel of the stove came into an unsafe condition. But it was orally agreed, at the argument, that the part of the funnel which was in the loft over the counting-room obstructed the free passage of persons about the loft, and was taken down in May or June; and that the plaintiffs never afterwards made a fire in the stove.

If the plaintiffs had used the stove on the night of the fire, or had authorized the use of it which was then made by the crew of the "Statira," the defendants would not have been liable for the loss. But the plaintiffs did not authorize the use of fire in the stove. On the contrary, they forbade the use of fire in the room, in any way. The violation of that injunction, by the seamen, does not furnish a defence against the plaintiffs' claim. It was a wrongful act of third persons, for the consequences of which the defendants are liable, in the same manner and to the same extent as if those persons had unlawfully broken into the counting-room and burned the building by kindling a fire on the floor. The plaintiffs were under no obligation, legal or moral, to keep their stove secure against fire that might be kindled in it by trespassers and burglars, nor against forbidden acts of persons, "wet and cold," whom they admitted to the room as a shelter. Nor did this act of humanity of itself avoid the policy. Though the building was represented as occupied for storing lumber, and having a counting-room in it, yet the use of the counting-room for a single night, as a resting place for strangers, was not such a change of use as exempts the defendants from their liability to pay the loss sustained by the plaintiffs. See *Boardman v. Merrimack Mutual Fire Ins. Co.*, 8 Cush. 585; *Dobson v. Sotheby, Mood. & Malk.* 90; *Shaw v. Robberds*, 1 Nev. & P. 279, and 6 Ad. & El. 75; *Barrett v. Jermy*, 3 Exchequer Reports, 545. [*Hynds v. Schenectady County Mutual Ins. Co.*, 1 Kernan, 554.]

*Judgment for the plaintiffs.*¹

¹ See *Breuner v. L. L. & G. Ins. Co.*, 51 Cal. 101 (1875). — ED.

TOWNSEND ET AL. v. NORTHWESTERN INSURANCE COMPANY.

COURT OF APPEALS OF NEW YORK, 1858. 18 N. Y. 168.

APPEAL from the Supreme Court.

The action was upon a policy of insurance against fire on a cotton factory and its machinery. Upon the trial before BROWN, J., and a jury, a defence was that there had been an increase of hazard in defiance of a condition in the policy. The judge having refused to direct a nonsuit and having given a charge to which the defendant company excepted, the plaintiffs had a verdict and judgment, which having been affirmed at general term, the defendant appealed. Further facts appear in the opinion.¹

Samuel Beardsley, for the appellant.

E. L. Fancher, for the respondents.

HARRIS, J.² . . . It was made a condition in the contract of insurance that if after insurance effected the risk should be increased, by any means whatever within the control of the assured, it should render the insurance void. The plaintiffs had represented that there was a good forcing pump, designed expressly for protection against fires, and at all times in condition for use.

It appeared upon the trial that the bulkhead, at the pond which supplied the factory with water, which was of wood, being out of repair, was taken down, and a new bulkhead, constructed of stone masonry, was substituted in its place. While this was being done, the water was turned off and the pump rendered useless. It was insisted by the defendants' counsel that, by making this change, the plaintiffs had materially increased the risk, and thus rendered the insurance void. Upon this ground, also, the court was asked to nonsuit the plaintiffs. The nonsuit was refused, and, upon this point, the court charged the jury that the defendants had assumed the risk of making ordinary and necessary repairs; and if, in making such repairs, the supply of water had been necessarily interrupted, and there had been no unreasonable delay in making the repairs, the interruption would not avoid the policy; but if, on the other hand, the supply of water had been unnecessarily interrupted, and the risk thus increased, the plaintiffs could not recover. To this part of the charge, and to this only, the defendants excepted. It was said upon the argument, and perhaps with truth, that "the upshot of this charge was, that the plaintiffs had a right, if the old bulkhead was ruinous, to remove it and build a new one of stone, although the pump was thereby totally disabled and the risk of fire increased."

¹ The reporter's statement has not been reprinted. — ED.

² A passage as to misrepresentation has been omitted. — ED.

This doctrine I understand to have been distinctly asserted by this court in this very case, when before it upon a former occasion.

[The learned judge here quoted from the opinion then delivered by JOHNSON, (now) C. J., which is hereinafter given at large,¹ and then continued:—]

There can be no doubt, I think, that where there is no express provision in the contract involving a relinquishment of the right to perform the ordinary acts of ownership which are usually exercised by owners over their own property, or restricting the party insured as to what he may do upon his own property, he is authorized, without vacating his policy, to make any repairs which may be required to render the premises useful for the purposes to which they are devoted. It is not to be presumed, in the absence of any express agreement on the subject, that when he effects an insurance on his building the owner deprives himself of the right to use it in the common and ordinary mode, including the right to make all proper and reasonable repairs.

But it was insisted, on the trial, that the removal of the old bulkhead and the substitution of a stone structure in its place was an alteration and not a mere repair. The court was accordingly requested to charge the jury that, if an entirely new bulkhead was constructed in place of the old one torn down, of different materials and in different form, designed as an improvement upon the old one, then it was not a case of

¹ The opinion delivered by JOHNSON, C. J., at the earlier stage of the case has not been fully reprinted herein; but the most important passages were these:—

“In order to say whether the risk has been increased, it is necessary to inquire, in the first place, what risk was originally assumed. In other words, upon the insurance of a building, is not the risk incident to the process of necessary repairs a part of the general risk assumed by the insurers, in the absence, of course, of any stipulation in the contract importing the contrary?”

“When a building is insured, it is, of course, understood that it is to be used in the ordinary way of using similar buildings, and no one expects that it is to be set apart and wholly devoted to being kept safely. One of the ordinary incidents to this usual occupation is that of making repairs. The general right to make these has never been doubted, when the policy contained no special provision upon the subject. It has never been supposed that, to a claim for a loss happening in the course of or by means of necessary repairs, the insurer could say, the risk by which that loss was occasioned was not within the terms of my contract. In all the cases I have met with, where the subject is spoken of, the right to make such repairs is assumed to be clear, and nowhere is it denied, unless upon the ground of some special stipulation to the contrary. *Stetson v. Massachusetts Mutual Fire Insurance Co.*, 4 Mass. 330; *Jolly v. Baltimore Equitable Insurance Co.*, 1 Harr. & Gill, 295; *Dobson v. Sotheby*, 1 Mood. & Malk. 90; *Grant v. Howard Insurance Co.*, 5 Hill, 10; *Jennings v. Chenango Mutual Insurance Co.*, 2 Denio, 75; *O’Neil v. Buffalo Fire Insurance Co.*, 3 Comst. 122, all illustrate this position. It is quite true that while such repairs are being made there may be a greater exposure to loss by fire, as may be also the case when fires are required in the winter for the comfort of the occupants. Such exposure, however, is part of the proper risk insured against. It is a hazard which the subject insured undergoes in the course of ordinary occupation, and which, therefore, cannot be deemed an increase of risk, within the condition set up by the defendants as avoiding their contract.

“In my own opinion, the language of the condition is not such as to permit its application to the hazard occasioned by making ordinary repairs.”—ED.

ordinary repairs. In the refusal so to charge there was no error. The substitution of a new bulkhead for one that had become useless by decay was certainly a repair, and not the less so because, in making the repair, the owner thought fit to make use of a more durable material than had at first been employed.

All that the court refused to do was to charge, as matter of law, that the substitution of a new bulkhead for an old one was not a case of ordinary repair. At the most, it could only have been required to submit the question to the jury; and this in fact was done, for, without deciding whether the new bulkhead was to be regarded as a repair or an alteration, the court instructed the jury that, if by any means whatsoever within the control of the assured, except in regard to reasonable and necessary repairs, any change had been made in the condition of the building or the machinery therein, or in the apparatus for the extinguishment of fires, whereby the risk had been increased, the insurance was void. This was certainly enough. The jury were left, without restriction, to inquire whether anything had been done, beyond the making of reasonable and necessary repairs, whereby the defendants' risk had been increased, with the instruction that, if the result of this inquiry should be in favor of the defendants, they were entitled to a verdict. This was all that the defendants had a right to claim. The judgment should be affirmed.

SELDEN, J., expressed no opinion; all the other judges concurring.

*Judgment affirmed.*¹

¹ See *Houghton v. Manufacturers' Mutual F. Ins. Co.*, 8 Met. 114, 121-122 (1844); *Lyman v. State Mut. F. Ins. Co.*, 14 Allen, 329 (1867); *Frost's Detroit Lumber and Wooden-Ware Works v. Millers' and Manufacturers' Mutual Ins. Co.*, 37 Minn. 300 (1887); *Mack v. Rochester German Ins. Co.*, 106 N. Y. 560 (1887).

In *First Congregational Church v. Holyoke Mut. F. Ins. Co.*, 158 Mass. 478 (1893), KNOWLTON, J., for the court, said:—

"The policies sued on in these six cases are all alike in containing provisions which are relied on in defence, and which are as follows: 'This policy shall be void if . . . without the assent in writing or in print of the company . . . the situation or circumstances affecting the risk shall . . . be so altered as to cause an increase of such risk; or if camphene, benzine, naphtha, or other chemical oils or burning fluids shall be kept or used by the insured on the premises insured.' . . . The property insured was a church edifice, built of wood, not clapboarded, but sheathed horizontally with grooved and tongued sheathing, closely matched together, and painted and sanded on the outside. The paint had peeled and curled, and at the time of the fire the plaintiff was repainting the building. . . . One Gilson, a painter, . . . was to burn off the old paint with a torch, or some such implement, preparatory to repainting. He procured for the purpose a naphtha torch, so made as to hold a quart or more of naphtha, with a handle at one side of the receptacle, and a tube extending out on the opposite side through which a flame could be emitted, produced by the gas from the naphtha and compressed air. . . . When the work had been going on about four weeks, the torch . . . having been used daily, . . . the building caught fire on the edge of a board where there was a crack and where the torch had just been used, and was entirely consumed. This was on the 16th day of July, 1890, and there was evidence that the weather was hot and that the boards were very dry. There was also evidence that, as a protection against fire, a pail of water was kept on hand while the work was going on. The evidence tended strongly to show that the danger of a conflagration was

greatly increased by the use of the naphtha torch on the dry, inflammable, soft pine boards, with their shrunken joints. . . .

"Was a change of this kind increasing the risk . . . an alteration of 'the situation or circumstances affecting the risk,' within the meaning of those words in the policies? Those words imply something of duration, and a casual change of a temporary character would not ordinarily render the policy void under this provision. . . . We are of opinion that the change of the condition was sufficiently long continued to be deemed a change in 'the situation or circumstances affecting the risk.' . . .

"We find no evidence that naphtha was kept on the premises. The word 'kept,' as used in the policy, implies a use of the premises as a place of deposit for the prohibited articles for a considerable period of time. . . .

"For nearly four weeks naphtha was used within a few inches of the outer wall . . . to produce the flame which was brought in contact with the building. It would be a narrow and unreasonable construction of the policies in reference to the purposes for which the words were inserted to say that the use of naphtha was not 'on the premises' because while in liquid form it was a few inches outside of the wall, when it was made to produce an effect directly on the premises by burning it in the form of gas and directing it against the building. . . .

"The only ground on which the plaintiff could fairly ask to present a question to the jury is upon its contention that the use of the naphtha and the change in conditions affecting the risk occurred through making ordinary repairs in a reasonable and proper way, and that in the provisions quoted from the policies there is an implied exception of what is done in making ordinary repairs. . . . Both parties to a contract for insurance must be presumed to expect that the property will be preserved and kept in a proper condition by making repairs upon it. Policies on buildings are often issued for a term of five years or more. The making of ordinary repairs in a reasonable way may sometimes increase the risk more or less while the work is going on, or involve the use of an article whose use in a business carried on in the building is prohibited by the policy. In the absence of an express stipulation to that effect, a contract of insurance should not be held to forbid the making of ordinary repairs in a reasonably safe way, and provisions like these we are considering should not be deemed to apply to an increase of risk or to a use of an article necessary for the preservation of the property. We are therefore of opinion, that if the use of naphtha at the time and in the manner in which it was used was reasonable and proper in the repair of the building, having reference to the danger of fire as well as to other considerations, it would not render the policies void. But the questions submitted to the jury on the answers to which verdicts were ordered for the plaintiff did not sufficiently present the matters of fact in issue. The only question bearing on the most vital part of the issue was as follows: "Was the method used the method ordinarily pursued to remove the paint on the outside of a building preparatory to scraping it off to repaint it?" The order of verdicts for the plaintiff on an affirmative answer to this question assumed that the removal of the paint from this building was reasonably necessary to the repair of the building. It also assumed that this building, in reference to the danger from moving the flaming torch all over its external surface, was like ordinary buildings. Many buildings are built of brick, and painted on the outer walls. Many others are clapboarded in such a way as to make a very close, tight covering. If this is the method ordinarily pursued when paint is to be removed from the outside of a building, it does not follow that it is ordinarily pursued when the building is covered with soft pine sheathing, tongued and grooved and put on horizontally, and when, at the time of doing the work, the weather is very hot and dry, and the boards shrunken so that in some places there are cracks.

"Gilson testified that, although he had been a house painter in Rockland twenty-five years, he had never burned off paint from the outside of a building before. The architect who was consulted by the plaintiff in regard to repairs advised removing the old paint by the application of a paint remover, which was a preparation to be applied by a brush or a sponge. The use of naphtha and the increase of risk by an alteration of the circumstances affecting it were permitted under the implied exception only when reasonably required for the making of repairs. If it was unreasonable to use

KYTE v. COMMERCIAL UNION ASSURANCE COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1889. 149 Mass. 116.¹

CONTRACT upon two policies of insurance, one upon a dwelling-house and the other upon a barn, in the form prescribed by the Pub. Sts. c. 119, § 139 (St. 1887, c. 214, § 60), against loss by fire, each for three years, from January 24, 1881, and April 2, 1881, respectively.

Trial, before BLODGETT, J., in the Superior Court, Suffolk County, after the former decision, reported in 144 Mass. 43.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions, as indicated in the opinion.

E. B. Powers and *S. L. Powers*, for the defendant.

C. Q. Tirrell, for the plaintiff.

C. ALLEN, J. These policies were in the form of the Massachusetts Standard Policy, and each provided that "this policy shall be void . . . if, without such assent [namely, the assent in writing or in print of the company], the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risks, . . . or if gunpowder or other articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law." Various other circumstances were enumerated which would also avoid the policy. At the beginning of the trial, the defendant waived every defence except increase of risk. The defence of the illegal keeping of intoxicating liquors, as a separate and distinct defence, was therefore waived.

We have to consider, in the first place, whether the instructions requested by the defendant were given in substance. The plaintiff contends that they were. The learned judge before whom the case was tried adopted in substance the third and fifth instructions asked for by the defendant, and thus instructed the jury, that if they should find that during the time for which these policies were issued the plaintiff Kyte, by obtaining a common victualler's license and making use of this building under said license, and legally or illegally selling intoxicating liquors therein, increased the risk, then this policy became void as to the plaintiff Kyte, and he could not recover for his interest therein; and if they should find that while these policies were in force intoxicating liquors were kept and sold in this building by the plaintiff Kyte, or with his consent or knowledge, and that thereby the risk was increased,

naphtha under the circumstances, at the time and in the manner disclosed by the evidence, the use was not within the exception, and the policies became void. The question for the jury was whether the defendants, if familiar with the condition of the building and the methods usually adopted in making repairs, should have contemplated when they issued the policies that the plaintiff corporation would burn off the paint at such a time and in such a way as it did. Was such a use of naphtha a reasonably safe and proper way of making repairs on this building under the circumstances? The questions submitted to the jury were not equivalent to these." — Ed.

¹ The reporter's statement has been omitted. — Ed.

this policy became void as to his interest, and he could not recover. This was a general and broad instruction, including the increase of risk by using the premises as a common victualling place, or as a place for selling intoxicating liquors legally or illegally, and well covered the general question of the effect of an increase of risk. From this instruction, taken alone, a jury might well have inferred that the policy would be void in case of any such increase of risk at any time during the time covered by the policies and before the fire.

But the defendant, in the fourth request for instructions, asked for a special instruction, adapted to the case of a temporary increase of risk which had ceased before the time of the fire; that is to say, that if the jury should find that, by the illegal sale of intoxicating liquors in this building by the plaintiff Kyte, or by others with his consent and knowledge, for a certain portion of the time for which these policies were issued, the risk was for that period increased, this policy would be void as to Kyte's interest, and he could not recover, although this increase was not permanent. The judge declined to give this ruling, and instructed the jury, in substance, that if that illegal use was temporary, not contemplated at the time when the policy was taken by the plaintiff, and ceased before the fire, then the fact that he had made an illegal use of the premises in 1882, which was during the time covered by the policy, would not deprive the plaintiff of the right to maintain the action; and that his right under the policy, if suspended while the illegal use of the building continued, would revive when he ceased to use it illegally. This instruction did not in express terms mention the subject of an increase of risk by the illegal use of the premises for selling liquor; but the instruction was given in place of the fourth request for instructions, and that request was refused, the judge saying that he had given what would be entirely inconsistent with it.

The question is thus presented whether the provision of the policy that it shall be void in case of an increase of risk means that it shall be void only during the time while the increase of risk may last, and may revive again upon the termination of the increase of risk. The provision is that the policy shall be void if any one of several circumstances successively enumerated shall be found to exist. Some of these circumstances relate to the time of issuing the policy, and others could not arise till afterwards. They are of different degrees of importance, some of them going to the essential matters of the contract, and others being comparatively trivial in character. The language of the policy is the same in respect to them all, that the policy shall be void.

In *Hinckley v. Germania Ins. Co.*, 140 Mass. 38, the policy was in the same form as those in the present cases, and for a short time during the term of the policy the plaintiff kept a bowling alley and billiard table without having any license therefor. There was no question of increase of risk, or other actual prejudice to the insurer; and under these circumstances two questions arose: first, whether the plaintiff's act fell within the provision that the policy should be void if gunpowder

or other articles subject to legal restriction should be kept in a manner different from that allowed by law; and secondly, whether, assuming that the policy would be void during the time of the illegal keeping of the bowling alley and billiard table, it would revive after such temporary use had ceased. In deciding the case, the court intimated that the plaintiff's act was not within the meaning of the provision in the policy, unless the risk was thereby increased, but placed the decision upon the second ground, that the policy would revive. The court now thinks it would have been better to place the decision of this part of the case solely upon the first ground, leaving it an open question whether a departure from the terms of the provision of the policy, without an increase of risk, may be deemed merely to suspend, and not absolutely to avoid the policy. However that may be, we think an increase of risk entitles the insurer to avoid the policy absolutely. The contract of insurance depends essentially upon an adjustment of the premium to the risk assumed. If the assured by his voluntary act increases the risk, and the fact is not known, the result is that he gets an insurance for which he has not paid. In its effect upon the company, it is not much different from a misrepresentation of the condition of the property.

If the provision stood alone, that in case of any material misrepresentation as to the risk or any voluntary increase of risk afterwards the policy should be void, it could hardly be doubted that the words should be taken in their natural, obvious meaning. The fact that with this are coupled the other provisions above referred to does not change its meaning with reference to the effect and consequence of an increase of risk. An increase of risk which is substantial, and which is continued for a considerable period of time, is a direct and certain injury to the insurer, and changes the basis upon which the contract of insurance rests; and since there is a provision that, in case of an increase of risk which is consented to or known by the assured, and not disclosed and the assent of the insurer obtained, the policy shall be void, we do not feel at liberty to qualify the meaning of these words by holding that the policy is only suspended during the continuance of such increase of risk. *Lyman v. State Ins. Co.*, 14 Allen, 329. *Mead v. Northwestern Ins. Co.*, 7 N. Y. 530.

It follows, therefore, that the fourth instruction which was requested, or something in substance like it, should have been given. Upon the facts stated and assumed, the increase of risk, if there was one, continued for fifteen months, and could not be treated as a casual, inadvertent, or inevitable thing.

*Exception sustained.*¹

¹ The law appears to be otherwise in Illinois. *New England F. & M. Ins. Co. v. Wetmore*, 32 Ill. 221 (1863); *Schmidt v. Peoria M. & F. Ins. Co.*, 41 Ill. 295 (1866); *Traders' Ins. Co. v. Catlin*, 163 Ill. 256 (1896).

In *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452 (1894), JACKSON, J., for the court, said:—

"It will be necessary to notice only the exceptions based upon the refusal of the court to instruct the jury, as requested by the defendant, "that if the work done by

the mechanics, as disclosed by the evidence, increased the hazard while such work was being done, then the plaintiff is not entitled to recover;" and the exception to the instruction given, to the effect that the question was whether the work and repairs done upon the building increased the risk at the time of the fire. . . .

"Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies, embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage, upon the terms and conditions agreed upon, and upon no other, and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfilment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and in order to recover, the assured must show himself within those terms; and if it appears that the contract has been terminated by the violation on the part of the assured, of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated, or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made.

"It is settled, as laid down by this court in *Thompson v. Phenix Ins. Co.*, 136 U.S. 287, that, when an insurance contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonably intelligent men on reading the contract would honestly differ as to the meaning thereof, that construction will be adopted which is most favorable to the insured.

"But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense.

"It is entirely competent for the parties to stipulate, as they did in this case, "that this policy should be void and of no effect, if, without notice to the company, and permission therefor indorsed hereon, . . . the premises shall be used or occupied so as to increase the risk, or cease to be used or occupied for the purposes stated herein; . . . or the risk be increased by any means within the knowledge or control of the assured; . . . or, if mechanics are employed in building, altering, or repairing premises named herein, except in dwelling-houses, where not exceeding five days in one year are allowed for repairs."

"These provisions are not unreasonable. The insurer may have been willing to carry the risk at the rate charged and paid, so long as the premises continued in the condition in which they were at the date of the contract; but the company may have been unwilling to continue the contract under other and different conditions, and so it had a right to make the above stipulations and conditions on which the policy or the contract should terminate. These terms and conditions of the policy present no ambiguity whatever. . . .

"It being shown that the insured in August, 1886, without the knowledge or written consent of the insurer, employed carpenters and brick masons, and reconstructed and enlarged the vaults and offices of the court-house—reconstructing the foundations corresponding to the enlargement of the vaults, which necessitated the cutting of the floors and ceilings of the different offices—and that this work occupied five or six weeks; and in connection therewith necessitated painting, and a new method of heating the offices of the register of probate and the clerk of the court (this change in the method of heating being completed about midnight of November 3, 1886, and the fire which destroyed the building occurring some two hours thereafter), clearly entitled the plaintiff in error to the instruction requested. . . .

ANGIER ET AL. v. WESTERN ASSURANCE CO.

SUPREME COURT OF SOUTH DAKOTA, 1897. 10 S. DAK. 82.

APPEAL from Circuit Court, Minnehaha County. Hon. Jos. W. JONES, Judge.

Action upon a policy of fire insurance. Plaintiff had judgment, from which, and from an order denying its motion for a new trial, defendant appeals. Affirmed.

The facts are stated in the opinion.

McDonald & Fauntleroy and *C. S. Palmer*, for appellant.

U. S. G. Cherry, for respondent.

CORSON, P. J. This is an action upon a fire insurance policy. A verdict was directed for the plaintiffs, and the defendant appeals.¹ . . .

The second defence is based upon the following stipulation in the policy: "This entire policy shall be void . . . if the hazard be increased by any means within the control or knowledge of the insured, . . . or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, . . . phosphorus or petroleum, or any of its products of greater

"The court not only refused this instruction, but in its charge to the jury so construed the condition that if 'mechanics are employed in building, altering, or repairing the premises named herein,' without the consent of the insurer, as to make it mean that such alterations and repairs must be shown to have increased the risk in point of fact, and that such increase of risk must have existed at the time of the fire.

"If the mechanics were employed in altering and repairing the building in a manner beyond what was required for its ordinary repair and preservation, and in such a material way as constituted a breach of the condition of the contract, it is difficult to understand upon what principle the charge of the court can be sustained. The condition which was violated did not, in any way, depend upon the fact that it increased the risk, but by the express terms of the contract was made to avoid the policy if the condition was not observed. The instruction of the court gave no validity or effect to the condition and its breach, but made it depend upon the question whether the acts done in violation of it, in fact, increased the risk, and whether such increased risk was operative at the date of the fire.

"The court below proceeded upon the theory that the fire having occurred after the employment of the mechanics had ceased, such employment, and the making of the alterations and repairs described, did not constitute a breach at the time of the fire; that the increased risk, which was necessary to render the policy void, must be found to have existed at the time of the fire, and not at any preceding date. . . .

"It is competent for the parties to agree that this or that alteration or change shall work a forfeiture, in which case the only inquiry will be whether the one in question comes within the category of changes which by agreement shall work a forfeiture. . . .

"In *Kyte v. Commercial Union Assurance Co.*, 149 Mass. 116, . . . the Supreme Court reversed the lower court, which had proceeded upon the same theory adopted by the Circuit Court in the case under consideration. The principles laid down in this and the other cases cited clearly establish that the general instruction to the jury complained of in the present case was erroneous." — Ed.

¹ The omitted passage stated the pleadings and dealt with waiver of proofs of loss. — Ed.

inflammability than kerosene oil of the United States standard (which last may be used for light, and kept for sale according to the law, but in quantities not exceeding five barrels provided it be drawn and lamps filled by daylight, or at a distance not less than ten feet from artificial light." Sec. 4175, Comp. Laws, provides: "An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or of his agents or others." The facts in regard to the origin of the fire are thus stated by the plaintiff Stevens on cross examination, and are undisputed: "I took a tomato can, maybe two-thirds or half full of kerosene oil, and put some of the oil on the kindling. I turned to strike a match to set it afire. I had on a pair of celluloid cuffs, and the flame caught on my cuffs, and in a moment they blazed up. I had the can in my left hand and it fell on the floor, and the fire caught in the stove the same time. I rushed out and tried to get my coat off. Q. And the whole thing caught fire and burned up? A. Yes. Q. How much oil would that tomato can hold? A. A pint or so. . . . Q. You put the oil on the wood, and struck a match for the purpose of lighting this coal oil? A. Yes, sir. Q. And it fell on your celluloid cuffs, you say? A. Yes, sir. Q. And that set fire to the cuff, and the fire fell down on the oil in the stove? A. Yes, sir." As will have been observed, there is no clause in the policy prohibiting the plaintiff from keeping kerosene oil upon his premises to the extent of five barrels, United States standard, and there is no evidence that the oil used by plaintiff was below the prescribed standard. The quantity on hand at the time of the fire was less than one gallon. In view of the stipulation in the policy, the provisions of the statute, and the evidence, it is somewhat difficult to comprehend the theory of the defendant. It seems to be contended that the kerosene oil, used in the manner testified to by the plaintiff Stevens, increased the hazard, and therefore relieved the defendant from liability. Undoubtedly, the use of the kerosene in the manner detailed by the witness was a careless and negligent act, but it was not such an act as is understood by the term "increase of hazard." The stipulation of the policy is that "the entire policy . . . shall be void . . . if the hazard be increased by any means within the control or knowledge of the insured." Keeping kerosene upon the premises in no manner violated the stipulations of the parties, and could not therefore be held to constitute an increase of the hazard, within the meaning of the policy. The term "increase of hazard" denotes an alteration or change in the situation or condition of the property insured, which tends to increase the risk. These words imply something of duration, and a casual change of a temporary character would not ordinarily render the policy void, under the stipulations therein contained. *First Congregational Church v. Holyoke Mut. Fire Ins. Co.*, 33 N. E. 572, 158 Mass. 475. In that case the Supreme Court of Massachusetts held the use of naphtha (the use or keeping of which on the insured premises was prohibited by the policy) for a period of a

month, in burning paint from the outside of a wooden church, and causing the burning of the church, constituted such a change or alteration, and was sufficiently long continued to be deemed a change in the situation or circumstances affecting the risk. In *Lyman v. Insurance Co.*, 14 Allen, 329, three weeks was held sufficient.

In the case at bar the contention of counsel for appellant that the use of kerosene at only one time, in the manner detailed, constituted an increase in the hazard, in the sense in which that term is used in the policy, is not tenable. It, as we have said, constituted negligence on the part of the plaintiffs, but did not increase the hazard in the sense that the term is used in the policies of insurance.¹ . . .

The judgments of the Circuit Court and order denying a new trial are affirmed.²

¹ The omitted passage dealt with negligence and procedure. — Ed.

² On increase of hazard in general, see also :—

Stetson v. Massachusetts Mutual F. Ins. Co., 4 Mass. 330 (1808);
Richards v. Protection Ins. Co., 30 Me. 273 (1849);
Sanford v. Mechanics' Mutual F. Ins. Co., 12 Cush. 541 (1853);
Reid v. Gore District Mutual F. Ins. Co., 11 U. C. Q. B. 345 (1854);
Francis v. Somerville Mutual Ins. Co., 25 N. J. L. (1 Dutch.) 78 (1855);
Washington Mutual Ins. Co. v. Merchants' and Manufacturers' Mutual Ins. Co.,
 5 Ohio St. 450 (1856);
Clark v. Hamilton Mutual F. Ins. Co., 9 Gray, 148 (1857);
Joyce v. Maine Ins. Co., 45 Me. 168 (1858);
Allen v. Massasoit Ins. Co., 99 Mass. 160 (1868);
Peterson v. Mississippi Valley Ins. Co., 24 Iowa, 494 (1868);
Dittmer v. Germania Ins. Co., 23 La. Ann. 458 (1871);
Commonwealth v. Hide & Leather Ins. Co., 112 Mass. 136 (1873);
Parker v. Arctic F. Ins. Co., 59 N. Y. 1 (1874);
Cornish v. Farm Buildings F. Ins. Co., 74 N. Y. 295 (1878);
Pottsville Mut. F. Ins. Co. v. Horan, 89 Pa. 438 (1879);
Crane v. City Ins. Co., 2 Flippin, 575 (U. S. C. C., S. D. O., 1880), s. c. 3 Fed.
 Rep. 558;
Albion Lead Works v. Williamsburg City F. Ins. Co., 2 Fed. Rep. 479 (U. S.
 C. C., D. Mass., 1880).
Daniels v. Equitable F. Ins. Co., 48 Conn. 105 (1880);
Long v. Beeber, 106 Pa. 466 (1884);
Rife v. Lebanon Mutual Ins. Co., 115 Pa. 530 (1886);
Planters' Mutual Ins. Co. v. Rowland, 66 Md. 236 (1886);
Davis v. Western Home Ins. Co., 81 Iowa, 496 (1890);
Martin v. Capital Ins. Co., 85 Iowa, 643, 650-651 (1892);
Willow Grove Creamery Co. v. Planters' Mutual Ins. Co., 77 Md. 532 (1893);
Franklin Brass Co. v. Phoenix Assurance Co., 25 U. S. App. 119 (Fourth Cir-
 cuit, 1895), s. c. 65 Fed. Rep. 773, and 13 C. C. A. 124;
King Brick Mfg. Co. v. Phoenix Ins. Co., 164 Mass. 291 (1895);
Collins v. Merchants' and Bankers' Mutual Ins. Co., 95 Iowa, 540, 543-544
 (1895);
Des Moines Ice Co. v. Niagara F. Ins. Co., 99 Iowa, 193, 200-201 (1896);
Bentley v. Lumbermen's Ins. Co., 191 Pa. 276 (1899). — Ed.

SECTION II. (*continued*).

(D) CONDITIONS PROHIBITING VACANCY AND THE LIKE.

SOYE v. MERCHANTS' INS. CO.

SUPREME COURT OF LOUISIANA, 1851. 6 La. Ann. 761.

APPEAL from the Fourth District Court of New Orleans, STRAWBRIDGE, J.

A. Pitot, for plaintiff.

L. Pierce, for defendants.

The judgment of the court was pronounced by

SLIDELL, J. This action is upon a fire policy, by which a dwelling-house was insured. The defendants answered that they were not liable, because, at the time of the fire, and long previous thereto, the house had been abandoned, and was left open and without a tenant, and that with ordinary care, attention, and supervision, the loss would not have occurred. There was judgment for the plaintiff, and the defendants have appealed.

It appears that the house was built about a year previous to the fire, and the assured had not been able to procure a tenant, except during one month. The key of the house was left, during the principal portion of the time, with a neighbor, who was requested to rent or sell it, and who showed it to such persons as came to look at it. One witness says that, about two months before the fire, a window was left open for two or three nights and days; he mentioned it to the assured, and recommended to him to send some one to watch and occupy the house during the night. Another witness says that, several times in the daytime (the dates he does not specify), he had seen the front doors partially open. The house was in a thinly populated quarter. How the fire originated does not clearly appear; but it is probable it was the work of an incendiary.

There is no clause in the policy, nor are we aware of any rule of law or usage, which would make it the duty of an assured to have his house, if untenanted, guarded by a keeper. It is said by counsel that leaving an untenanted house open is a temptation to incendiaries; but there is no evidence that the house was in that condition on the night of the fire, so that the legal effect of such negligence need not be determined.

Judgment affirmed, with costs.

KEITH v. QUINCY MUTUAL FIRE INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1865. 10 Allen, 228.

CONTRACT upon a policy of insurance for one year, dated February 21, 1863, issued by the defendants upon the plaintiff's wooden building in West Sandwich, occupied by him for a trip-hammer shop, and on a water-wheel and the machinery therein. The policy contained a provision that "if the building insured remains unoccupied over thirty days without notice, this policy shall be void." The answer set up, amongst other things, that at the time of the alleged fire the building had remained unoccupied for many months.

At the trial in the Superior Court, before LORD, J., a verdict was rendered for the defendants. The plaintiff tendered a bill of exceptions, which the judge refused to allow, certifying that the report was very erroneous in many respects; that the ruling upon the question of occupancy was as given, but in all other respects the bill was so erroneous that it must be disallowed. The ruling upon the question of occupancy was as follows: "It is not sufficient to constitute occupancy that the tools remained in the shop, and that the plaintiff's son went through the shop almost every day to look around and see if things were right, but some practical use must have been made of the building; and if it thus remained without any practical use for the space of thirty days, it was, within the meaning of the policy, an unoccupied building for that time, and the policy became void."

The first count in the declaration was upon an agreement to renew a former policy of insurance upon the same premises, which expired on the day of the date of this policy, and which did not contain the provision requiring the building to be occupied; and the answer denied the making of any such agreement. The plaintiff's bill of exceptions, as tendered, contained a statement of certain facts upon which he contended that this count could be supported, and also of a ruling of the court that he could not rely and recover upon it.

The plaintiff also took some steps toward proving the truth of his bill of exceptions, as tendered to the judge of the Superior Court; but no additional exception was ever established or allowed.

F. W. Sawyer, for the plaintiff. The meaning given by the judge to the word "unoccupied" is erroneous. The true meaning as applied to buildings is, "not taken up, vacant, unused." Any substantial use of premises by persons, tools, or furniture is an occupancy. *Walker v. Furbush*, 11 Cush. 366. This shop was no more unoccupied than is a store with goods in it during the night; a dwelling-house when the family are away; a warehouse when no goods are coming in or going out; a farmer's barn full of products; or a school-house during vacation.

G. Marston, for the defendants.

DEWEY, J. This case must be decided solely upon the ruling of the court with reference to the clause in the policy, "if the building insured remains unoccupied over thirty days without notice, this policy shall be void." The plaintiff had procured a policy of insurance upon a wooden building occupied by him for a trip-hammer shop. The presiding judge, in reference to the defence set up in the answer that the building had remained unoccupied over thirty days without notice, instructed the jury that "it is not sufficient to constitute occupancy that the tools remained in the shop, and that the plaintiff's son went through the shop almost every day to look around to see if things were right, but some practical use must have been made of the building; and if it thus remained without any practical use for the space of thirty days, it was, within the meaning of the policy, an unoccupied building for that time, and the policy became void."

As adapted to the provisions in the policy we cannot say that these instructions were erroneous. The case presented is only the abstract one of the correctness of the general principle stated, the particular facts of the case not being before us by any allowed bill of exceptions. The presiding judge refused to certify the bill of exceptions as drawn up by the counsel for the plaintiff, and, upon a hearing before this court on the application in behalf of the plaintiff for an allowance of the same, it has only further appeared that the plaintiff offered to prove that the defendant's agent, through whom the insurance was effected, knew how the trip-hammer shop had been used by the plaintiff in previous years, and that it had always been used from time to time, as the course of the plaintiff's business required trip-hammer and other lighter forging work. But this evidence of such knowledge, if in the case and if unobjectionable otherwise, would be immaterial, as the stipulation in the policy alleged to have been violated was wholly in reference to the future, and was not to be qualified by any particular previous use of this trip-hammer shop.

The court also properly ruled that the plaintiff could not recover under the first count, setting forth an agreement to insure in a different form. The plaintiff received the policy without objection, and it thus became a valid contract between the parties. He gave notice of his loss under it, and has sought to make it the foundation of a legal claim.

*Exceptions overruled.*¹

¹ *Acc.*: Halpin v. Phenix Ins. Co., 118 N. Y. 165 (1890). — **ED.**

WHITNEY, RESPONDENT, v. BLACK RIVER INS. CO.,
APPELLANT.

COURT OF APPEALS OF NEW YORK, 1878. 72 N. Y. 117.

APPEAL from a judgment of the General Term of the Supreme Court, in the third judicial department, affirming a judgment in favor of plaintiff entered upon a verdict. (Reported below, 9 Hun, 37.)

This action was brought upon a policy of fire insurance issued by defendant. The defence was an alleged forfeiture of the policy by violation of conditions therein.

The facts sufficiently appear in the opinion.

James F. Starbuck, for appellant.

Leslie W. Russell, for respondent.

ANDREWS, J. The insurance was upon the plaintiff's saw-mill, gang, water-power, and on his fixed and movable machinery, mill-tools, and implements contained and used in the mill; and among the several pages of printed conditions and stipulations in the policy is a condition that if the premises become "vacant and unoccupied," the policy shall be void. It is quite obvious that the parties did not intend by this provision that the saw-mill should be inhabited, or that any person should remain in it so as to watch and guard it against fires, in order that the plaintiff should have the protection of the policy. The saw-mill, when the policy was issued, was used during the day, and was left open night and day, as saw-mills usually are. The plaintiff lived near it, and the mill had such oversight as under such circumstances he could give it. The saw-mill was not intended as a domicile, and the meaning of this condition, when used in a policy upon a dwelling-house, may be quite different from its meaning when applied to a saw-mill. The condition against vacancy, although designed mainly for cases where the building insured is used as a habitation, is, however, found in the policy, and effect is to be given to it. But it is to be construed in view of the situation and character of the property insured, and the contingencies affecting its use, to which this and other property of like character, similarly situated, is subject. The description in the policy shows that the defendant knew that the mill was operated by water-power, and as it was a saw-mill the insurer must be presumed to have known that saw-mills are or may be used as well for custom work as for sawing the logs of the owner; and as machinery was used for the operation of the mill, the fact that it was liable to break down and need repairs must also have been within the contemplation of the parties when the policy was issued. The interruptions of the business and the discontinuance of the active use of the saw-mill by reason of low water, diminished custom, or derangement of the machinery, if held to be a violation of the condition, and to create a vacancy and non-occupation of the building within the true meaning of the condition, would greatly

impair the value of the contract as a contract of indemnity, and the result would be that the contract would be deemed forfeited by the happening of events which might reasonably have been anticipated, and which were among the common incidents of the business carried on on the insured premises.

We do not think this would be a reasonable construction of the contract. Delays and interruptions incident to the business of conducting a saw-mill, although involving a temporary discontinuance of the active use of the mill for sawing purposes, would not, we think, make the mill "vacant and unoccupied" within the meaning of the policy. Take the case of the insurance of a church building or schoolhouse, or cider-mill. Would the fact that the church was closed for six days consecutively each week be a violation of the condition in question, or would the schoolhouse in vacation time, or the cider-mill, when no apples were to be had, be without the protection of the policy? These illustrations serve to show that the condition against vacancy and non-occupation is to be construed and applied in view of the subject-matter of the contract, and of the ordinary incidents attending the use of the insured property.

The referee finds that the plaintiff's mill was not vacant and unoccupied at or before the fire, and this finding is conclusive, unless upon the uncontroverted facts a vacancy and non-occupation was established. We think the finding of the referee upon this question cannot be disturbed. The breaking of the journal the last of February, 1873, rendered the gang of saws temporarily useless, and the condition of the water making it difficult at that time to repair the journal, the repairs were not made. But the other saws continued to run without interruption to the last of March, when the sawyer who had been employed by the plaintiff left. He returned the first week in April, and did some sawing, and no more sawing was done until the last of April or first of May, when several hundred feet of lumber were sawed, and some planing was done. The fire occurred on the sixteenth of May, and no sawing had been done for sixteen or eighteen days before. But there were logs in the mill-yard and elsewhere, which the plaintiff intended to saw at the mill. There was lumber piled in the yard, and a small quantity was kept in the mill up to the time of the fire, from which, from time to time, small sales were made, — the last one the day before the fire. The evidence would not have justified the finding that the plaintiff had abandoned, or intended to abandon, the use of the mill. There was no error, therefore, in the finding of the referee, that the mill did not become vacant and unoccupied within the meaning of the policy.

The policy also contains a condition that it shall be void if the insured premises "shall be occupied or used so as to increase the risk," without the consent of the company. There was, at the time of the insurance, a planer in the mill, which was used from time to time in planing lumber cut at the mill, and this occasional use was continued

after the policy was issued. It is claimed that this was an increase of the risk within the covenant. It is a conclusive answer to this position, that the covenant only prohibits a new and different use of the property from that to which it was applied when the policy was issued, by which the risk is increased. The continuation of an existing use, in the absence of warranty against such use or fraudulent representation or concealment, neither of which is alleged in the answer, is not a violation of the contract, and it is not material that the company did not know that the planer was used when the policy was issued. We have examined the exceptions to the admission and rejection of evidence, and find no error in the rulings of the referee.

The judgment should be affirmed.

All concur.

*Judgment affirmed.*¹

¹ In *Poss v. Western Assurance Co.*, 7 Lea (Tenn.), 704 (1881), COOPER, J., for the court, said: "The point which the parties desire to have determined, which has been argued before us, and which is, though inartificially, made by the pleading, is whether, under the terms of the policy, a temporary cessation of the operation of the chair and furniture factory of the insured, by reason of the prevalence of the yellow fever in epidemic form, would avoid the policy; in other words, whether the condition of the policy, that it shall become void if the manufacturing establishment insured "shall cease to be operated," applies only to a permanent and not a temporary cessation of the operations of the establishment. And we are very clearly of opinion that the policy contemplates, in this connection, only the permanent ceasing to be operated. The language is, "cease to be operated." If the letter of the contract be alone looked to, the cessation of work on Sunday, the stoppage of operations by the necessity of cleaning out the boiler, by an accident to the machinery, or by a strike of the hands, might be held to vitiate the policy. Of course, the parties never contemplated such a construction of their words, nor has the argument submitted on behalf of the defendant gone to that length. But if a temporary cessation to operate the establishment, by reason of these and other common occurrences, would not avoid the policy, it can scarcely be successfully maintained that a temporary cessation occasioned by the visitation of Providence in the form of a deadly epidemic shall have a greater effect. The whole clause of the policy, which we have quoted above, shows that the parties contemplated a permanent cessation of operations. The language used is the language of the insurance company, and must be taken most strongly against the company whenever it admits fairly of two constructions. It could never have been intended to apply to a ceasing to operate occasioned by the usual incidents to the business, among which would be the impossibility of procuring operatives temporarily for any cause. The clause in question, moreover, probably exclusively applies to an insurance of the building in which manufacturing is carried on, and not to an insurance of the boiler, machinery, etc., as in the case before us."

See *Ladd v. Aetna Ins. Co.*, 147 N. Y. 478 (1895); *Des Moines Ice Co. v. Niagara F. Ins. Co.*, 99 Iowa, 193, 198-200 (1896). — ED.

STUPETSKI v. TRANSATLANTIC FIRE INS. CO.

SUPREME COURT OF MICHIGAN, 1880. 43 Mich. 373.

ERROR to Superior Court of Detroit.

Assumpsit on insurance policy. Plaintiff brings error.

John C. Donnelly, for plaintiff in error.

Morgan E. Dowling, for defendant in error.

CAMPBELL, J. Plaintiff sued defendant on a policy of insurance, for the destruction of his dwelling and contents by fire. The policy was by one of its conditions made void if the house should "become vacant or unoccupied" without assent of the company.

The fire which destroyed the property was on September 4, 1879. Plaintiff used the premises as his own dwelling. About ten days before the fire he received a telegraphic despatch from South Bend, Indiana, announcing that his daughter, who lived there, was dangerously ill, and at the point of death. He with his wife and another daughter at once went there, intending to return, and he did return the next day but one after the fire. A son who was not boarding at home was directed to and did visit the house daily to look after the house and feed the stock.

The court below instructed the jury that this was enough to require the house to be regarded as vacant and unoccupied, and directed a verdict for the defendant.

There is not much authority upon this precise form of condition, but we think it must be construed as it would be usually understood by ordinary persons reading and acting on it. We think it would not convey to an ordinary mind the idea that a house is vacant or unoccupied when it has an inhabitant who intends to remain in it as his residence, and who has left it for a temporary purpose. If the phrases were used in their strict legal sense, no one would imagine that the tenant was not such an occupant as would be liable to the responsibilities attached by law to occupants, or that there was such a vacancy of possession as would suspend possessory rights. It would be burglary to feloniously break and enter the house, and arson to maliciously burn it. There may be less occasion to care for a house in which no one lives than for one tenanted, but a person temporarily absent will usually take some pains to have his premises kept under oversight, and in the present case such provision was made for the domestic animals as well as for the house itself. It would, we think, be regarded as singular doctrine to hold that families leaving their houses on excursions or other temporary occasions cease to occupy them.¹ . . .

It is not safe to resort to extreme definitions beyond the usual understanding. We think in the case before us the premises did not become

¹ Here were stated *Cummins v. Agricultural Ins. Co.*, 67 N. Y. 260 (1876); and *Whitney v. Black River Ins. Co.*, ante, p. 564 (1878). — Ed.

vacant or unoccupied, if left for the purpose testified to, and that it was error to charge the jury as was done here.

The judgment must be reversed with costs, and a new trial granted.¹

The other justices concurred.

HERRMAN, RESPONDENT, *v.* MERCHANTS' INS. CO., APPELLANT.

COURT OF APPEALS OF NEW YORK, 1880. 81 N. Y. 184.

APPEAL from judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court. (Reported below, 12 J. & S. 444.)

The nature of the action and the facts are set forth sufficiently in the opinion.

George W. Parsons, for appellant.

N. B. Hoxie, for respondent.

EARL, J. This is an action upon a fire policy, and the defence is a breach of certain warranties contained in the policy.

The insurance was upon a dwelling-house and other buildings, and upon certain personal property therein, and the fire which occasioned the loss occurred in the daytime, in April, 1877, and probably was of incendiary origin. The policy contained a condition that it should be void if the premises should become "vacant and unoccupied." The dwelling-house was a summer residence of the plaintiff. He resided in it in the summer and fall of 1876, and removed therefrom in November of that year, and went with his family to the city of New York, intending to return again about the middle of May. He left all his furniture in the house, which was furnished throughout, and left his house in charge of a person who lived near thereto.

We should have had a different question for consideration if the condition had been that the policy should become void if the house should become "vacant or unoccupied," or simply "unoccupied." Here we have the two words joined together, "vacant and unoccupied;" and what do they mean? They should not be taken in any technical or narrow sense. They need not be taken in the sense in which they may have been understood by underwriters, as both parties to this contract were not underwriters, supposed to be familiar with the meaning of such words when used in the business of fire insurance. But they must be

¹ *Acc.*: *Hill v. Ohio Ins. Co.*, 99 Mich. 466 (1894); *Home F. Ins. Co. v. Peyson*, 54 Neb. 495 (1898).

See *Ashworth v. Builders' Mut. F. Ins. Co.*, 112 Mass. 422 (1873); *Corrigan v. Connecticut F. Ins. Co.*, 122 Mass. 298 (1877); *Shackelton v. Sun Fire Office*, 55 Mich. 288 (1884); *Agricultural Ins. Co. v. Hamilton*, 82 Md. 88 (1895).

Compare *Fitzgerald v. Connecticut F. Ins. Co.*, 64 Wis. 463 (1885). — ED.

taken in their ordinary sense, as commonly used and understood; and if the sense in which they were used is uncertain, as they are found in a contract prepared and executed by the insurer, they should be construed most favorably to the insured. *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405; *Rann v. Home Ins. Co.*, 59 N. Y. 387. We do not progress much by ascertaining what the insurer meant by these words; but we must endeavor to ascertain how the insured understood and could properly understand them, — in other words, the meaning which they convey to the common mind.

A dwelling-house is unoccupied when no one lives therein, but is not then necessarily vacant. A house filled with furniture throughout cannot be said to be "vacant," the primary and ordinary meaning of which is "empty." To avoid the policy, the premises must not only be unoccupied but also vacant. Force should be given to both words. This is not a casual contract drawn in haste, in which language has been carelessly used; but it is a form of contract used by the defendant in its business, probably adopted with great deliberation, every word of which, as we may suppose, has been carefully weighed. It was not intended that mere non-occupancy should avoid the policy; if it had been, it cannot be supposed that the word "vacant" would have been superadded. It is not necessary to hold that a house with a few articles of furniture in it, from which the owner or tenant has removed, with no definite intention of returning, might not be regarded as vacant, or found to be so by a jury. It is sufficient to hold that a house thoroughly furnished, from which the owner has removed for a season, intending to return again and resume possession, is not, in any proper sense, a vacant house. There are many houses in and about the city of New York, and elsewhere, which are occupied only in the summer as summer residences, or only in the winter as winter residences, the furniture remaining in them all the time; and for aught we know, these two words were adopted with a view to insurances upon such houses.¹ . . .

There was also a condition in this policy that if the risk should be increased either "internally or externally," the insured should give proper notice thereof in writing, and have the same entered on the policy, and that any failure to comply with the condition should render the policy void. It is claimed on the part of the defendant that this condition was violated by non-occupancy of the house. Its counsel offered to show that the risk was increased by such non-occupancy, and the proof was rejected. Upon the assumption that the risk was thus increased, we are of opinion that this condition was not violated. The policy contained express conditions as to vacancy and occupancy, and as to the mode in which, and purposes for which, the house was to be used; and it is not to be supposed that this general condition was intended for any of the cases thus specially noticed. What is to be re-

¹ Here were summarized *Alston v. Old North State Ins. Co.*, 80 N. Car. 326 (1879); *North American F. Ins. Co. v. Zaenger*, 63 Ill. 464 (1872); and *American Ins. Co. v. Padfield*, 78 Ill. 167 (1875). — Ed.

garded in the business of insurance as an increase of risk is frequently a matter of much difficulty, about which men, even experts, differ. Such general language must, therefore, be strictly construed against the underwriter, or else one may not know whether he has violated his policy or not, until the verdict of a jury upon disputed evidence. The words risk increased "either internally or externally," do not convey to my mind an increase of risk by removal from the house, but an increase of risk by internal or external changes in the house itself, or its exposure, which manifestly increase the risk of fire so that it is not the same risk insured.

There was no question of fact for submission to the jury, and the court did not err in directing a verdict for plaintiff.

The judgment should be affirmed.

All concur.

*Judgment affirmed.*¹

HERRMAN, RESPONDENT, v. ADRIATIC FIRE INS. CO.,
APPELLANT.

COURT OF APPEALS OF NEW YORK, 1881. 85 N. Y. 162.²

THIS was an action upon a policy of fire insurance issued to the plaintiff for three years, beginning June 3, 1874, insuring specific amounts upon a dwelling-house, household furniture therein, outhouses, barn, carriage-house, farmer's house and outbuildings, produce in barn, live stock, horses, carriages, and harness. The policy provided that "if the above-mentioned premises . . . shall become vacant or unoccupied, and so remain for more than thirty days, without notice to and consent of this company in writing, . . . this policy shall be void." The premises were a farm and summer residence. In November, 1876, the plaintiff and his family returned to their city home for the winter, leaving in the insured dwelling-house their summer clothing and all the furniture. The farmer employed by the plaintiff lived in the farmer's house, watched the dwelling-house insured, and once a week caused it to be ventilated, and then to be locked up again. The plaintiff himself visited the dwelling-house once a fortnight, going through the rooms and eating a lunch there, but not remaining over night. Three days before the fire, he and his wife made such a visit to the premises. On April 8, 1877, the dwelling-house, its furniture, and the outhouses were destroyed by fire. The loss exceeded the amount insured upon these items.

A verdict was directed for the defendant company, whereupon the

¹ See *Norman v. Missouri Town Mutual Ins. Co.*, 74 Mo. App. 456 (1898).

Compare *Moore v. Phoenix Ins. Co.*, 64 N. H. 140 (1886). — Ed.

² The reporter's statement has not been reprinted. — Ed.

plaintiff excepted. The General Term of the Superior Court of the City of New York sustained the plaintiff's exceptions, set aside the verdict, and ordered a new trial, as reported in 13 J. & S. 394. The defendant company appealed.

James Thomson, for appellant.

N. B. Hoxie, for respondent.

FOLGER, C. J. This is an action on a policy of fire insurance. The property insured consisted of different buildings, and different kinds of chattel property kept in those buildings, respectively. The different properties insured, and the different amounts put at risk, each are specifically named in the policy with much minuteness. The property destroyed and for the loss of which the action is brought was but parts of the whole at risk, being the dwelling-house, and most of the contents of it, and four outbuildings, essential or convenient for use with the dwelling.

The question in agitation at the trial term and at the General Term was, whether the policy was avoided by the breach of the condition, that if the premises should become vacant or unoccupied, and so remain for more than thirty days without notice to, and consent of, the defendant, in writing, the policy should be void. The plaintiff contends that the two words "vacant" and "unoccupied" are synonyms, and are to be interpreted as having the same meaning, and that that meaning is empty; and then argues that, as the dwelling-house was not empty, there was no breach of the condition. There are doubtless conditions of a dwelling-house, or other like structure, when either word applied to it, or both words applied to it, will express a like state of it. There are, however, states of it when that will not be the case. It is so, because the different things that are receptive of the epithets of "vacant" and "unoccupied" are different in their capability and susceptibility of being filled or occupied. Some cannot have one of those terms applicable to them, without the other at the same time being also applicable. Some, from the nature of the use which goes with the occupation of them, may not be vacant, and yet they will, in any just use of the term as applicable to them, be unoccupied. A dwelling-house is chiefly designed for the abode of mankind. For the comfort of the dwellers in it, many kinds of chattel property are gathered in it. So that, in the use of it, it is a place of deposit of things inanimate and a place of resort and tarrying of beings animate. With those animate far away from it, but with those inanimate still in it, it would not be vacant, for it would not be empty and void. And as a possible case, with all inanimate things taken out, but with those animate still remaining in it, it would not be unoccupied, for it would still be used for shelter and repose. And it is because, in our experience of the purpose and use of a dwelling-house, we have come to associate our notion of the occupation of it with the habitual presence and continued abode of human beings within it, that that word applied to a dwelling always raises that conception in the mind. Sometimes, indeed, the use of the

word "vacant," as applied to a dwelling, carries the notion that there is no dweller therein: and we should not be sure always to get or convey the idea of an empty house by the words "vacant dwelling" applied to it. But when the phrase "vacant or unoccupied" is applied to a dwelling-house, plainly there is a purpose,—an attempt to give a different statement of the condition thereof; by the first word, as an empty house, by the second word, as one in which there is not habitually the presence of human beings. In the case of *Herrman v. The Merchants' Insurance Company*, 81 N. Y. 184, in this court, in June last, the decision went, not on the ground that the two words were used to mean, or that they meant, the same condition of the building, but that, by the use of the copulative conjunction with them, there was a contract framed of which there was no breach, unless the house was at the same time in the double state expressed by the phrase; that is, both vacant and unoccupied at the time of the fire, both empty and unused for abode.

It is clear, from the testimony, that the dwelling-house insured by the defendant was not occupied as such at the time of the fire. The fortnightly visits of the plaintiff and his wife to it were not the occupation that is meant when a dwelling-house is spoken of. The weekly tours of inspection of the farmer and members of his family living on the grounds, and his supervision of it from his own house, were more useful, but they fell short of being occupation of it. The term "unoccupied," used in the policy, is entitled to a sense adapted to the occasion of its use, and the subject-matter to which it is applied. It does not need that we go into discussion of the good reasons for exacting the condition on taking a risk upon a dwelling-house. It is enough that the parties have come into that covenant. It is to have a meaning fitted to the circumstances in which it was made and to the subject to which it related. We have already said enough to show our opinion that, for a dwelling-house to be in a state of occupation, there must be in it the presence of human beings as at their customary place of abode, not absolutely and uninterruptedly continuous, but that must be the place of usual return and habitual stoppage. We think that a verdict of a jury would not have been allowed to stand, that found that this dwelling-house was occupied at the time of the fire, within the terms of the policy. But it is said, that though this may be so in general, yet that the defendant made its contract with a view to just the state of things that existed with this property; that it was chargeable with a knowledge of the character and use of the premises, and that there would be a change of occupancy, such as in fact occurred. We cannot yield to that view. It may be that the defendant knew that it was but the place of summer abode for the plaintiff. Its contract was issued in the summer, when the property was in strict occupancy, and it provided for the coming of the fall, when that occupancy would be abandoned or modified; for the policy was not void at once on a cessation of occupancy. That cessation must last for thirty days, and be

unnotified to the defendants and continue thereafter without its consent. There was opportunity for the plaintiff to keep up that indemnity or to get other; and to the defendant to retain the risk, or to be freed from it, when that occupancy was about to cease, and notice was given.

Nor are we able, after much consideration, to agree with the learned General Term on the ground upon which it put its judgment. The condition of the policy is: "Or if the above-mentioned premises shall . . . become vacant or unoccupied . . . this policy shall be void." As we have above said, there were several different kinds and pieces of property insured, and, as was indicated by the description of them, the whole making up a well-to-do proprietor's rural establishment. The understanding must have been that there was comprised in the whole the buildings on a farm or country seat and the chattel property usually kept at such a place. The contention is that the words "above-mentioned premises" are collective and apply to all the property described, and the intent of the condition is that if all of it should be left unoccupied, then the policy should be void; but that one or several, or many of the buildings might be unoccupied, yet, if the rest were occupied, the condition of the policy would be saved. To give this construction to the phrase in question, it would need to carry it through all the conditions in the policy, to manifest absurdity and to an inconvenient precedent. There is a condition against other insurance, "on the property hereby insured." If the plaintiff had over-insured his dwelling-house, would not the condition have been broken, as to that, though he had not increased that on his kitchen detached? There is a condition against the change of title of the property. If the plaintiff had sold off so many acres as would include the farmhouse, would he have retained his insurance on that building because he had not transferred the whole premises? The plaintiff grasps at a two-edged sword, when he seeks to make such application of those general words of the policy. He contends that when words are used in the policy referring back to the property described, they mean to include the whole property. This would be to make the contract of insurance entire and indivisible; and to affect all the property insured with any act of the insured, which, as to any item thereof, worked a breach of any condition. This is not the true, just, or equitable construction. The clause is to be used distributively, and to be applied to each singular of the previous description of the property, as the kind of that property and the nature of the use of it may demand. It was upon this principle that we grounded our decision in *Merrill v. Agr. Ins. Co.*, 73 N. Y. 452. There we said: "Though there may have been some conduct of the insured as to some of the property, not evil in itself, but working a breach of the condition in its letter, the effect of that breach may be confined to the insurance upon that property, the contract as to that be held to be avoided, and as to the other subjects held valid." This was the converse of the proposition that we are now maintaining.

The case of *Bryan v. Peabody Ins. Co.*, 8 W. Va. 605, is not parallel with this.

Therefore, though the farm premises and some of the buildings thereon were in actual human occupation, that use of them did not extend to and take in the dwellings burned, so as to keep good the condition of the policy. It is further claimed that it was erroneous for the trial court to direct a verdict for the defendant, because all of the property burned was not unoccupied. Besides the dwelling-house, there was lost a wash-house, a wood-house, a kitchen, and a privy. It is contended that there was no evidence that these were unoccupied. The reasoning is ingenious, but it is not convincing. It is said that it does not appear that the occupation of these structures was confined to the plaintiff or the members of his immediate family as it was made up when he dwelt upon the place, and that it might be that the farmer and the members of his family might have used and occupied them. Now, these out-buildings were appurtenant to the dwelling-house; the use of them was concurrent with the use of the dwelling-house; they were parts of the one domestic establishment, and separated but forty feet from the main building. It is too plain for denial, save as a *dernier ressort*, that the occupancy of them, in habitual, continuous use for the purposes for which they were built and to which they were put, began when that of the dwelling-house began, and ended when that ended.

The plaintiff and the defendant made their contract in such terms as it pleased them both. It may or may not be a strict and rigorous application to the facts of the case of the condition that we have been considering; but we cannot, consistently with lasting principles of construction and interpretation, hold otherwise than that the plaintiff made a breach of a binding condition, and must abide the unfortunate consequence.

The order of the General Term should be reversed, and judgment absolute rendered in favor of defendant upon the verdict, with costs.

All concur, except MILLER, J., not voting.

*Order reversed and judgment accordingly.*¹

¹ Compare *Bryan v. Peabody Ins. Co.*, 8 W. Va. 605 (1875); *Harrington v. Fitchburg Mut. F. Ins. Co.*, 124 Mass. 126 (1878); *Connecticut F. Ins. Co. v. Tilley*, 88 Va. 1024 (1892); *Worley v. State Ins. Co.*, 91 Iowa, 150 (1894). — ED.

MOORE v. PHENIX INS. CO.

SUPREME COURT OF NEW HAMPSHIRE, 1882. 62 N. H. 240.¹

THIS was an action of assumpsit upon a policy insuring the plaintiff's house, shed, and barn for \$800, and the hay and produce in the barn for \$50. One defence was that the policy was not binding at the time of the fire, by reason of a breach of the provision against vacancy and unoccupancy. The essential facts appear in the opinion.

The court denied the defendant company's motion for a verdict, instructed the jury, as matter of law, that the non-occupancy from August 26 to December 11, 1876, did not avoid the policy, and denied the defendant company's motion that the verdict for the plaintiff should be set aside. The defendant company excepted to each of these rulings.

Philip Carpenter, Bingham & Aldrich, and Bingham, Mitchells & Batchellor, for the defendants.

Ray, Drew & Jordan, Rand & Morse, and J. L. Foster, for the plaintiffs.

SMITH, J. The defendants are liable only in accordance with the terms and stipulations expressed in their contract as the conditions of their liability. The contract is in writing, and is contained in the policy of insurance. In consideration of \$8.50 paid by the plaintiff, the defendants covenanted to insure his property against loss or damage by fire for the term of three years commencing August 15, 1876. The policy contained this condition; "If the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant and unoccupied for a period of more than ten days, or the risk be increased by any means whatever within the control of the assured, without the assent of this company indorsed hereon, . . . then, and in every such case, this policy shall be void." The premises remained unoccupied from August 24 until December 11, 1876, and on the 18th or 19th of that month were destroyed by fire. The contract was, not that the policy should be void in case of loss or damage by fire during the period of unoccupancy, but that vacancy and unoccupancy should terminate the policy. There is no occasion to inquire what distinction there may be between a vacant and an unoccupied building (*Herrman v. Merchants' Ins. Co.*, 81 N. Y. 184; *Herrman v. Adriatic Ins. Co.*, 85 N. Y. 162; *N. A. Fire Ins. Co. v. Zaenger*, 63 Ill. 464; *American Ins. Co. v. Padfield*, 78 Ill. 167), for no point was made at the trial that the plaintiff's buildings were not both vacant and unoccupied from August 24 until December 11. Nor is it necessary to go into an inquiry of the reasons for exacting this condition. It is enough that the parties entered into the covenant. It was a condition that would

¹ The reporter's statement has not been reprinted. — Ed.

afford protection of a substantial character against fraudulent incendiarism, of which insurers may well avail themselves. *Hill v. Ins. Co.*, 58 N. H. 82; *Sleeper v. Ins. Co.*, 56 N. H. 406. The insurers had a right, by the terms of the policy, to the care and supervision which are involved in the occupancy of the buildings. *Ashworth v. Ins. Co.*, 112 Mass. 422.

There was no waiver by the defendants of the condition, nor any assent to the changed condition of the premises insured, for they had no notice or knowledge that the buildings were unoccupied until the plaintiff furnished his proofs of loss. A waiver, to be effectual, must be intentional. The premises were left unoccupied more than ten days; and if the non-occupation had continued to the time of the fire, the plaintiff could not recover. *Fabyan v. Ins. Co.*, 33 N. H. 206; *Shepherd v. Ins. Co.*, 38 N. H., 240; *Sleeper v. Ins. Co.*, 56 N. H. 406; *Hill v. Ins. Co.*, 58 N. H. 82; *Baldwin v. Ins. Co.*, 60 N. H. 164; *Lyman v. Ins. Co.*, 14 Allen, 329; *Merriam v. Ins. Co.*, 21 Pick. 162; *Herrman v. Ins. Co.*, 85 N. Y. 162; *Harrison v. Ins. Co.*, 9 Allen, 231; *Wustum v. Ins. Co.*, 15 Wis. 138; *Mead v. Ins. Co.*, 7 N. Y. 530; *May Ins.* (ed. 1873) s. 248.

It is contended by the plaintiff, upon the authority of *State v. Richmond*, 26 N. H. 232, that the policy had not become absolutely void at the expiration of ten days from the time the house became unoccupied, but was voidable only at the election of the defendants. In the construction of contracts words are to be understood in their ordinary and popular sense, except in those cases in which the words used have acquired by usage a peculiar sense different from the ordinary and popular one. In this case the word "void" has not acquired by usage a different signification from the ordinary and popular one of a contract that has come to have no legal or binding force. Whether the cessation of the executory contract of insurance was temporary and conditional, or perpetual and absolute, is a question; but "void" means that on the eleventh day of continuous non-occupation the plaintiff was not insured. The defendants might have waived the condition altogether, or might have waived its breach; but having had no opportunity before the loss to make their election to waive the breach, their refusal to pay, when notified of the loss and unoccupancy, was an effectual election that they insisted upon the condition in the policy.

The duty of obtaining the consent of the defendants to the changed condition of the buildings rested with the plaintiff. By his neglect to comply with this requirement of the contract, it came to an end by force of its own terms. *Girard Ins. Co. v. Hebard*, 95 Pa. St. 45. If, when the unoccupancy commenced, he had requested the assent of the defendants, they would have had their option to continue the policy upon payment of such additional premium as the increased risk called for, or to cancel the policy, refunding the unearned premium. *Lyman v. Ins. Co.*, 14 Allen, 329. There is no presumption that they would

have given their assent to the unoccupancy of the buildings without the payment of a premium commensurate with the additional hazard.

The contract being once terminated, it could not be revived without the consent of both of the contracting parties. It is immaterial, then, whether the loss of the buildings is due to unoccupancy or to some other cause. *Mead v. N. W. Ins. Co.*, 7 N. Y. 530, 535, 536; *Lyman v. State M. F. Ins. Co.*, 14 Allen, 329, 335; *Merriam v. Ins. Co.*, 21 Pick. 162; *Jennings v. Ins. Co.*, 2 Denio, 81; *Shepherd v. Ins. Co.*, 38 N. H. 232, 239, 240; *Poor v. Ins. Co.*, 125 Mass. 274; *Alexander v. Ins. Co.*, 66 N. Y. 464, 468; *Sleeper v. Ins. Co.*, 56 N. H. 401; *Hill v. Ins. Co.*, 58 N. H. 82.¹ . . .

This result is in accordance, also, with that rule of the law of marine insurance which holds that a deviation from the stated voyage against a condition in the policy discharges the insurer, though the loss does not happen during the deviation, nor the risk be increased thereby. *Kettell v. Wiggin*, 13 Mass. 68; *Burgess v. Ins. Co.*, 126 Mass. 70; *Fernandez v. Ins. Co.*, 48 N. Y. 571; *Ins. Co. v. Le Roy*, 7 Cranch, 26. Kent says: "The courts are exceedingly strict in requiring a prompt and steady adherence to the performance of the precise voyage insured; and, considering the particular state of facts upon which calculations of the value of risks are made, and the uncertainty and danger of abuse that relaxations of the doctrine would introduce, the severity of the rule is founded in sound policy." 3 Kent Com. 314. . . .

The decisions in Maine, cited by the plaintiff, are not in point, for c. 34, Laws 1861, Maine, provides that "Any change in the property insured, its use or occupation, or breach of any of the conditions or terms of the contract by the insured, shall not affect the contract unless the risk was thereby materially increased." *May Ins.* 269; *Cannell v. Phoenix Ins. Co.*, 59 Me. 582.

The cases cited from Illinois seem to have followed the decision in *Ins. Co. v. Wetmore*, 32 Ill. 245, where the policy provided for a suspension of liability so long as the premises should be appropriated and occupied in violation of the terms of the policy. And accordingly, in *N. E. F. & M. Ins. Co. v. Schettler*, 38 Ill. 166; *Schmidt v. Ins. Co.*, 41 Ill. 296; and *Ins. Co. v. McDowell*, 50 Ill. 120, it was held that the insurer's liability recommenced when the increased risk terminated. . . .

The strict and literal meaning of the stipulation that the policy shall be void if the premises remain unoccupied more than ten days is not that the insurance will be suspended merely during non-occupation after the ten days, and will revive when occupation is resumed. In ordinary speech, a void policy is one that does not and will not insure the holder if the insurer seasonably asserts its invalidity. It might be argued that this clause should be so construed as to accomplish no more than the purpose for which it was inserted; that its sole purpose

¹ In reprinting the opinion, it has seemed necessary to omit several passages discussing authorities on the effect of breaking conditions as to prohibited articles, other insurance, and alienation. — Ed.

was to protect the insurer against the risk resulting from non-occupation; and that if this risk was terminated by reoccupation, the parties intended the insurance should be suspended only during the existence of the cause of a risk which the company did not assume. On the other hand, it might be argued that such an intention would have been manifested by words specially and expressly providing for a suspension and resumption of the insurance, and would not have been left to be inferred from the general agreement that the policy should be void; that a final termination of the insurance at the end of ten days of non-occupation is plainly expressed by the provision that the policy shall then be void; and that the parties would not think it necessary to go further, and provide that the void policy should not become valid on reoccupation.

Without determining the true construction, or what the result would be if there were no authority in this state, we are inclined to follow the decision in *Fabyan v. Insurance Company*, 33 N. H. 203, although in that case the question of suspension seems not to have been presented by the plaintiff or considered by the court. It was apparently assumed that "void" meant finally extinguished, and not temporarily suspended; and in the present state of the authorities we are not prepared to hold that the assumption was erroneous.

*Verdict set aside.*¹

BLODGETT and CARPENTER, JJ., did not sit; STANLEY, J., dissented; the others concurred.

¹ For the later history of the litigation, see *Moore v. Phoenix F. Ins. Co.*, 64 N. H. 140 (1886).

Compare *Laselle v. Hoboken F. Ins. Co.*, 43 N. J. L. 468 (1881).

On vacancy and the like, see also:—

Sleeper v. N. H. F. Ins. Co., 56 N. H. 401 (1876);
Hill v. Equitable M. F. Ins. Co., 58 N. H. 82 (1877);
Cornish v. Farm Buildings F. Ins. Co., 74 N. Y. 295 (1878);
American Ins. Co. v. Foster, 92 Ill. 334 (1879);
Sonneborn v. Manufacturers' Ins. Co., 44 N. J. L. 220 (1882);
Short v. Home Ins. Co., 90 N. Y. 16 (1882);
Insurance Co. v. Wells, 42 Ohio St. 519 (1885);
Snyder v. Fireman's Fund Ins. Co., 78 Iowa, 146 (1889);
Halpin v. Ins. Co. of North America, 120 N. Y. 73 (1890);
Continental Ins. Co. v. Kyle, 124 Ind. 132 (1890);
England v. Westchester F. Ins. Co., 81 Wis. 583, 588 (1892);
Limburg v. German F. Ins. Co., 90 Iowa, 709 (1894);
Home Ins. Co. v. Scales, 71 Miss. 975 (1894);
Moody v. Ins. Co., 52 Ohio St. 12, 20-24 (1894);
Names v. Dwelling House Ins. Co., 95 Iowa, 642, 649-650 (1895);
East Texas F. Ins. Co. v. Kempner, 12 Tex. Civ. App. 533 (1896);
Home Ins. Co. v. Mendenhall, 164 Ill. 458, 468-469 (1897);
Jones v. Granite State F. Ins. Co., 90 Me. 40 (1897);
Clifton Coal Co. v. Scottish U. & N. Ins. Co., 102 Iowa, 300 (1897);
Stoltenburg v. Continental Ins. Co., 106 Iowa, 565 (1898).—ED.

SECTION II. (*continued*).

(E) CONDITIONS AS TO OWNERSHIP AT THE INCEPTION OF THE CONTRACT.

REAPER CITY INS. CO. v. BRENNAN.

SUPREME COURT OF ILLINOIS, 1871. 58 Ill. 158.

APPEAL from the Circuit Court of Sangamon County; the Hon. B. S. EDWARDS, Judge, presiding.

This was an action on a policy of insurance, brought by Brennan against the Reaper City Insurance Company. Judgment was rendered in favor of the plaintiff, from which the defendant appealed.

Messrs. *J. C. & C. L. Conkling*, for the appellant.

Messrs. *Herndon & Orendorff*, for the appellee.

MR. CHIEF JUSTICE LAWRENCE delivered the opinion of the court:

This is an action on a policy of insurance. At the time the insurance was effected, the property had been sold on a judgment and execution against the assured, but the twelve months allowed for redemption had not expired. It is insisted the non-disclosure of this sale avoids the policy, by virtue of the following clause therein:

“If the property to be insured be held in trust or on commission, or be a leasehold interest or equity of redemption, or if the interest of the insured to the property be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the insured, it must be so represented to the company, and so expressed in the written part of this policy; otherwise the policy shall be void.”

We must hold this defence valid. It cannot truthfully be said that the assured had, at the date of the insurance, “the entire, unconditional, and sole ownership of the property.” On the contrary, the purchaser at the sheriff’s sale, although he had not acquired a complete title, either legal or equitable, as held in *Phillips v. Demoss*, 14 Ill. 412, had certainly acquired an interest in the land to the extent of his bid, which would, in a few months, ripen into a title unless redeemed. With this outstanding and paramount interest vested in another, the title of the assured was not “entire, unconditional, and sole.”

The judgment must be reversed and the cause remanded.

Judgment reversed.

CLAY FIRE AND MARINE INS. CO. v. HURON SALT
AND LUMBER MANUFACTURING CO.SUPREME COURT OF MICHIGAN, 1875. 31 Mich. 346.¹

ERROR to Bay Circuit.

This was an action of assumpsit brought by the Huron Salt and Lumber Manufacturing Co., for the use and benefit of George C. Smith, upon a policy insuring The Huron Salt and Lumber Manufacturing Co., to the amount of \$1,500, on "their one-story frame salt block," and certain machinery contained therein, "loss payable to George C. Smith, . . . as his interest may appear." The policy said that "if the assured is not the sole and unconditional owner of the property insured, or (if said property be a building or buildings) of the land on which such building or buildings stand, by a sole, unconditional, and entire ownership and title, and is not so expressed in the written portion of the policy, — then . . . this policy shall be void." The insurance was for one year from April 2, 1873. The property was destroyed by fire on June 22, 1873.

The insurance company pleaded the general issue and gave notice of defences, that when the policy was issued the plaintiff corporation was not the entire, unconditional, and sole owner; that the interest of the plaintiff corporation was not expressed in the written part of the policy; that on or about April 1, 1868, the plaintiff corporation, by a written contract in the name of the president, sold the property to John W. Babcock, who fully paid for the property, went into possession, and at the date of the policy and of the loss was equitable owner and entitled to conveyance and possession; that at the date of the policy and of the loss the plaintiff company had no interest except as trustee of the naked legal title; and that George C. Smith had no interest in the property at the date of the policy or of the loss.

At the trial the defendant company offered to make proof of the facts stated in the notice as to the equitable title of Babcock. The offer was rejected. The defendant company also requested a charge that no recovery could be had without proof of some legal or equitable interest belonging to George C. Smith. This was refused. The jury found for the plaintiff company. The case came to the Supreme Court upon a bill of exceptions. The exceptions included some matters not mentioned in this statement.

Holmes, Haynes & Stoddard, for plaintiff in error.

McDonell & Cobb, and *Hoyt Post*, for defendant in error.

GRAVES, C. J.² . . . The point raised by a request to charge, as before mentioned, is not well taken. . . .

¹ The statement has been based upon the opinion. — ED.

² In reprinting the opinion, the statement of the case has been omitted; and so have passages foreign to ownership, which was the only point as to which error was found. — ED.

The occurrence in the policy of the direction to pay to George C. Smith, as his interest might appear, did not necessitate proof of any interest by him in the insured property. The insurance was not made with him, but with the salt and lumber company. They paid the consideration and were the promisees. The expression in the policy in regard to paying to Smith as his interest might appear, seems to have been chosen as a mode of appointing that payment should be made by the insurance company to him to the extent of some claim he had or was expected to have against the assured. *Bates v. Equitable Ins. Co.*, 10 Wall. 33. Whatever might be paid to him consistently and in accordance with his claim against the assured, which this appointment contemplated, would be a payment to the assured.

No interest of Smith appears to have been contemplated as the subject of the insurance, and no interest by him in the property insured was made a condition of the right of the assured to assert a remedy in the policy. His chance and the right of the assured were not intended to depend upon his having an insurable interest in the property, but upon the requisite ownership of the assured.

We come now to the offer of the defence to prove that Babcock held the entire equitable estate and interest and the right to be immediately invested with the legal title, and that this bare legal title then due to Babcock was the only badge of ownership which the assured possessed.

As the offer was refused, we must consider the case as though the fact proposed to be shown had been established. And it must be borne in mind that the question is not, whether the salt and lumber company, as lawful possessor for the time being of the bare legal title, had a scintilla of insurable interest, but it is, whether the clause which insisted that it should be stated in the policy, if the fact were so, that the assured was not the sole and unconditional owner by a sole, unconditional, and entire ownership and title, was satisfied by the facts as we must assume them to have been under the offer of proof and the statement in the policy that the property was "their" property.

If it was *not*, then the policy by its own terms was made ineffectual, and the plaintiff corporation was not entitled to recover.

After much consideration, I am unable to concur with the circuit court upon this point. No reasonable interpretation of the policy has been intimated or has suggested itself which will harmonize the requirements of the policy, the statement as to ownership in the clause describing the property, and the condition of things contemplated by the offer of proof. The express statement in regard to ownership was not, when viewed in connection with the subsequent clause, a correct statement. It gave no intimation of any outstanding right in Babcock, or in anybody else. It conveyed no other idea than that of complete and exclusive ownership by the salt and lumber company. There was no qualification whatever. The matter will appear in the clearest light by reading the statement in the beginning of the policy, that the property was "their" property, in connection with the clause before quoted,

requiring it to be stated, if true, that it was not their property by entire ownership and title, etc.

When thus examined, the policy will be seen to import that the salt and lumber company was not merely owner, but owner by a sole, unconditional, and *entire ownership and title*.

At this very time, however, as must be conceded for the purpose of the question, Babcock's right was in every way so ample and complete that a statement in the policy that the property belonged to him would have been warranted. Certainly it cannot be claimed that a party holds by a sole, unconditional, and entire ownership and title, when in truth another at the same time has so complete a right and interest that he may be rightly considered as owner.

The point appears too clear to justify elaborate discussion. Among a number of cases having some bearing, only two will be noticed. The first is the *Columbian Insurance Co. v. Lawrence*, 2 Pet. 25.¹ . . .

The other case is *Hough v. City Fire Insurance Co.*, 29 Conn. 10. There the applicant, Samuel W. Hough, described the property as "his dwelling-house," and it was likewise so described in the policy. The policy contained the following condition: "If the interest in the property to be insured is not *absolute*, it must be so represented to the company and expressed in the policy in writing; otherwise the insurance shall be void."

It appeared at the trial that Hough's ownership was similar to that claimed for Babcock in the case at bar. The legal title was in another, with whom Hough had made a parol contract to purchase for a fixed price. He had agreed absolutely to pay, had paid part, had entered as purchaser, and made valuable improvements.

The court were of opinion that as he had a right to the property and the power by law to enforce that right, it might properly be denominated his. Among other observations, the court said: "The evidence conduced to prove that the plaintiff's interest in that property was an absolute interest. That is an absolute interest in property which is so completely vested in the individual that he can by no contingency be deprived of it without his own consent, and by this contract with Eliakim Hough, and its part performance, the plaintiff had acquired a right to the whole property, of which he could not be deprived without his own consent. So, too, *he* is the *owner* of such absolute interest who must necessarily sustain the loss if the property is destroyed."²

If Hough, as held in this case, had an absolute interest, and was so far owner that the property could rightly be described as *his* property in an application for insurance, and in a policy, most clearly Babcock, if in the position contemplated by the offer of proof, held an absolute interest, and was in a situation which would have justified describing

¹ Here was stated *Columbian Ins. Co. v. Lawrence*, *ante*, p. 248, n. (1829). — ED.

² *Acc.*: *Loventhal v. Home Ins. Co.*, 112 Ala. 108 (1896).

Compare *Brown v. Williams*, 28 Me. 252 (1848); *Hinman v. Hartford F. Ins. Co.*, 36 Wis. 159, 167 (1874). — ED.

him *as owner*, in the policy in suit, and the salt and lumber company was not at the same time holding by a sole, unconditional, and entire ownership and title.

The view taken disposes of the case, and renders a new trial necessary. The judgment should be reversed, with costs, and a new trial awarded.¹

MERS v. FRANKLIN INS. CO.

SUPREME COURT OF MISSOURI, 1878. 68 Mo. 127.²

APPEAL from Cass Circuit Court.

This was an action upon a policy whereby the defendant insured the plaintiff for one year from March 10, 1873, against loss by fire to the amount of \$1,000 on his hotel, and \$1,000 on personal property. All the property was destroyed by fire on April 18, 1873.

The policy provided that "if the interest in the property to be insured be a leasehold interest, or other interest not absolute, it must be so represented to the company and expressed in the policy in writing, otherwise the insurance shall be void." There was nothing to show that the plaintiff signed a written application for insurance, or made any representation as to the ownership of the house; but in the policy it was described as "his."

The plaintiff had owned the house, but in November, 1872, it was sold to one Yocum at sheriff's sale under an execution. On Dec. 16, 1872, the plaintiff and Yocum, the latter acting by an agent, executed an instrument, under seal, whereby Yocum agreed to execute a quitclaim to the plaintiff in case the latter should pay \$1,480 on or before June 1, 1873. On Dec. 16, 1872, the same parties executed a lease of the premises for one year. The plaintiff went into possession and paid rent. Up to the day of the fire the plaintiff paid nothing under the agreement for a conveyance.

On this state of facts the defendant contended that the policy was void as to the building. The plaintiff recovered judgment for the full amount of the policy. The defendant appealed.

Adams & Sherlock, for appellant.

R. O. Boggess, for respondent.

HOUGH, J.³ . . . We think it quite clear from the record that the plaintiff had, at the time of the fire, only a leasehold interest in the building. The instrument executed by Yocum, through his agent, Briant, was not a contract of sale, and conferred upon the plaintiff

¹ *Acc.*: *Barnard v. National F. Ins. Co.*, 27 Mo. App. 26 (1887); *Hamilton v. Dwelling House Ins. Co.*, 98 Mich. 535 (1894). — ED.

² The statement has been based upon the opinion. — ED.

³ After stating the case. — ED.

none of the rights of a vendee of the property in question, and hence does not come within the rule laid down in *Gaylord v. Lamar Fire Ins. Co.*, 40 Mo. 13. So far as appears, this instrument was without any consideration, in fact was a simple gratuity, and conferred a mere privilege upon the plaintiff to redeem the estate upon the payment of a specified sum. It conferred a mere option, and not a vested interest. By it no obligation is created, on the part of the plaintiff, to pay the sum named at the time specified, or at any time, and there is no evidence of any independent undertaking to that effect. That the parties themselves considered it a mere privilege is manifested by the fact that plaintiff, at the time of receiving it, accepted the lease from Yocum of the very premises embraced in the agreement, and paid rent therefor. It is quite evident, therefore, that the plaintiff went into possession as lessee and not as vendee; and that his interest was, at the time of the contract and the loss, a leasehold only. *Hand v. Insurance Co.*, 57 N. Y. 41.

We are next to consider whether the condition of the policy above recited has been complied with. A warranty is a part of the contract, and must be exactly and literally fulfilled. It is in the nature of a condition precedent, and no inquiry is allowed into the materiality or immateriality of the fact warranted. *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 255. Where a representation is inserted in the policy, or where it is referred to in the policy as forming a part thereof, the representation becomes a warranty. *Flanders*, 233, and cases cited. Conditions annexed to a policy of insurance are, likewise, a part of the policy, and are of the same effect as if incorporated in it. By the general law of insurance, the interest of the insured in the property is not required to be specifically described in the policy. *Franklin v. The Atlantic Fire Ins. Co.*, 42 Mo. 459. The object of the condition above cited undoubtedly was to require in all cases a representation as to the interest of the assured, and to make such representation a warranty. This condition is a reasonable and valid one. In the case last cited this court, in speaking of a similar clause in a policy then before it, said that its object doubtless was to protect the company against the danger of taking risks on the property insured for so large an amount in proportion to its value, or the value of the interest of the assured, as to furnish a temptation to fraudulent conduct.¹ . . .

When, by the terms of the policy, no disclosure is required of the assured as to the extent of his interest, and no inquiry is made by the company in reference thereto, a lessee may, in effecting insurance, properly describe the premises as his, but his recovery will, in case of loss, be restricted to his qualified interest. *Niblo v. North American Fire Ins. Co.*, 1 Sand. 551, 561; *Fletcher v. Commonwealth Ins. Co.*, 18 Pick. 419; *Sussex Co. Mut. Ins. Co. v. Woodruff*, 2 Dutcher, 541. But when a disclosure of the true interest of the assured, if the same is not absolute, is required to be made by a condition of the policy, such in-

¹ Here was stated *Franklin v. Atlantic F. Ins. Co.*, 42 Mo. 456, 459 (1868). — ED.

terest must be stated to the company, or the policy will be void. The acceptance of a policy containing the condition under consideration, without any representation as to title, or any statement of the specific interest of the assured, amounts to a declaration, on the part of the assured, that his interest is an absolute one.¹ If the plaintiff had truly represented his interest in the property insured, the failure of the agent to incorporate it in the policy would not avoid the policy. But as it does not appear that the plaintiff stated his real interest in the building, he cannot recover for the loss thereof. The judgment must, therefore, be reversed and the cause remanded. *Reversed.*

Judges NAPTON and HENRY concur. SHERWOOD, C. J., and NORTON, J., dissent.

DAKIN, RESPONDENT, v. LIVERPOOL, LONDON AND GLOBE INSURANCE COMPANY, APPELLANT.

COURT OF APPEALS OF NEW YORK, 1879. 77 N. Y. 600.²

THIS action was brought upon four policies of insurance, issued by defendant upon a tannery in Schuyler County. (Mem. of decision below, 13 Hun, 122.)

The policies were similar, save as to dates and amounts. In each the insurance was to "S. D. Wood and T. W. Moore & Co., as interest may appear. . . . Loss, if any, payable to Lyon & Dakin." The property was owned by T. W. Moore & Co. Wood had a mortgage thereon, as had also Lyon & Dakin, theirs being the first mortgage. The interest of Lyon, in the mortgage last mentioned, passed subsequently to Dakin, who conveyed an interest therein to Wood. The defendant urged, among other objections to a recovery, that Wood's interest, as mortgagee, was not expressed in the policies, and that there was, therefore, a breach of conditions of each policy, forfeiting it "if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not stated in the policy;" or, "if the interest of the assured

¹ *Acc.*: *Lasher v. St. Joseph F. & M. Ins. Co.*, 86 N. Y. 423 (1881); *Scottish Union & National Ins. Co. v. Petty*, 21 Fla. 399 (1885); *Wilcox v. Continental Ins. Co.*, 85 Wis. 193, 198 (1893); *Hamilton v. Dwelling-House Ins. Co.*, 98 Mich. 535, 540-542 (1894); *Syndicate Ins. Co. v. Bohn*, 27 U. S. App. 564 (Eighth Circuit, 1894); s. c. 12 C. C. A. 531, and 65 Fed. R. 165; *Ætna Ins. Co. v. Holcomb*, 89 Tex. 404, 410, 412 (1896); *Dumas v. Northwestern National Ins. Co.*, 12 Dist. Col. App. 245 (1898).

Contra: *Philadelphia Tool Co. v. British American Assurance Co.*, 132 Pa. 236 (1890); *Wright v. Fire Ins. Co.*, 12 Mont. 474 (1892); *Schroedel v. Humboldt F. Ins. Co.*, 158 Pa. 459 (1893); *Phenix Ins. Co. v. Fuller*, 53 Neb. 811 (1898); *Manchester F. Ass. Co. v. Abrams*, 61 U. S. App. 276 (Ninth Circuit, 1898); s. c. 32 C. C. A. 426, and 89 Fed. R. 932. — ED.

² Among "memoranda of causes not reported in full." — ED.

in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured," and it is not "so expressed in the written part of this policy." *Held*, that the interest of Wood was sufficiently expressed in the policies, and there was no breach of these conditions.

The portion of the opinion upon that subject is as follows : —

"The second point is, that Simeon D. Wood was assured as owner, while his interest was really that of a mortgagee, whereby there was a breach of some conditions in the policy which we have given above. But some effect is to be given to the phrase 'as interest may appear.' This was in manuscript, inserted in the printed form of policy by the defendant. It indicated uncertainty; that there was something contingent and undetermined in the mind of the contracting parties as to the interest of Wood in the property at risk. The defendant claims that it indicated uncertainty as to the extent of the interest, and not as to its quality or character. But when it is once conceded or held that this phrase indicates uncertainty, we know not why we should confine that uncertainty to one element of an insurable interest rather than another, unless there have been rules laid down giving such effect to the phrase. No adjudication has been cited to us so deciding. A somewhat exhaustive search fails to bring one to our attention; while *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6, tends the other way. We know no reason, where the use of the phrase indicates such uncertainty in the draftsman, and creates such doubt in the mind of one called to interpret as that there is an ambiguity, to be explained only by evidence *aliunde* the paper, why the evidence may not be directed to the fact that the kind, as well as the extent, of interest was not clearly ascertained by the contracting parties, or was purposely left without statement in full. Nor does the meaning of the word 'interest,' used in the phrase, confine the intention of the draftsman to the extent rather than the kind. The phrase 'an interest,' though primarily it included the terms estate, right, or title (*Co. Litt.* 345 *b*, *155) has latterly come often to mean less, and to be the same as concern, share, and the like. *Inhab. of Northampton v. Smith*, 11 Metc. 390. In contracts, in general, that word means the peculiar right of property which one has in a thing. More especially is this so in contracts of insurance, in the law of which so much space is taken by the topic of insurable interest, which deals especially with the kind rather than the extent of right in the property; as is apparent when we begin to enumerate the interests usually insured; as owner, mortgagor, mortgagee, agent, consignee, factor, and the like, *ad infinitum*. The use of a similar phrase in a policy viz. : 'on account of whomsoever it might concern at the time of loss,' has been held to leave it undetermined, until the loss took place, who might then be the owner of the property and entitled to the money. *Rogers v. Traders' Ins. Co.*, 6 Paige, 583. Effect has been given to a more restricted phrase, 'for account of whom it may concern;' though there must have existed, at the time the contract of insurance

was made, an intention to protect the person who claims the payment: *Steele v. Ins. Co.*, 17 Penn. St. 290; yet that intention might be made known subsequently by evidence *aliunde* the policy. The use of such indeterminate phrases makes way for evidence in explanation of them, and of what was the purpose in the use of them. *Finney v. Ins. Co.*, 8 Met. 348. After the door is thus opened for the admission of such evidence, what rule is there that will keep out any that will show what was in the mind of the contracting parties, on the subject of the interest to be insured? In *Watson v. Swann*, 11 C. B. [N. S.], 755, there was an open policy, 'upon any kind of goods and merchandise, *as interest might appear*.' The effect of the opinion delivered there is, that under such a phrase, persons who could not be named and ascertained at the time the policy is effected are allowed to come in and take the benefit of the insurance, if they were persons contemplated at the time the policy was made. It is so then, that the use of such phrases, expressive of uncertainty in the mind of the insurers, at the time of the framing of the contract they have given out, as to some matter with which the contract is concerned, does open the instrument to explanation by proof *aliunde* the instrument. In the absence of any rule or reason confining the effect of such proof, any material matter which was then in doubt may be made sure by evidence, when the time has come that certainty is wished. Where the clause expressive of doubt shows that the uncertainty is as to the person who is to have the benefit of the contract, who the person is may be proven. Where it is as to the interest which is to be protected, what the interest is may be proven, and what is the extent, kind, or quality of it. The phrase in this policy, 'as interest may appear,' is as applicable to Wood, as one of the insured, as to L. W. Moore & Co. It indicates that when the policy was filled up by the defendant, there was uncertainty as to his interest, or that for some reason it was not thought best to state it; and the use of the phrase gave the right to him to show what the fact was as to it, whenever the time came at which it was for his good to show it. It is a phrase anticipatory of the fact as it would then be shown; and the use of the phrase is as if the recital of the fact, as it is afterwards shown, was, at the time of the making of the contract, written out in full in the policy. We must now read that paper as if there was written into it what was Wood's interest, which was to be saved by the contract, as now ascertained to have then been contemplated as possible. Doing that, it is plain that the printed conditions of the policy, above given, relied upon by the defendant, are of no avail; for then the interest of Wood is 'truly stated in this policy; the interest of the assured in the property' being 'other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, is expressed in the written part of the policy.'

"It may be well to say here that this point of the defendant arises on the motion for a nonsuit. It was not claimed, on that motion, that

the interest of Wood was 'not represented to the company.' We spend no time, therefore, on that clause of the condition.

"It is suggested that if it had been proven that the company knew that Wood was a mortgagee, and with that knowledge issued the policies, then effect and application could be given to these words so as not to have the contract fail, and it is urged that with such proof lacking, that result cannot follow. But one of the cases cited, *Rogers v. Traders' Ins. Co.*, *supra*, shows that under the language there used the person who was to be benefited need not be known, at the time of the contract, to either of the parties instrumental in making it. And so it is said in the case from 11 C. B. N. s. *supra*: 'A very wide extension has been given to the principle I have adverted to as to the parties to a contract in respect of policies of insurance, viz.: that persons who could not be named or ascertained at the time the policy is effected are allowed to come in and take the benefit of the insurance.' There is no reason then why, when it is assumed that there is an insurable interest of some kind in a person, that interest may not be covered by the contract, though its exact nature and extent be left to future ascertainment. The cases cited by the defendant (*Bidwell v. N. W. Ins. Co.*, 19 N. Y. 179; *Bidwell v. N. W. Ins. Co.*, 24 N. Y. 302; *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6; *Van Shoick v. Niagara F. Ins. Co.*, 68 N. Y. 434; 24 N. Y. 302; 65 N. Y. 6; 3 Keyes, 87, 436; 68 N. Y. 434) do indeed show that there was knowledge by the company when giving out the policy; but they do not hold or intimate anything contrary to our views above expressed."

In the complaint plaintiff demanded judgment for the amount due to him only. Upon the trial the court allowed an amendment thereof so as to demand judgment for the full amount due on all the policies. *Held*, no error; as by the policies the whole loss was made payable to Lyon & Dakin, and so far as the contract of defendant was concerned, plaintiff had the right to enforce the policies to the full amount, he holding the residue over and above his own interest, as trustee for the benefit of the others interested.

Further points were disposed of on the facts.

Erastus P. Hart, for appellant.

M. M. Mead, for respondent.

Per Curiam opinion for affirmance.

All concur.

*Judgment affirmed.*¹

¹ In *Lasher v. St. Joseph F. & M. Ins. Co.*, 86 N. Y. 423 (1881), a policy insured Jane A. Lasher against loss by fire "on her household furniture . . . loss, if any, payable to Artemas Sahler and William Lounsbury as their interest may appear." Mrs. Lasher did not own the furniture, but was in possession under a contract to purchase it for \$19,000 from Sahler and Lounsbury, the contract providing that the title should not pass until full payment was made, and that Mrs. Lasher should keep the furniture insured, loss, if any, payable to Sahler and Lounsbury as their interest might appear. At the time of the fire Mrs. Lasher had paid about \$2,680. EARL, J., for a majority of the court, said:—

"The policy contained a provision that it should be void 'if the interest of the

DOLLIVER AND OTHERS v. ST. JOSEPH FIRE AND
MARINE INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1880. 128 Mass. 315.

Soule, J. The plaintiffs are the assignees in bankruptcy of Abraham Day, who, being the owner in fee of the buildings described in his policy, subject to certain mortgages and to a lease running for about three and one half years, obtained the policy sued on; and, the buildings having been destroyed by fire, bring this action to recover the amount for which they were insured. The plaintiffs were appointed assignees after the loss. The defendant contended, and the Chief Justice at the trial ruled, that the action could not be maintained, because no mention is made in the policy of the encumbrances on the title to the property destroyed. This ruling was based on the following provision of the policy: "4. If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the company, and so expressed in the written part of this policy, otherwise the policy shall be void." This provision is in the body of the policy, and is inserted for the benefit of the insurer. It is to be construed strictly against it, and liberally in behalf of the assured. If, therefore, its terms can be satisfied by a construction which will save the policy, and at the same time accord with the established rules of law, such construction must be adopted.

It has long been settled in this Commonwealth that, as to all the world except the mortgagee, a mortgagor is the owner of the mortgaged lands, at least till the mortgagee has entered for possession. *Willington v. Gale*, 7 Mass. 138; *Waltham Bank v. Waltham*, 10 Met. 334; *White v. Whitney*, 3 Met. 81; *Ewer v. Hobbs*, 5 Met. 1; *Henry's case*, 4 Cush. 257; *Howard v. Robinson*, 5 Cush. 119; *Buffum v. Bowditch Ins. Co.*, 10 Cush. 540; *Farnsworth v. Boston*, 126 Mass. 1.

assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated' in the policy. It is claimed that this provision in the policy was violated, and we are of that opinion. Mrs. Lasher was the assured, and it was her interest only which was insured. . . . It was the obvious purpose of the provision quoted to require the assured to state truly her interest, whatever it was. This she did not do. It is true that she had an interest which was insurable, but what that interest was she should have truly stated. . . .

"The necessity for a true statement of plaintiff's interest in the furniture was not obviated by the clause making the loss payable to Sahler and Lounsbury as their interest might appear. . . . That clause at most implied that Sahler and Lounsbury had some lien upon, or some other interest in, the furniture which was consistent with title and ownership in her. It was not tantamount to a notice to the defendant that Sahler and Lounsbury owned the furniture, and that she had but a small interest therein under an unperformed contract of purchase, but simply to a notice that they had a lien upon or interest in the furniture which she owned."—Ed.

This being the law, and the mortgagees not being in possession of the premises, the plaintiff's assignor might well be described in a policy of insurance as the owner of the property insured; and, inasmuch as his estate was in fee simple, not an estate for life, and not a base, qualified or conditional fee, it might well be described as the entire and unconditional ownership; and, as he had no joint tenant nor tenant in common, his estate was well described as the sole ownership. As between him and the defendant, the mortgages and the lease were mere encumbrances on his title, not affecting its character as entire, and not changing it from an absolute to a conditional estate or ownership. Even as between him and the mortgagees, the mortgagees' estate was the conditional one, determinable by satisfaction of the condition set out in the mortgage deed. There was no joint tenancy nor tenancy in common of the mortgagor and the mortgagees. All the characteristics of such tenancies are lacking in their relations to the property.

The lease for years created only a chattel interest in the premises, not affecting the ownership of the fee. It was merely an encumbrance. It has been held by the Supreme Court of the United States, in a recent case, that an outstanding lease did not invalidate a policy in which the ownership of the assured was described as entire, unconditional, and sole. *Insurance Co. v. Haven*, 95 U. S. 242. And we do not understand that the ruling in the case at bar was supposed to rest on the existence of the lease.

The policy sued on provides, in the condition numbered 1, that, "if the property be sold or transferred, or upon the passing or entry of a decree of foreclosure, or on a sale under a deed of trust, or if the property be assigned under any bankrupt or insolvent law, or any change takes place in title or possession, . . . or if the interest of the assured, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in the policy, the policy is void." It is evident from the first branch of this condition, that the parties did not intend that the placing of a mortgage on the insured property should be regarded as a change of title, or have any effect on the rights of the parties to the contract of insurance, but that the entry of a decree for foreclosure should avoid the policy, although such decree would not destroy the insurable interest of the mortgagor. The language of the second branch of the condition excludes the idea that a mortgagee or a lessee is to be regarded as in any sense an "owner" of the property, and the whole condition numbered 1 aids in arriving at the construction of the condition numbered 4, on which the defendant relies. *Jackson v. Massachusetts Ins. Co.*, 23 Pick. 418. The plaintiffs' assignor owned the fee. There was no adverse interest in the property, except that of the mortgagees and the lessee. The policy, in its terms, indicates that mortgaging the property is not intended to affect the policy, though a decree for foreclosing a mortgage shall avoid it. Further-

more the policy discriminates between owners and the holders of encumbrances, and nowhere contains any language which indicates that mortgagees or lessees are to be regarded, for any purposes of the policy, as owners of the property.

It is to be borne in mind, further, that the terms of the condition relied on by the defendant are not those which would naturally direct the attention of the insured to the question whether or not his estate is encumbered. If the defendant intended that the validity of the policy should be affected by the failure to mention existing encumbrances, that intention could easily have been made clear by inserting the word "unencumbered," or other phrase equivalent thereto, in the fourth condition of the policy, after the word "sole." It has already been held by this court that a requirement of the policy that the proof of loss should state the "whole value and ownership of the property insured," did not require any statement as to encumbrances, the property being under mortgage. *Taylor v. Ætna Ins. Co.*, 120 Mass. 254. In Tennessee, it has been held that the assured, who had bought the property and given the seller a lien for part of the purchase money, was the unconditional and sole owner of it. *Manhattan Ins. Co. v. Barker*, 7 Heisk. 503.

This case does not require us to consider whether a subsequent mortgage should be regarded as "a change of title" which would avoid a policy containing nothing to explain the sense in which those words were used. See *Edmands v. Mutual Safety Ins. Co.*, 1 Allen, 311; *Shepherd v. Union Ins. Co.*, 38 N. H. 232; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53; *Hartford Ins. Co. v. Walsh*, 54 Ill. 164.

On consideration, we are all of opinion that, on the peculiar language of the policy sued on, the ruling that the interest of the assured was not sufficiently expressed in the policy, and that the policy was therefore void, was erroneous. The case must therefore

*Stand for trial.*¹

S. B. Ives, Jr. & L. S. Tuckerman, for the plaintiffs.

A. S. Wheeler, for the defendant.

¹ On the effect of a mortgage, see *Warner v. Middlesex Mut. Assur. Co.*, 21 Conn. 444 (1852); *Buffum v. Bowditch Mut. F. Ins. Co.*, 10 Cush. 540, 543-544 (1852); *Washington F. Ins. Co. v. Kelly*, 32 Md. 421, 439-441 (1870); *Carrigan v. Lycoming F. Ins. Co.*, 53 Vt. 418, 428-429 (1881); *De Armand v. Home Ins. Co.*, 28 Fed. R. 603 (U. S. C. C., W. D. Mich., 1886).

On the effect of a lease, see *Insurance Co. v. Haven*, 95 U. S. 242 (1877). — Ed.

MILLER v. AMAZON INSURANCE CO.

SUPREME COURT OF MICHIGAN, 1881. 46 Mich. 463.

ERROR to Bay. Assumpsit. Plaintiff brings error.

Shepard & Lyon, for plaintiff in error.*McDonell & Mann*, for defendant in error.

GRAVES, J. July 17, 1878, the insurance company issued a policy to James J. Miller, the plaintiff's husband, to insure for the term of one year in the sum of \$650 a two-story framed building situated on leased land and standing on blocks, and not fixed to the freehold. April 27, 1879, the building was destroyed by fire, and on the first of June thereafter the assured assigned his claim for the loss to his wife, the plaintiff. The company refused payment and Mrs. Miller brought this action to enforce it. The case was tried by a jury and they found for the defendant corporation.

Among other stipulations in the policy it was provided that it should be void "if the interest of the assured be any other than the entire, unconditional, free and unencumbered ownership of the property and is not so expressed in the written portion of the policy," or "if the premises hereby insured become vacated by the removal of the owner or occupant without immediate or written notice to the company and consent thereto indorsed." Nothing was inserted to qualify the scope or force of the clause concerning title or to show that the interest of the assured was any other than the entire, unconditional, free and unencumbered ownership. At the time of issuing the policy the building was occupied, but it became vacant some five days prior to the fire, and so remained until it was destroyed, and no notice was given to the company.

The defence was based on the foregoing stipulations, and if the facts were such as to furnish an answer to the action under either of them no discussion of the other will be necessary. The provision in regard to title stands first and is perhaps most important, and no one can fail to observe that it is much more sweeping and exclusive than the generality of such conditions, and the difference is so well marked that many decisions which have been made on stipulations of the same general nature can have no application.

The substantial facts respecting the state of the title at the time of insurance are not controverted. In April, 1876, the building was owned by James J. Miller, the plaintiff's husband and person assured. His nephew, James J. Miller, Jr., had been carrying on business in the building and had received pecuniary assistance through his uncle from the plaintiff. An arrangement was then made by which the plaintiff's husband, James J. Miller, Sr., transferred an undivided half of the building to his nephew, James J. Miller, Jr., and the latter gave to his aunt, the plaintiff, a mortgage on said undivided half to

secure her the re-payment of the money she had advanced to him, being \$500. The mortgage also covered other property, and by its terms \$250 were to be paid by the first day of November, 1876, and the remainder by the first day of November, 1877. It has not been foreclosed.

August 14, 1876, Miller, Jr., the nephew, made an assignment for the benefit of his creditors to Charles Newman, and the undivided half of the building which he owned and which stood mortgaged to the plaintiff was included. Newman took possession. It hence appears that at this period the plaintiff's husband owned one undivided half of the property, and that the other undivided half was in Newman, the assignee, subject to the encumbrance upon it held by the plaintiff. In this state of things the plaintiff's husband applied for the insurance, and the agent refused to entertain the application, and gave as a reason, as the plaintiff's husband testifies, that the title "would have to be rectified," and that he would not insure the property "until I got it straightened out." The applicant then went away to get the title "straightened out" and subsequently returned and informed the agent that he had succeeded and the policy was issued. The proceedings taken to concentrate and disencumber the title were explained by Miller on the trial in this way: He testified that he called on Newman and "got," as he expressed it, "Newman's right;" and that Newman told him that "it was not worth his while to go on;" that he then had a conversation with his wife, the plaintiff, in which he said to her that it was necessary for him to have her interest in the property to get it insured; and she replied, "All right; you can have it;" and this is substantially the plaintiff's version of the circumstances relied on to show that at the time of the insurance her husband was vested with the "*entire, unconditional, free and unencumbered ownership*" of the building.

There was no writing to attest any transfer or surrender on the part of Newman or to show a conveyance from the plaintiff to her husband. But it was not indispensable that there should be. For the purpose of combining in himself the entire, free, and unencumbered ownership it was necessary that the plaintiff's husband should get in the right and title possessed by Newman and the mortgage interest possessed by the plaintiff, and these results, although capable of being effected without writing, could not be worked out except by transactions containing the elements necessary to make them binding, and here occurs a manifest difficulty. There is a total want of consideration.

If we understand the plaintiff's husband as testifying that Newman gave up the assigned interest to him, then so far as the record discloses there was no consideration to support the arrangement and it had no force. But if Newman abandoned the property to the plaintiff as mortgagee, her interest was not increased, and could not be except through purchase on foreclosure, and no foreclosure has been had. The legal title must have continued in the assignee. But suppose the

meaning was that the property should be applied on the mortgage (a view hardly possible), it seems not to have been acted on. It was not applied. There has been no recognition of anything of that kind. But whether another interest was or was not added to that held by the plaintiff under her mortgage, it was necessary that her husband should be positively vested with whatever interest she had. His description of the transaction relied upon as having legally conferred upon him that interest has been noticed, and we observe that it consisted of mere words. No mention of any consideration was made, and the transaction had nothing in it to bind him as vendee or assignee or her as vendor or assignor. It follows that according to the undisputed facts the entire, unconditional, free, and unencumbered ownership of the building was not in the assured at the time of the insurance, and that the policy was therefore not enforceable against the company. The other question becomes immaterial.

The result reached below was correct, and the judgment should be affirmed with costs.¹

DUPREAU v. HIBERNIA INSURANCE CO.

SUPREME COURT OF MICHIGAN, 1889. 76 Mich. 615.

ERROR to Saginaw. GAGE, J.

Assumpsit on an insurance policy. Defendant brings error. The facts and points of counsel passed upon by the court are stated in the opinion.

Wilber & Brucker, for appellant.

Durand & Brewer, for plaintiff.

LONG, J. Defendant issued its policy of insurance to plaintiff on May 15, 1888, for the sum of \$500, — \$400 upon his dwelling-house, and \$100 on his barn.

The application was verbal, and was made to Schœneberg & Knight, at East Saginaw, this state, who were the local agents of the defendant company there. They were required to make their reports and remittances to John Naghten & Co., general agents of the western department at Chicago, Illinois.

The policy was issued and delivered to the plaintiff on the above date, and a premium of \$7.50 duly paid, the policy to continue in force for three years from May 15, 1888.

July 16, 1888, the property was totally destroyed by fire. Notice was duly given of the fire and loss, and on the twenty-seventh day of July, 1888, the defendant company, by its general agent, refused payment by reason of the fact, then claimed by it, that the plaintiff was not the owner of the property at the time of taking the insurance.

¹ See *Schroedel v. Humboldt F. Ins. Co.*, 158 Pa. 459 (1893). — ED.

The cause was tried in the Saginaw Circuit Court, before a jury, where the plaintiff had verdict and judgment for the amount of the policy and interest. Defendant brings error.

The policy contained, among other conditions, the following:—

“This entire policy, unless otherwise provided by agreement indorsed hereon, or added hereto, shall be void, if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee-simple, or if the subject of insurance be personal property, and be or become encumbered by chattel mortgage.”

It appears that the plaintiff held the premises upon which the buildings were situate, and the buildings, under a land contract of purchase, dated May 15, 1888. This contract specifically describes the property, and provides for the annual payments of \$100 until the whole amount of the purchase money (\$500) is paid; \$100 being paid down at the time of the purchase. The plaintiff went into the actual possession of the premises immediately upon the execution of this contract. Upon the payment of \$100 additional, the contract provided for the execution and delivery of a deed of the premises to the plaintiff. The contract itself provided for the taking of possession of the premises by the plaintiff.

On the trial in the court below the court charged the jury that the clause in the policy relative to the title would not violate the policy, as it appeared that the plaintiff was the equitable owner in fee of the premises. The court thereupon directed a verdict in favor of the plaintiff.

It does not appear that any representations as to title and ownership were made by the plaintiff at the time of taking the policy, but counsel for the defendant contend that, by the terms of the policy itself upon which the action is brought, the plaintiff cannot recover, as he has no such title in fee as contemplated by the contract. The land contract, under which the plaintiff held, provided that he should keep the buildings thereon insured against loss and damage by fire by insurers, and in amount approved by the first party, and should assign the policy and the certificates thereof to the first party.

The omission of the owner of the equitable title to state the nature thereof will not render the policy of insurance invalid, under a condition therein forfeiting the insurance in case the interest is other than the entire, unconditional, and sole ownership, if the fact is not so represented to the company. *Farmers', etc. Ins. Co. v. Fogelman*, 35 Mich. 481.

It is insisted, however, that by the terms of the policy the title must be a legal estate in fee-simple, and that an equitable estate in fee would not satisfy its terms; and that therefore the court was in error in directing the verdict in favor of the plaintiff.

We are satisfied that the court was not in error. The plaintiff had paid quite a sum of money on the purchase price, and entered into an

undertaking to pay the balance, and was to have immediate possession of the premises under the terms of the contract, and was to keep the buildings thereon insured. He was in actual possession at the time of taking the policy, and equitably the owner in fee, and we think he may be said at that time to have been the entire, unconditional, and sole owner, within the meaning of the terms of the policy.

We think this doctrine is fully supported by numerous decisions. If loss occurred, it would fall upon the insured. He was in possession, having paid part of the purchase price, and under a valid agreement for the payment of the balance, and, by the very terms of his contract, the very party who had the insurable interest in it. In the case of *Imperial Fire Ins. Co. v. Dunham*, 117 Penn. St. 462, 475, 12 Atl. Rep. 668, 674, the language of the policy was :

“This policy shall be void and of no effect if, without notice to this company, and permission therefor in writing indorsed hereon, the assured shall now have, or hereafter make or procure, any other insurance, whether valid or not, on the property hereby insured, or any part thereof, or if this policy be assigned before a loss, or if the interest of the assured be other than the entire, unconditional, and sole ownership, or if the property insured be a building standing on ground not owned by the assured in fee-simple.”

The court, in passing upon this provision of the policy, said : —

“He was the equitable owner in fee, and, in respect to the insurance, we think he may be said to have been the entire, unconditional, and sole owner. This provision of the policy does not necessarily distinguish between the legal and the equitable estate.”

This seems to be the settled doctrine in most, if not all, of the states.

We find no error in the record. The judgment of the court below must be affirmed, with costs.¹

COLLINS v. ST. PAUL FIRE AND MARINE INS. CO.

SUPREME COURT OF MINNESOTA, 1890. 44 Minn. 440.

APPEAL by defendant from an order of the District Court for Sibley County, EDSON, J., presiding, granting a new trial after verdict directed for defendant, in an action to recover \$600 on the policy mentioned in the opinion.

John D. O'Brien, for appellant.

R. A. & F. C. Irwin, for respondent.

¹ Acc.: *Loventhal v. Home Ins. Co.*, 112 Ala. 108 (1896).

See *Swift v. Vermont Mut. F. Ins. Co.*, 18 Vt. 305 (1846); *Pelton v. Westchester F. Ins. Co.*, 77 N. Y. 605 (1879); *Capital City Ins. Co. v. Caldwell Bros.*, 95 Ala. 77, 88-89 (1891).

Compare *Hinman v. Hartford F. Ins. Co.*, 36 Wis. 159, 167 (1874). — Ed.

GILFILLAN, C. J. This is an action on a policy of insurance upon a dwelling-house and log barn, and sheds connected therewith, situate on section 31, township 114, range 25. Upon the trial the court below directed a verdict for the defendant, and after such verdict, upon plaintiff's motion, granted a new trial, and from the order granting it defendant appeals. On the case made at the trial it was impossible for the plaintiff to recover, for two reasons: *First*. The house, barn, and sheds, for a loss upon which a recovery is sought, were not on section 31; but plaintiff claimed at the trial, and gave some evidence tending to show, that it was the intention to insure, by the policy, similar buildings on section 32, and that section 31 was inserted in the policy through mistake. If this were true it would be good cause for reforming the policy by inserting section 32 instead of section 31, but, until so reformed, no recovery could be had for loss to the buildings on section 32. *Second*. Even if so reformed, no recovery could be had, for the policy provides that the company shall not be liable "if the interest of the assured in the property is not one of absolute and sole ownership," and it appeared beyond controversy that the plaintiff had only a life-estate in the property. Of course she had an insurable interest, but that interest was not insured. The policy expressly excluded from its operation any interest other than the absolute and sole ownership.¹ *Order reversed.*

¹ In *Garver v. Hawkeye Ins. Co.*, 69 Iowa, 202 (1886), the application for insurance on a barn and contents, in section 36, stated that the applicant was "the sole and undisputed owner of said land and the property to be insured." The application was by its own terms and by the policy made a warranty. In fact the applicant had a life-estate in the realty. It was held that there could be no recovery for a loss by fire. *SEEVERS, J.*, for the majority of the court, said: "The precise question we are required to determine is whether the owner of a life-estate is the 'sole and undisputed owner' of real estate. . . . Now, what does 'sole owner' mean, or what did the parties understand thereby? Evidently, we think, they meant, and must have understood, that the assured had the fee-simple title. 'Sole owner' must mean, it seems so to us, that no one else has or owns an interest in the real estate. If one should state that he was the sole owner of real estate, describing it, the hearer would understand that he owned all there was or could be owned; that no one else had any interest therein. If one should covenant in a deed that he was the sole owner of the real estate, such a covenant would be broken if he owned a life-estate only. There is no distinction between 'sole owner' and the owner of an 'absolute interest' in real estate. A sole interest and absolute interest mean the same thing."

Compare *Allen v. Charlestown Mut. F. Ins. Co.*, 5 Gray, 384 (1855).

On conditions as to ownership at the inception of the contract, in general, see also:—

- Smith v. Bowditch Mut. F. Ins. Co.*, 6 Cush. 448 (1850);
- Phillips v. Knox County Mut. F. Ins. Co.*, 20 Ohio, 174, 182-184 (1851);
- Hope Mut. Ins. Co. v. Brolaskey*, 35 Pa. 282 (1860);
- South Australian Ins. Co. v. Randell*, L. R. 3 P. C. 101 (1869);
- Citizens' F. Ins. S. & L. Co. v. Doll*, 35 Md. 89 (1871);
- Manhattan Ins. Co. v. Barker*, 7 Heisk. (Tenn.) 503 (1872);
- Noyes v. Hartford F. Ins. Co.*, 54 N. Y. 668 (1873);
- Fowle v. Springfield F. & M. Ins. Co.*, 122 Mass. 191, 197-198 (1877);
- Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568 (1878);

- Walsh *v.* Fire Association, 127 Mass. 383 (1879);
Castner *v.* Farmers' Mut. F. Ins. Co., 46 Mich. 15 (1881);
Southwick *v.* Atlantic F. & M. Ins. Co., 133 Mass. 457 (1882);
Martin *v.* State Ins. Co., 44 N. J. L. 485, 490 (1882);
Crescent Ins. Co. *v.* Camp, 64 Tex. 521 (1885); s. c. at a later stage, 71 Tex.
503 (1888);
Weed *v.* London & Lancashire F. Ins. Co., 116 N. Y. 106, 113-115 (1889);
Davis *v.* Pioneer Furniture Co., 102 Wis. 394 (1899). — ED.

SECTION II. (*continued*).

(F) CONDITIONS PROHIBITING ALIENATION.

(a) *Alienation ; sale ; conveyance ; transfer.*

LANE v. MAINE MUTUAL FIRE INS. CO.

SUPREME COURT OF MAINE, 1835. 12 Me. 44.

THIS was an action of assumpsit on a policy of insurance, wherein the defendants insured the plaintiff against fire to the amount of two hundred dollars on his store, and the like sum on the goods in said store, for six years from the 17th day of January, 1832, promising, "according to the provisions of their act of incorporation, to pay the plaintiff the said sum within three months next after said buildings, etc. should be burnt." The store and its contents were consumed by fire on the night of the 7th of June, 1834.

In the 8th section of the act of incorporation, referred to in the policy, is the following provision, viz. : "When the property insured shall be *alienated* by sale or otherwise, the policy shall thereupon be void, and be surrendered to the directors of said company to be cancelled ; and upon such surrender the assured shall be entitled to receive his deposit note, upon the payment of his proportion of all losses and expenses that have accrued prior to such surrender."

It was proved, that one James Dunn hired the store of the plaintiff, and purchased all the goods therein in May, 1833 — put his son into the store, who traded there and continued to hold exclusive possession until November of the same year, when the plaintiff took back the store and goods under an agreement with Dunn to allow him a certain sum for his services, and to pay the debts and receive the dues of the store. From this time, the plaintiff continued in the exclusive occupation of the store, and traded therein until it was burned.

The defendants contended, that this was such an *alienation* as rendered the policy void, both as to the store and the goods. But PARRIS, J., ruled otherwise, and a verdict was returned for the plaintiff, subject to the opinion of the whole court upon the facts here reported.

The defendants also filed a motion in arrest of judgment, because, —

1. The plaintiff had not alleged in his declaration that he was the owner of the store and goods at the time they were burned. 2. That he had not alleged the value of said store and goods at the time.

Longfellow, for the defendants.

S. & W. P. Fessenden, for the plaintiff.

PARRIS, J. The first question presented for our decision is, whether the hiring and occupation of the store by Dunn, from May to Novem-

ber, was such an alienation of the property insured as rendered the policy void under the 9th section of the act of incorporation therein referred to.

In the construction of this language we should have regard to the circumstances under which it was used, and the situation and object of the parties using it. The insured was the owner of the store, and for the purpose of securing his interest against the peril of fire, became a member of the company, assuming the obligations of membership by the payment of money and depositing his note, thereby giving the company a lien, for the payment of such note, on the building insured.

The insurers, in assuming the risk, provide for the continuance of the interest of the assured in the property covered, so long as their liability continues. In other words, they guard against its becoming a gaming or wager policy in any event. Accordingly so long as the property covered belongs to the insured, whether it be in his possession, or that of his agent, servant, or lessee, the company's lien continues, and an insurable interest remains. But when the property is alienated, that is, when the insured is divested of title by sale or in any other manner, the lien of the company ceases, and the insured is no longer a member of the company. If a loss then happen it is not his loss, for as he had no property he could sustain no loss, and consequently could be entitled to no satisfaction. The party insured must, in all cases of fire insurance, have an interest or property at the time of insuring and at the time the fire happens. But he need not have an absolute and unqualified or even immediate interest in the property insured. A trustee, mortgagee, reversioner, a factor or agent of goods to be sold on commission, may legally insure their respective interests, subject to the rules of the office in which the insurance is effected. Upon general principles applicable to fire insurance, the person insured cannot convey the estate insured and assign the policy, so as to render it valid in favor of the grantee and assignee, unless by consent of the insurer. Mutual offices should have the power of exercising a discretion in the selection of persons whom they may admit to membership, and whose property they may insure. The character of the person insured may be a subject of importance.

If by conveyance of the estate and assignment of the policy, the purchaser would stand in the place of the insured and be entitled to indemnity under the policy, the office might be defeated of this right of selection.

Under these views of the law relating to fire insurance, we think the occupation of the store by Dunn, who, having no lease in writing, was at most only tenant at will, was not an alienation of the property insured within the true meaning and intent of the act of incorporation. The language is, "when the property insured shall be alienated by sale or otherwise," etc. The word alien or alienate extends not only to alienations of land in *deed* but also to alienations in law. A transfer of title by devise, descent, or by levy would be as technically an

alienation as a transfer by deed. Blackstone, speaking of title by alienation, Book 2, ch. 19, says, "The most usual and universal method of acquiring a title to real estate is that of alienation, conveyance or purchase in its limited sense; under which may be comprised any method by which estates are voluntarily resigned by one man, and accepted by another; whether that be effected by sale, gift, marriage, settlement, devise, or other transmission of property by the mutual consent of the parties." Alienation is defined in Jacob's Law Dictionary to be a transferring the *property* of a thing to another.

The object of the statute was, without doubt, to render certain by positive enactment what would otherwise have depended upon common law principles and judicial decisions, viz. that the policies of the company should not be obligatory any longer than the property insured continued in the individual named in the policy, as the owner; and that by a transfer of his interest the policy should be void. This construction is believed to be in accordance with general usage, and the intention and understanding of the parties.

As to the goods, we are clear that the policy was intended to cover and did cover whatever goods the plaintiff might have in his store, at any time during the continuance of the risk, not beyond the amount actually insured.

A construction limiting the policy to the goods actually in the store at the time the insurance was effected would defeat the very object of the insured, and so must have been understood by the insurer. The plaintiff's business was trade, the vending of goods from his store. According to the construction put upon this policy by the company, the plaintiff has no security except upon the goods actually in the store when the policy was issued, and when those were disposed of, their liability was at an end. We cannot listen, for a moment, to such a suggestion. A policy of insurance being a contract of indemnity, must receive such a construction of the words employed in it as will make the protection it affords coextensive, if possible, with the risks of the assured. *Dow v. The Hope Ins. Co.*, 1 Hall, 66. The risk of the assured was to continue six years, and the assurers assumed that risk to the amount of two hundred dollars on the goods in the store. Both parties must have understood this to mean on goods which may be in the store at any time during the continuance of the policy. If the assured had goods to an amount exceeding two hundred dollars, the undertaking of the company was limited by that amount. If, by sale, the quantity was reduced below that sum in value, the insurers were so far benefited, as their risk was diminished below that paid for by the premium, and if the whole were sold, the insurers were benefited to a still greater degree by a suspension of the risk. And it was a mere suspension, for upon filling up again the risk revived; and we see no difference in principle between the case where the quantity is diminished by a partial sale and then replenished, and where the whole is sold and an entire new stock purchased. In either case there is a risk,

limited in amount by the contract, which has been assumed by the insurer, and for which the insured has paid the stipulated premium.

We are clear that it is a continuing risk, to the amount specified, upon such goods as the insured may have in the store within the term covered by the policy, and not confined to such as were there at the time of assuming the risk.¹ . . .

*There must be judgment on the verdict.*²

HOFFMAN AND PLACE v. ÆTNA FIRE INS. CO.

COURT OF APPEALS OF NEW YORK, 1865. 32 N. Y. 405.

THE action was on a policy of insurance for \$6,000, issued in February, 1861, to Hoffman, Place & Co., of New York, covering their stock of merchandise, including not only their own goods, but those held by them in trust or on commission, or sold but not delivered, in their brick and marble store in Broadway. The policy contained, among other things, a printed proviso that it should be null and void, "if the said property shall be sold or conveyed." The insurance was renewed in February, 1862. On the 7th of March following, Silvernail, one of the partners, retired from the business, selling out his interest to Hoffman and Place, by whom the business was continued. They subsequently, with the written consent of the company, removed the business and stock to their new brick and marble store in Duane Street. The loss occurred on the 9th of April; and the company declining to pay, the present action was brought.

It was tried in the Superior Court before Judge MONELL, and the jury found a verdict for the plaintiffs. The judgment was affirmed on appeal, and the present appeal is from that decision.

The principal questions of law raised on the trial were, whether the transfer avoided the sale, and if not, whether goods afterwards added to the stock were within the protection of the policy.

John H. Reynolds, for the appellants.

Grosvenor P. Lowrey, for the respondents.

PORTER, J. The weight of judicial authority in this state is against the doctrine that a policy issued to a firm is forfeited by a transfer of interest as between the parties assured. As a contrary opinion has prevailed to some extent, it may be well briefly to retrace the history of this question in our courts.³ . . .

¹ The remainder of the opinion dealt with the questions as to pleading. — ED.

² *Acc.*: *Power v. Ocean Ins. Co.*, 19 La. 28 (1841). — ED.

³ Here were cited, frequently with discussion, *McMasters v. Westchester County Mut. Ins. Co.*, 25 Wend. 379 (1841); *Howard v. Albany Ins. Co.*, 3 Denio, 301 (1846); *Murdock v. Chenango County Mut. Ins. Co.*, 2 N. Y. 210 (1849); *Tillou v. Kingston Mut. Ins. Co.*, 7 Barb. 570 (1850); s. c. in the Court of Appeals, 5 N. Y. 405 (1851);

It is quite apparent, therefore, that, in this state, there is a decisive preponderance of judicial authority against the recognition of a sale by one to another of the assured, as cause of forfeiture within the meaning of the proviso. But if the authorities were in equipoise, and the solution of the question depended on general reasoning and the application of settled and familiar principles of law, our conclusion would be in accordance with that of the court below.

The terms of the proviso are, that the policy shall be null and void, "if the said property shall be sold and conveyed." But these words are, themselves, vague and indeterminate. Are they to be understood in their largest sense, without restriction or limitation? Clearly not; for we find, on referring to other portions of the policy, that it was issued to the assured as merchants, and that it covered a stock of goods which it was their business to sell from day to day. Is the proviso applicable to the particular goods in the store at the date of the insurance? Such a construction would not only defeat the purpose of protecting a fluctuating stock, but it would annul the policy at once, for it would bring the first mercantile sale at the counter within the terms of the condition. What description of sales and conveyances, then, did the parties contemplate when this provision was framed? Evidently such, and such only, as would transfer the proprietary interest of those with whom the insurers contracted, to others with whom they had not consented to contract. They testified their confidence in each of the assured, by issuing to them the policy; but they did not choose to repose blind confidence in others who might succeed to the ownership. If the assured parted with the possession, as well as the title of the goods, the insurers knew, of course, that their liability would cease; but they were aware that, in the exigencies incident to business, parties often retain the control, possession, and apparent ownership of goods, after parting with all their title. To guard against such contingencies, they chose to provide for the forfeiture of the policy on the transfer of the title to others, even though the business should continue to be conducted by the assured.

It is suggested that the proviso may have been designed to secure the continuance in the firm of the only member in whom the insurers reposed confidence. The only evidence of their confidence in either is the fact that they contracted with all; and the theory is rather fanciful than sound that they may have intended to conclude a bargain with rogues, on the faith of a proviso that an honest man should be kept in the firm to watch them. Certainly, nothing appears in the present case to indicate that all the assured were not equally worthy of confidence; and it is not to be presumed that, in any case, underwriters would deliberately insure those whose integrity they had reason to distrust.

Wilson v. Genesee Mut. Ins. Co., 16 Barb. 511 (1853); s. c. in the Court of Appeals, 14 N. Y. 418 (1856); *Dey v. Poughkeepsie Mut. Ins. Co.*, 23 Barb. 623, 627 (1857); *Grosvenor v. Atlantic F. Ins. Co.*, 17 N. Y. 391, 399 (1858); and *Buffalo Steam Engine Works v. Sun Mut. Ins. Co.*, 17 N. Y. 401, 412 (1858).—ED.

The policy in question having been issued to a mercantile firm, the company must be deemed to have had in view the fluctuating nature of a partnership business, and the changes of relative interest incident to that relation. These might be very important to the assured, though wholly immaterial to the risk. It is manifest that mere variations in the character and amounts of the interests of the assured as between themselves did not constitute the mischief at which the proviso was aimed. If the applicants had originally objected to the form of the policy, on the ground that the effect of the clause might be to prevent the increase by a partner of his interest from one-fourth to one-third of the business, by purchase from the other members of the firm, the answer would undoubtedly have been that such a change was not within the operation or intent of the proviso. There is probably not a business firm in the state which would accept, at the usual rates, a policy declaring *in terms* that the premium should be forfeited and the insurance annulled, by a mere change of interest as between the partners. In this instance there is no such declaration; and an *implication* so repugnant to the evident design of the contract is not to be deduced from the unguarded use of general words, if they can be fairly limited to the appropriate and obvious sense in which they were employed by the parties.

The design of the provision was, not to interdict all sales, but only sales of proprietary interests by parties insured to parties not insured. If the words were taken literally, a renewal of the policy would be required at the close of each day's sales. Indeterminate forms of expression, in such a case, are to be understood in a sense subservient to the general purposes of the contract. It is true that the language of the proviso against sales was not guarded by a special *exclusion* of changes of interest as between the assured, or of the sales of merchandise in the usual course of their business; but this was for the obvious reason that there was nothing in the tenor of the instrument to denote that the *application* of the clause to such a case was within the contemplation of the underwriters.¹ . . .

Reading the proviso as it was read by the parties, it is easy to discern the purpose of its insertion. It was to protect the company from a continuing obligation to the assured, if the title and beneficial interest should pass to others, whom they might not be equally willing to trust. . . .

The terms of the policy were not such as would naturally suggest even a query in the minds of the assured, whether a transfer of interest as between themselves would work a forfeiture of the insurance, and relieve the company from its promise to indemnify both, — the buyer as well as the seller, — the premium being paid in advance, and the risk remaining unchanged. One or two joint payees of a non-negotiable note would hardly be more surprised to be met with a claim, that by

¹ Here and elsewhere in the opinion it has seemed necessary to omit passages dealing principally with general rules of construction. — Ed.

buying the interest of his associate he had extinguished the obligation of the maker to both. . . .

The appellants seem to suppose that there is a technical embarrassment on the question of damages, growing out of the fluctuating character of the stock, and the continuance of the business by the remaining members of the firm, who succeeded, under the transfer, to the interest of the retiring partner. Looking to the nature and design of the contract of insurance, we find no such embarrassment.¹ . . .

The plaintiffs were parties to the contract made with the defendant. They were conducting the business contemplated by the terms of the policy. The insurance was intended to cover the mercantile stock of which the assured were proprietors, stored, from time to time, in the building in which that business was conducted. There was no substantial change material to the risk, and clearly none within the intent of the proviso. Each member of a partnership firm, as Lord HARDWICKE said, is "seized *per my et per tout*" of the common stock and effects. (*West v. Skip*, 1 Vesey Sen. 242.) This interest of each and all the policy in question was designed to protect; and its language, fairly construed, is in harmony with this intent. There is no reason why the full measure of agreed indemnity should be withheld from the plaintiffs, who were owners at the date of the insurance, and sole owners at the time of the loss. *Hooper v. Hudson River Ins. Co.*, 17 N. Y. 425, 426; *Wilson v. Genesee Mut. Ins. Co.*, 16 Barb. 511; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 73; Code, § 111.

The judgment should be affirmed, with costs.

*Judgment affirmed.*²

BLACKWELL v. INSURANCE COMPANY.

SUPREME COURT OF OHIO, 1891. 48 Ohio St. 533.

ERROR to the Superior Court of Cincinnati.

The plaintiff in error brought an action in the Superior Court of Cincinnati against the defendant in error, upon a policy of insurance issued by it to him upon a stock of dry goods, notions, etc., owned by him in said city.

The defendant admitted issuing the policy and the loss of the goods by fire, and set up in bar of a recovery for the loss, that the policy contained a provision that it should become "null and void" if the property insured should be sold or transferred by the assured; and averring that, in violation of this condition, after the policy was issued and before the fire, he sold and transferred the goods and business to

¹ Here was quoted a passage from *Harper v. Hudson River F. Ins. Co.*, 17 N. Y. 424, 425 (1858). — Ed.

² *Acc.*: *Powers v. Guardian F. & L. Ins. Co.*, 136 Mass. 108 (1883). — Ed.

a firm composed of himself and one Horman, and that at the time of the loss the goods were owned, and the business was conducted, by said firm, by which sale and transfer the policy became forfeited and void.

The plaintiff interposed a demurrer to this defence, and upon its being overruled, declined to plead further, and suffered judgment to be entered against him. This judgment was affirmed by the Superior Court in General Term; whereupon this proceeding was brought to reverse both judgments.

Joseph W. O'Hara, for plaintiff in error.

Ramsey, Maxwell & Ramsey, for defendant in error.

BRADBURY, J. The record in this case raises two questions, both of which must be determined in favor of the plaintiff in error, to entitle him to relief.

1. Did the act of the assured, who before was a sole trader, in receiving a partner, constitute a sale and transfer of the insured property, within the meaning of the policy, and the policy thereby rendered void?

2. If it was not such a sale as to render the policy void, may the plaintiff maintain an action on the policy in his own name to recover for the loss?

There is some conflict among the authorities upon the first question. It is discussed by May in his work on Insurance, and by the courts of a number of the states; notably in *Dix et al. v. The Mercantile Insurance Co.*, 22 Ill. 272; *Finley et al. v. The Lycoming County Mutual Ins. Co.*, 30 Penn. St. 311; *The Hartford Fire Ins. Co. v. Ross et al.*, 23 Ind. 179; *The Western Mass. Ins. Co. v. Riker et al.*, 10 Mich. 279; *Drennan et al. v. London Assurance Corp.*, 20 Fed. Rep. 657; *Malley v. Atlantic Ins. Co.*, 51 Conn. 222; *Scanlon v. The Union Fire Ins. Co.*, 4 Biss. 511; *Cowan v. The Iowa State Ins. Co.*, 40 Iowa, 551; *Hathaway v. State Ins. Co.*, 64 Iowa, 229; *Keeler v. Niagara Fire Ins. Co.*, 16 Wis. 523; *Wood v. Rutland Ins. Co.*, 31 Vt. 552.

An examination of the cases above cited will disclose that the conditions in the policies, where forfeiture for alienation was sustained, were materially different from the one involved in this action, except perhaps in the cases in 30 Penn. St. 311, and that in 16 Wis. 523, where the language of the condition was very similar to that now under consideration. In the other cases sustaining the forfeiture, the condition contained a provision forfeiting the policy, not merely for a "sale or transfer" of the property, but in case of "a change of title" or the sale of "any undivided interest therein" (23 Ind. 179); in case of a "change of title" (10 Mich. 279); "or any change took place in the title or possession" (51 Conn. 222; 20 Fed. Rep. 657); and therefore they cannot be rightfully claimed as direct authorities for the insurance company in the case at bar. In the case in 40 Iowa, 551, the condition against alienation was very similar to those above quoted, but the Supreme Court of Iowa held "that nothing less than a sale of

the entire interest of the party insured would defeat the policy." This doctrine was maintained by DRUMMOND, J., in 4 Biss. 411.

Heretofore this precise question has not been before this court, and in the conflict of authorities respecting it, we feel at liberty to adopt that rule upon the subject which most nearly accords with the policy of our decisions and the presumed intention of the parties. It is the policy of this court to strictly construe those clauses in an insurance policy which forfeit the indemnity provided for the assured. *West et al. v. The Citizens' Insurance Company*, 27 Ohio St. 1. In this case, on page 10, JOHNSON, J., refers with approval and in the following language to the views on the subject contained on page 74 of *May on Insurance*: "Exceptions in a policy should be strictly construed, and where there are two interpretations equally fair, that which gives the greater indemnity should prevail." And on page 13 (27 Ohio St.) the same learned jurist says: "Stipulations in a contract providing for disabilities or forfeitures, are to receive, when the intent is doubtful, a strict construction against those for whose benefit they are introduced."

Let us recur to the exact words of forfeiture as they are set forth in the defendant's answer. "If . . . said assured should sell or transfer the property thereby insured, that said policy should become null and void." It was competent for the policy to provide, expressly, that a sale of a part of the property or of an interest therein should avoid the policy; this they did not do. The absence of a specific provision to that effect when it could have been so easily inserted, together with the rule before referred to that conditions which defeat a policy should be construed strictly against the forfeiture, leads us to hold that a sale of the entire interest of the party insured was necessary to avoid the policy.

In a strict legal sense, perhaps, wherever one engaged in business alone, takes a partner into his business, or a firm receives a new member, or a member goes out, the transaction results in the formation of a new concern, accompanied by a sale and transfer of all the property of the old establishment to the new one; but it is at least doubtful whether this strict legal result is contemplated by the business world generally. That the parties in the case before us intended the policy should be avoided, in case the assured received a partner into his business, is uncertain; that the plaintiff understood the transaction to be a sale of an undivided half of the property and business to Horman, rather than a sale of the whole of it to a firm composed of himself and Horman, is quite probable. It was competent for the parties to provide in unambiguous terms that, if the assured received into the business, without the consent of the insurer, a partner, the policy should become void. This was not done, and we think the principles already announced require us to hold that the sale and transfer resulting from the reception of a partner did not avoid the policy.

Notwithstanding the transaction the plaintiff retained a substantial and insurable interest in the property covered by the policy, while to

avoid the policy on account of the provision against alienation it should have divested him of his entire interest.

The defendant contends that this construction disregards the rule that, in construing an instrument, effect should be given to all its parts; and that to hold that the plaintiff must divest himself of his entire interest to avoid the policy renders the provision against alienation nugatory, because, if the policy contained no such provision, yet he could not recover for a loss that occurred after he had sold his entire interest, as in that event he suffered no injury, and the contract of insurance is one of indemnity. Whether the construction we have adopted renders the provision against alienation nugatory or not, or whether circumstances may not arise under which it might be operative, we do not deem it necessary to inquire, for the rule thus urged upon our consideration is only one of many rules applied by courts to ascertain the meaning of the words adopted by parties to express their intentions, and in many instances it readily yields to other rules of construction, as we think it should in the case now under consideration.

The remaining question presents no difficulty. Section 4,993, Revised Statutes, requires an action to be brought in the name of the real party in interest. Here the plaintiff, alone, is interested in the policy of insurance set forth by him in his petition; the contract it contains is to indemnify him; he can recover, of course, only to the extent he has been damaged; but, as no question is before us as to its proper measure, it will not receive consideration.

Judgment reversed.

BROWN v. COTTON AND WOOLEN MANUFACTURERS' MUTUAL INSURANCE COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1892. 156 Mass. 587.

HOLMES, J. This is an action on a policy of insurance against fire, issued by the defendant, a Massachusetts company, in 1885, upon the plaintiff's woollen factory in Connecticut. So far as material, the policy was in the Massachusetts standard form, with a rider. Pub. Sts. c. 119, § 139.¹ At the trial, the judge directed a verdict for the defendant, and reported the case to this court. When the policy was issued, the plaintiff had the legal title, probably as mortgagee in equity, by conveyance from her husband through a third person. We assume her title to have been sufficient without discussion. The defences relied on are, that before the fire she had broken the condition against sale, that she no longer had an insurable interest, and

¹ The form provided that "this policy shall be void if . . . without the assent in writing or in print of the company . . . the said property shall be sold." — Ed.

that she had broken the condition against the factory ceasing operation for more than thirty days. It also is set up that the plaintiff had not rendered a statement in writing setting forth the value of the property insured, etc., as required by the policy. The plaintiff replies to this last defence that it was waived, and we shall give it no consideration. For the purposes of our decision, we assume that, if it had stood alone, the plaintiff at least would have had a right to go to the jury.

The sale relied on was a conveyance by the plaintiff four days before the fire to the trustee in insolvency of her husband's estate, by a deed which purported to be for valuable considerations, but for which the plaintiff testified that she received nothing. The plaintiff proved against her husband's estate, and her claim was allowed, but she received nothing upon it. It is argued that her position as a creditor preserved for her an insurable interest in the factory after the transfer, and that the conveyance was not a sale.

In the opinion of a majority of the court, the conveyance was a breach of condition. We are of opinion, in the first place, that it makes no difference whether the consideration of the conveyance is of substantial value, or is merely the technical consideration which is said to be imported by the execution of a deed. If the plaintiff's conveyance was in other respects a breach of the condition, the fact that she received nothing for it will not save it. *Essex Savings Bank v. Meriden Ins. Co.*, 57 Conn. 335, 338.

But it is said that the plaintiff did not alienate her whole interest, because she retained an insurable interest after the transfer, as one of the creditors for whom her grantee held the property in trust. We will assume that it is true that a creditor has an insurable interest in the estate of his debtor when conveyed to an assignee in insolvency. *Eastern Railroad v. Relief Ins. Co.*, 98 Mass. 420, 423; *Rohrbach v. Germania Ins. Co.*, 62 N. Y. 47, 58. But we think that an interest of that kind would not be a continuation of the former interest of the plaintiff. By her conveyance the plaintiff parted with the whole legal title, and, as her grantee already owned her husband's equity, she extinguished her mortgage. In whatever words we express the fact, she put an end to her preferred right to satisfy her debt out of this land before other creditors could touch it. Her right afterwards was not created by or reserved or excepted out of her conveyance. It arose from the independent circumstances that her grantee was an assignee in insolvency, and that the land became part of the fund held by him as such. It was a right, in common with other creditors, to share in the fund, and in the land only in so far as it was part of the fund. We are of opinion that the condition against sale was broken. *Dadmun Manuf. Co. v. Worcester Ins. Co.*, 11 Met. 429, 435; *Oakes v. Manufacturers' Ins. Co.*, 131 Mass. 164, 165; *Dailey v. Westchester Ins. Co.*, 131 Mass. 173; *Grevemeyer v. Southern Ins. Co.*, 62 Penn. St. 340, 342; *Adams v. Rockingham Ins. Co.*, 29 Maine,

292, 296, 297; *Hazard v. Franklin Ins. Co.*, 7 R. I. 429. See further, *Young v. Eagle Ins. Co.*, 14 Gray, 150, 152, 153. We express no opinion whether there was a breach of the condition against the factory ceasing operation.

Judgment on the verdict.

L. S. Dabney & E. M. Parker, for the plaintiff.

J. N. Marshall (*G. J. Burns* with him), for the defendant.

(b) *Sale, transfer, or change in title or possession.*

BARNES v. UNION MUTUAL INS. CO.

SUPREME COURT OF MAINE, 1863. 51 Me. 110.

REPORTED from *Nisi Prius* by DAVIS, J.

This was an action on a policy of insurance, to recover for loss insured against.

F. O. J. Smith, for the plaintiff.

T. M. Hayes, for the defendants.

The facts in the case, bearing on the questions considered, are fully indicated in the opinion of the court, which was drawn up by

DAVIS, J. The plaintiff applied for insurance on "one half, in common and undivided," of certain buildings, and household furniture therein. In answer to the question, "Who owns and occupies the buildings?" he answered, "The applicant owns and occupies the property." A fair construction of this representation of title is, that the applicant was the owner of an undivided half of the property described, and the sole owner of the *property to be insured*. This representation was true.

The by-laws of the company are expressly made a part of the policy, as conditions of the insurance. By the sixteenth article, it is provided that "when the title of any property insured *shall be changed*, by sale, mortgage, or *otherwise*, the policy shall thereupon be void."

The insurance in this case was for six years. The policy was dated Nov. 15, 1851. Upon a petition for partition, duly prosecuted by the other tenant in common, upon which judgment was rendered Jan. 20, 1857, the premises were divided, and the plaintiff became the owner of a particular half thereof, in severalty. The buildings were destroyed by fire, April 1, 1857.

The partition of the property may not have been an *alienation*, as understood in matters of insurance. But when a by-law provides that any alteration or change in the title shall make the policy void, any material change in the title will have that effect, though it is not by an alienation. *Edmonds v. Mutual Safety Fire Ins. Co.*, 1 Allen, 311; *Campbell v. Hamilton Mutual Ins. Co.*, 51 Me. 69.

The title, in the case at bar, was materially changed by the partition. The effect was equivalent to an alienation, and a purchase. The plaintiff no longer owned any interest in the entire property, while he did own the entire interest in a part of it. It was the same as if he had given his co-tenant a deed of his interest in a specific part, and had received from him such a deed of the other part. His title no longer corresponded with the policy, in nature or quantity. He insured but one undivided half of *the part which he owned after it was divided*. And, after the division, he owned no part of the *other half*. If he could recover at all, which he cannot do, it would be for only *one-fourth* part of the whole, — or, for an undivided half of the part which he continued to own after the partition.

The furniture was separately valued in the policy; and it is claimed that the plaintiff is entitled to recover for the loss of that, if he fails to recover for the loss of the buildings. But the provision in the by-laws is that, if the title is changed, *the policy* shall be void. And besides, it has been decided by this court, that such a contract of insurance is indivisible, and, if rendered void by the assured in any of the items of property insured, the whole policy is void. *Lovejoy v. Augusta M. F. Ins. Co.*, 45 Me. 472; *Gould v. York County Mut. Fire Ins. Co.*, 47 Me. 403; *Day v. Charter Oak Ins. Co.*, 51 Me. 91.

*Plaintiff nonsuit.*¹

APPLETON, C. J., KENT, WALTON, and DICKERSON, JJ., concurred.

(KENT, J., held that the representation of the plaintiff, as to occupancy of the building, was either a misstatement or a concealment of a material fact.)

LOY v. HOME INSURANCE CO.

SUPREME COURT OF MINNESOTA, 1877. 24 Minn. 315.

APPEAL by defendant from an order of the District Court for Olmsted County, MITCHELL, J., presiding, denying a motion for a new trial in an action on a policy of insurance.

Henry C. Butler, for appellant.

Start & Gove and *P. M. Tolbert*, for respondent.

CORNELL, J. The policy on which this action is brought contains the following among other conditions: —

“If the property be sold or transferred, or any change takes place in title or possession (except by reason of the death of the insured), whether by legal process or judicial decree, or voluntary transfer or conveyance, . . . this policy shall be void.”

The property insured consisted of a dwelling-house, and certain furniture and wearing apparel therein contained, situate upon premises

¹ *Acc.*: *Trabue v. Dwelling-House Ins. Co.*, 121 Mo. 75 (1894). — ED.

belonging to the respondent. After the issuance of the policy the respondent mortgaged the premises, and the same were sold under a power of sale, upon a foreclosure of the mortgage by advertisement, pursuant to the statute. After the sale, and before the period for redemption had expired, the loss occurred, the respondent still being in possession of the premises.

The question for consideration is, whether this foreclosure sale was "a sale, transfer, or change in title," within the meaning of the foregoing condition, such as avoided the policy.

In construing a condition of this character, if, upon a consideration of the whole contract, it is uncertain whether the language of the stipulation is used in an enlarged or restricted sense, or if it is fairly open to two constructions, one of which will uphold and the other defeat the claim of the insured to the indemnity which it was his object in making the insurance to obtain, that should be adopted which is most favorable to the insured, and most in harmony with such, the main purpose of the contract on his part. The reasons for this are twofold: the tendency of any such stipulation is to narrow the range and limit the force of the underwriter's principal obligation. It is also inserted by him for his own benefit and in language of his own choice. If any doubt arises as to its meaning the fault is his in not making use of more definite terms in which to express it; hence the rule of strict construction against him, and the liberal one in favor of the assured, which prevail under such circumstances. *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405; *Westfall v. Hudson Riv. Ins. Co.*, 2 Duer, 495; *Ins. Co. v. Wright*, 1 Wall. 456; *West. Ins. Co. v. Crapper*, 32 Pa. St. 351.

Applying these principles, a correct interpretation of this condition of the policy would seem to be attended with but little difficulty. In the first place it makes a sale or transfer of the property a cause for avoiding the policy. Within the meaning of the stipulation this refers to an absolute and completed, and not a conditional or incomplete, sale or transfer; in other words, a sale that wholly divests the owner of the property of all insurable interest therein.

The succeeding clause, which gives a like effect to any "change in title, . . . whether by legal process, judicial decree, or voluntary transfer or conveyance," has reference to an absolute transfer of the legal title in one of these ways, though such transfer, as in the case of a conveyance in trust, or by a deed, absolute in terms, but intended merely as a security, might not operate to divest the owner of the property of all his insurable interest therein.

In our judgment nothing short of a complete transfer of the legal title comes within the prohibition of this stipulation. The mere creation of a lien or encumbrance upon the property insured cannot be regarded as affecting "any change in title," either in the legal sense or according to the ordinary and popular understanding. "In legal acceptance," says ALLEN, J., in *S. F. & M. Ins. Co. v. Allen*, 43 N. Y. 389, "title has respect to that which is the subject of ownership, and

is that which is the foundation of ownership; and with a change of title, the right of property, the ownership, passes." As applied to real estate, it is defined to be "the means whereby the owner of lands or other real property has the just and legal possession and enjoyment of it;" "the lawful cause or ground of possessing that which is ours." (2 Bouv. Law Dict. 986.)

In this sense, which is also the ordinary and popular one in which the word is used, a "change in title" is a change in ownership, which carries the legal right of possession and property, and it is in this sense we must understand the word as having been used in this clause.

Although within the meaning of the registry laws a mortgage of real estate is defined to be a conveyance, yet under our laws it is not deemed a conveyance in the sense of passing any estate or interest in lands, or transferring any legal title thereto. The only interest which a mortgagee acquires is a lien upon the land in way of security, which, prior to the foreclosure of the right of redemption, is treated as personal property that goes to the administrator or executor, and not to the heirs. The legal title, with the right of possession, remains with the mortgagor until a completed foreclosure is had by sale, and the same becomes absolute by the expiration of the period for redemption. Until this time expires the purchaser at the sale has only a chattel and equitable interest. He has no legal title to the lands, nor any conveyable estate therein. The character of his interest is the same as that of a mortgagee before foreclosure sale. Gen. St. c. 52, §11; Id. c. 75, §11; Donnelly v. Simonton, 7 Minn. 110 (167); Horton v. Maffitt, 14 Minn. 290-292.

Neither is a foreclosure by advertisement "legal process" or a "judicial decree." The proceedings in this kind of a foreclosure are carried on wholly outside of court, and without the aid of its process or decree. It is obvious, then, that neither the giving of the mortgage nor the sale of the premises on foreclosure, the time for redemption not having expired, effected any change in title or possession in respect to the property insured, and did not, therefore, avoid the policy.

*Order affirmed.*¹

¹ See McKissick v. Mill Owners' Mut. F. Ins. Co., 50 Iowa, 116 (1878); Commercial Union Assurance Co. v. Scammon, 102 Ill. 46 (1882); Hopkins Mfg. Co. v. Aurora F. & M. Ins. Co., 48 Mich. 148 (1882); Marts v. Cumberland Mut. F. Ins. Co., 44 N. J. L. 478, 481-482 (1882); Haight v. Continental Ins. Co., 92 N. Y. 51 (1883); Hanover F. Ins. Co. v. Brown, 77 Md. 64 (1893).

Compare McIntire v. Norwich F. Ins. Co., 102 Mass. 230 (1869).

In Hanover F. Ins. Co. v. Brown, *supra*, BRYAN, J., for the court, said:—

"The passing or entry of a decree of foreclosure is one of the causes which according to the terms of the policy would make it void; and it is maintained by the defendant that the proceedings for a sale under the mortgage were equivalent to the entry of such a decree within the meaning of the policy. A mortgage is in law a conditional sale. The mortgagor in consideration of so much money sells the property to the mortgagee, upon the condition, however, that the sale is to be void, provided by a given day the mortgagor repays the money with interest. If the mortgagor fails to repay the money with interest at the time stipulated, the mortgagee's title to the

property becomes absolute at law, because the condition subsequent which was to defeat it has not been performed. But courts of equity give to the mortgagor what is called the equity of redemption; that is, they allow him to redeem his forfeited mortgage by repaying notwithstanding the default the sum mentioned therein. And the only way for the mortgagee to prevent this redemption is to file a bill in equity in which he calls upon the mortgagor to repay the money, or be forever foreclosed of his equity of redemption. The court, in due course, passed a decree appointing a day for the money to be paid, and declaring that if it is not paid at or before that time the mortgagor's right of redemption shall be forever taken away. Upon the failure to pay at the designated time the decree is made final and absolute. This is a decree of foreclosure, and it was the ordinary proceeding in behalf of mortgagees before the Act of Assembly, which authorized courts of equity to decree that the property should be sold. The decree for foreclosure has disappeared from our practice, being entirely superseded by the more convenient decree for sale, which is however sometimes, though inaccurately, called a foreclosure decree. The proceeding in this case was not a decree of any kind, but an advertisement and sale under a power contained in a mortgage. To be sure the sale under such a power would be as effective as a sale under a decree of a court of equity, and so would any other sale lawfully made. But if we could consider it as equivalent within the meaning of the policy to a decree, we could not disregard the difference between a decree for a sale and a decree of foreclosure. A sale under a decree does not pass the title unless it is ratified and confirmed. The court is the vendor acting through its agent the trustee who has been appointed to make the sale. He reports to the court the offer of the bidder for the property; if the offer is accepted, the sale is ratified, and thereupon, and not sooner, the contract of sale becomes complete. Before ratification the transaction is merely an offer to purchase which has not been accepted. On the other hand a decree of foreclosure *ipso facto* extinguishes the mortgagor's right of redemption and vests the entire title in the mortgagee.

"Another cause which would render the policy void is a sale under a deed of trust, or any change in the title or possession of the property. It was necessary that the sale made by the attorney named in the mortgage should be reported to a court of equity, and when it was reported, the same proceedings were required as if it had been made by a trustee under a decree. Code, Article 66, section 9, Public General Laws. We have seen that the sale was not a complete contract, and that when reported, it was merely an offer to make a purchase which had not been accepted by the only authority competent to accept it; that is to say, the court. If we read the whole of this clause containing the causes of forfeiture it is evident that the purpose was to provide that the insurance should cease to be effective as soon as the title of the insured came to an end. It was not intended that he should have a right of recovery for the destruction of property which he did not own. But it could not have been the purpose to forfeit the policy while his ownership continued. The sale under a deed of trust mentioned in the policy means a consummated transaction by which the interest of the insured was divested. The sale made by the attorney was finally ratified by the court after the fire had occurred. Before this ratification the proceeding was merely an unaccepted proposition for a purchase and no change had taken place in the title. The property was occupied by a tenant of Hammond, the insured, and his occupancy was in law the possession of his landlord, and it continued to be vested in him until the change of title had been accomplished." — Ed.

HATHAWAY ET AL. v. STATE INSURANCE CO.

SUPREME COURT OF IOWA, 1884. 64 Iowa, 229.¹

APPEAL from Fayette Circuit Court.

The action was upon a policy insuring the firm of Hathaway & Smith, composed of plaintiff and E. P. Smith, against loss by fire on a stock of goods. The policy provided that "if the title of the property is transferred, incumbered, or changed, . . . or if the policy is assigned, . . . the policy shall be void." Before the loss, the partnership was dissolved, and Hathaway bought the interest of Smith in the property and in the policy. The defendant asked instructions that there was such a change of title as avoided the policy. The court refused these instructions, and charged the jury that they were simply to determine whether the goods had been damaged by fire, and, if so, what was the amount of such damage. Verdict and judgment for plaintiff. Defendant appealed.

Fouke & Lyon, Ainsworth & Hobson, and J. B. Johnson, for appellant.

John Hutchinson, and Hoyt & Hancock, for appellee.

D. W. Clements, for intervenor.

REED, J.² . . . Whether the sale by Smith of his interest has the effect claimed by defendant depends upon the construction which shall be placed on the words of the provision of the policy quoted above. The question as to the effect on the contract of insurance of the sale by one joint owner to another of his interest in the joint property, when the policy contains a provision against alienation, has often been before the courts; and the numerical weight of authority is probably in favor of the proposition that a sale by one partner to his co-partner of his interest in the partnership property does not have the effect to terminate a policy of insurance which contains a provision against the sale or transfer of the property. The case of *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405, is probably the leading case holding this doctrine. The policy in that case provided that it should be null and void, "if the said property shall be sold or conveyed." The policy was issued to a partnership, one member of which sold his interest in the property to his co-partner before the loss, and it was held that this did not have the effect to avoid the policy; and this holding is followed in *Dermani v. Ins. Co.*, 26 La. Ann. 69; *Pierce v. Ins. Co.*, 50 N. H. 297; *Burnett v. Ins. Co.*, 46 Ala. 11, and *West v. Ins. Co.*, 27 Ohio St. 1; in each of which cases the policy contained substantially the same provision. The ground upon which the holding is put is, that the alienation against which the parties provided by the provision

¹ The statement has been drawn from the opinion. — Ed.

² After stating the case. — Ed.

was of the whole of the insured property, and not merely a portion of it, or some interest in it less than the whole; and that a sale of his interest by one partner to his co-partner was not such a disposition of the property as was contemplated by the parties when they framed the provision; that what was intended to be guarded against was such a transfer of the property as would change the proprietary interest therein of the parties with whom the insurers contracted, and substitute others with whom they had not consented to contract; but that the sale of his interest by one partner to his co-partner did not have the effect to introduce a stranger to the contract, or to make any change in the condition or situation of the property or risk. In *Cowan v. The State Ins. Co.*, 40 Iowa, 551, the policy was issued to plaintiff, but before the loss he sold the insured property to a partnership of which he was a member. It contained a similar provision against alienation, and it was held by this court that, as he retained an insurable interest in the property, the policy was not avoided by the sale; that, while the clause in the policy prohibited the alienation of the insured property, it did not forbid the sale of an interest therein less than the whole, and, as long as the plaintiff retained an insurable interest in the property, the policy attached to and protected that interest. We think it clear that this case does not sustain the position of appellee in the case now before us. The facts of the two cases, and the questions involved, are essentially different. In the one, the party seeking to enforce the contract was an original party to it, and the question involved was whether his right of recovery was defeated by his sale of an interest in the insured property, while, in this case, plaintiff is not personally a party to the contract, and the question is whether he acquired a right of action on the policy by his purchase of an additional interest in the property. Nor do we think that the other cases cited above are conclusive of the question here involved. The provisions of the policies involved in those cases were that the policies should be null and void if the property was sold or conveyed, while the provision in this case is that, "if the title of the property is transferred, incumbered, or changed, . . . the policy shall be void." The effect of this language is materially different from that used in the policies in the other cases. The title of the property would be transferred by a sale or conveyance of it to another person. If the word "changed" had not been inserted in the provision, the effect of the language would have been the same as that used in the other policies, and the same construction which was put upon the provisions in those cases could fairly have been put upon it. But the parties, having inserted in their contract words which fully express the provision that the policy would be avoided by a sale or conveyance of the property to a stranger, have also inserted another word, by which the same consequence is made to follow a change of the title to the property. It is certainly true that by a transfer of the title to the whole of the property to a stranger the title would be changed, but

we cannot presume that the parties intended to express that provision by the use of the word "changed," for, as we have seen, they had already expressed it by the words which precede it in the contract.

This latter word was deliberately used by the parties, and we cannot reject it in construing the contract, and, as it neither limits nor qualifies those which precede it, we are bound to presume that the parties intended by its use to express some provision or condition of their contract which was not otherwise expressed.

The effect of the provision is, then, that the policy would be avoided, either by a transfer of the title of the property insured to a stranger, or by a change of the title to it. This conclusion can be avoided, as we think, only by disregarding the elementary rules of construction.

The case turns, then, upon the question whether a change of the title of the property occurred upon the dissolution of the partnership and the sale by Smith to plaintiff of all of his interest in the property, and it seems to us there can be but one answer to this question. During the existence of the partnership it cannot be said that plaintiff had title to any specific share or interest in the property. His claim was to the proportion of the residue which should be found to be due to him upon the final balance of the accounts of the firm, after the conversion of the assets and the liquidation of its debts. But, upon the dissolution of the partnership, and the purchase by him of Smith's interest, he was vested with the absolute title to the whole of the property. We think, therefore, that the Circuit Court erred in refusing to give the instructions asked by defendant.

The conclusion we reach is sustained by the following authorities: *Keeler v. Niagara Ins. Co.*, 16 Wis. 523; *Hartford Fire Ins. Co. v. Ross*, 23 Ind. 179; *Dix v. Mercantile Ins. Co.*, 22 Ill. 272; *Wood v. Rutland Ins. Co.*, 31 Vt. 552. *Reversed.*¹

¹ *Acc.*: *Girard F. & M. Ins. Co. v. Hebard*, 95 Pa. 45 (1880); *Oldham v. Anchor F. Ins. Co.*, 90 Iowa, 225 (1894).

Contra: *Virginia F. & M. Ins. Co. v. Vaughan*, 88 Va. 832, 835-837 (1892); *Phoenix Ins. Co. v. Holcombe*, 57 Neb. 622 (1899).

See *Dreher v. Ætna Ins. Co.*, 18 Mo. 128 (1853); *Jones v. Phoenix Ins. Co.*, 97 Iowa, 275 (1896).

In *West v. Citizens' Ins. Co.*, 27 Ohio St. 1 (1875), there was issued to H. F. West & Co., a firm of four members, a policy covering the firm's stock of goods, and providing that "if this policy, or any interest therein, shall be assigned, . . . these presents shall be . . . void." One of the partners retired from the firm, and assigned to his co-partners his interest in the stock of goods and in the policy. It was held that the policy was not avoided, either wholly or in part, and that the partners continuing the business could recover the whole damage subsequently suffered by them, up to the amount of the policy. — Ed.

BARRY, APPELLANT, v. HAMBURG-BREMEN FIRE
INS. CO., RESPONDENT.

COURT OF APPEALS OF NEW YORK, 1888. 110 N. Y. 1.

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made May 6, 1886, which affirmed a judgment in favor of defendant, entered upon an order nonsuiting plaintiff on trial. (Reported below, 21 J. & S. 249.)

This action was brought upon a policy of fire insurance issued by defendant upon a dwelling-house.

The material facts are stated in the opinion.

W. E. Osborn, for appellant.

Edward Salomon, for respondent.

RUGER, C. J. It was assumed upon the trial that the property described in the insurance policy, upon which this action was brought, had been destroyed by fire, and the policy had become payable, by its terms, to the plaintiff, except for the alleged breach of a condition of the policy set up as an affirmative defence by the answer.

The condition referred to was a clause reciting substantially that "if the property shall be sold or transferred, or any change take place in the title or possession, whether by legal process, judicial decree, or voluntary transfer or conveyance, . . . without the consent of this company written hereon, . . . then . . . this policy shall be void." The property referred to consisted of real estate, and it was admitted on the trial that no change of possession thereof had taken place within the meaning of the above condition. It was alleged, however, that the property had been sold or transferred and a change of title had been effected, which, it was claimed, avoided the policy.

To support this issue the defendant gave in evidence two deeds, both absolute in terms, and each purporting to convey the property, one from Maria Sleight, the owner, to one Michael Moloughney, Jr., and another from Moloughney to John H. Corwin, which were each executed subsequent to the date of the policy, and were, respectively, duly recorded in the clerk's office of the county where the property was situated. This evidence established a *prima facie* case for the defendant. To obviate the effect of this evidence the plaintiff offered to prove that the deed to Moloughney was given under a parol agreement to secure an existing indebtedness from Mrs. Sleight to Moloughney, and that a subsequent agreement was made between Mrs. Sleight and Moloughney, whereby Moloughney relinquished his security and conveyed the property to Corwin, as security for a debt owing by Mrs. Sleight to the latter.

The defendant's counsel, for the purposes of the motion, admitted the truth of the facts stated in the plaintiff's offer, and thereupon moved the court to nonsuit the plaintiff, and the court granted the

motion, to which ruling the plaintiff duly excepted. The General Term, upon appeal to that court, affirmed the judgment, and the plaintiff appeals to this court. For the purpose of our decision it must, therefore, be assumed that the deeds in question were given as security. We are of the opinion that the courts below have erred in their views of this case, and that the question presented by the exception has been repeatedly adjudged in favor of the plaintiff by the courts of this state. There is no ambiguity in the terms of the condition of the policy, and no question of construction arises over the true meaning and intent of the provision. If the property has, in fact, been sold or transferred or any change has taken place in the title or possession, then the policy by its terms becomes void. In determining this question we can only inquire whether any transaction has taken place which, in law, transferred the title of the property. The parties must be assumed to have contracted with full knowledge of the law and to have used the terms employed in the policy with reference to the character which the law attaches to them.

It is not contended by the defendant that the giving of a mortgage by Mrs. Sleight upon the property would have effected a sale or transfer thereof or a change of title within the meaning of the condition, but it is claimed that because the defeasance was not written in the deeds put in evidence they operated as a legal transfer of the title so far as the defendant was concerned, and thus came within the terms of the policy. The precise and only question in the case is what effect does the *law* give to a deed, absolute in form, but which, in fact, is given as security for a debt. Is it a conveyance of title or simply a chattel interest incapable of affecting the title, except through legal proceedings to enforce the collection of a debt?

It seems to us that the courts below have failed to appreciate the effect produced by the abolition of the distinction between law and equity, and the more recent decisions in this state depriving a mortgage of the characteristics of a conveyance. The cases are very numerous in our reports, and so familiar to the profession that we are surprised at the necessity, at this date, of referring to them at all. We will, however, cite a few of the cases showing that it has been the settled law for many years that a deed, though absolute in form, if given as security for a debt, is, to all intents and purposes, both at law and in equity, a mortgage only.¹ . . .

It follows, from these authorities, that the legal position of Mrs. Sleight, as the owner of the property, was not changed or affected by the deeds referred to, and that such instruments did not bring the transaction within either the letter or the spirit of the contract.

The interest of Mrs. Sleight in the property remained the same after as before the delivery. It is true, that, through a course of legal pro-

¹ Here were stated or quoted *Murray v. Walker*, 31 N. Y. 399 (1865); *Horn v. Keteltas*, 46 N. Y. 605 (1871); *Carr v. Carr*, 52 N. Y. 251 (1873); *Shattuck v. Bascom*, 105 N. Y. 39 (1887); and *Hodges v. Tennessee Ins. Co.*, 8 N. Y. 416 (1853).

ceedings, the title to the property might finally be acquired by some one, if the debt was not paid, but this would be equally true if Mrs. Sleight had given to Moloughney her note of hand for the debt and it had been followed by judgment and a sale of the land under execution.

The circumstance that Moloughney or Corwin might, by a conveyance to a *bona-fide* purchaser, have given a good title under the recording acts, does not affect the question as to whether Mrs. Sleight was the legal owner of the property at the time of the trial. She could, of course, estop herself by her conduct as against certain persons, from proving the truth as to her title, but this does not show that she is not the holder of the legal title, and there is nothing in this case to bar her from controverting the truth of the defendant's evidence tending to show that she had transferred the title of the property.

We think the judgments of the courts below should be reversed and a new trial ordered, with costs to abide the event.

All concur.

*Judgment reversed.*¹

¹ *Acc.* German Ins. Co. v. Gibe, 162 Ill. 251 (1896); Bank of Glasco v. Springfield F. & M. Ins. Co., 5 Kan. App. 388 (1897); Peck v. Girard F. & M. Ins. Co., 16 Utah, 121 (1897).

Contra: Western Massachusetts Ins. Co. v. Riker, 10 Mich. 279 (1862).

See Bryan v. Traders' Ins. Co., 145 Mass. 389 (1888).

Compare Foote v. Hartford F. Ins. Co., 119 Mass. 259 (1876).

In Judge v. Connecticut F. Ins. Co., 132 Mass. 521 (1882), a fire insurance policy on a stock in trade provided that "if the property be sold or transferred, or upon the passing or entry of a decree of foreclosure, or upon a sale under a deed of trust, or any change take place in title or possession (except in case of succession by reason of the death of the assured), whether by legal process or judicial decree or voluntary transfer or conveyance, . . . this policy shall be void." Chattel mortgages were subsequently executed; but possession was not taken under them, and the sums secured were not due at the time of the fire. DEVENS, J., for the court, said:—

"That a subsequent mortgage is not to be treated as an alienation of the estate under the clause forbidding alienation, has been repeatedly held. Jackson v. Mass. Ins. Co., 23 Pick. 418. Tomlinson v. Monmouth Ins. Co., 47 Maine, 232; Smith v. Monmouth Ins. Co., 58 Maine, 96; Shepherd v. Union Ins. Co., 38 N. H. 232; Commercial Ins. Co. v. Spankneble, 52 Ill. 53. Nor is there in this respect any distinction between real and personal property, where the goods mortgaged are not taken possession of. Rice v. Tower, 1 Gray, 426; Van Deusen v. Charter Oak Ins. Co., 1 Rob. (N. Y.) 55; Hartford Ins. Co. v. Walsh, 54 Ill. 164. But even if there was not an alienation of the property, or any part of it, it may be contended that there was a change in title or interest which would avoid these policies. . . .

"Had it been intended to include mortgages among those changes in title which would avoid the policies, it would seem that they would have been specified in express terms. When a policy enumerates changes in title in particular ways, by which it is to be avoided, a change otherwise made cannot have this effect, where at least it does not amount to an alienation of the property. All the ways enumerated are alienations of the property, which a mortgage is not. If it is an alteration or change in the title, it is one of an entirely different character from those specified. Mortgages are not sales, transfers, or conveyances, in the usual acceptance of those words. They are securities for the payment of money. Ewer v. Hobbs, 5 Met. 1; Norcross v. Norcross, 105 Mass. 265. The words which follow "change in title," &c., contemplate that the party making the sale or transfer is to part with his interest in whole or in part. They apply to the termination of that interest. The mortgagor is still interested to the full value of

GERMANIA FIRE INS. CO., APPELLANT, v. HOME INS. CO.,
RESPONDENT.COURT OF APPEALS OF NEW YORK, 1894, 144 N. Y. 195.¹

THE Home Insurance Co. insured J. A. D. Verdier on a stock of hardware. The policy provided that "if the property be sold or transferred, or any change takes place in title or possession . . . this policy shall be void." Verdier took in a partner, Brown, transferring to him a three-tenths interest in the property insured. For a subsequent loss, action was brought by the Germania Fire Ins. Co. as assignee of Verdier & Brown. Upon an agreed statement of facts, the Special Term of the Superior Court of the city of New York gave judgment for the defendant. The General Term affirmed this judgment, as reported in 4 N. Y. Misc. 443. The plaintiff appealed.

G. W. Cotterill, for appellant.

George Richards, for respondent.

BARTLETT, J.² . . . The question presented by this appeal is whether the fact of the insured having taken in a partner rendered the policy void.

It was stated on the argument that this precise point had never been presented to this court, but it is insisted that the trend of some of our decisions is in favor of plaintiff's contention that the policy is not avoided by taking in a new partner.³ . . .

None of these cases deals with the question now under consideration.

We think it perfectly clear on principle that the sale of an interest in the insured property by Verdier to Brown and the formation of a co-partnership between the two rendered the policy void.

The contract of insurance is peculiarly personal in its nature, and the success of the business of underwriting depends largely upon what is known as the moral hazard.

It is a well-established principle of the common law that every man has the right to determine with whom he will enter into contract obligations.

An insurance company is induced to issue or withhold its policy after carefully scrutinizing the character of the applicant for insurance.

the property; he makes no such change in title or interest as would be effected by the transactions enumerated. . . .

"We are therefore of opinion that there was no such change in title and interest as avoided the policies." — ED.

¹ The statement has been rewritten. — ED.

² After stating the case. — ED.

³ Here were summarized *Hoffman v. Aetna F. Ins. Co.*, ante, p. 602 (1865); *Walton v. Agricultural Ins. Co.*, 116 N. Y. 317, 326 (1889); and *Walradt v. Phoenix Ins. Co.*, post, p. 625 (1893). — ED.

It is of the utmost importance to the company to ascertain who is to be vested with the title and possession of the property sought to be insured.

It would be a harsh and indefensible rule that required the underwriter, who had insured an individual on a stock of goods in a store, to continue the insurance after the insured had taken in two partners and formed a firm wherein each partner was vested with an undivided third interest in the property covered by the policy, without having been afforded the opportunity to examine into the moral and business characters of two strangers to the original contract.

The right of the insurance company was in nowise invaded when this court held that a sale by one partner to another of his interest, where both were insured, did not avoid the policy.

It is only when a stranger is to be brought into contractual relations with the insurance company that the consent of the latter is essential.

This right of the company has been upheld in other jurisdictions. *Drennen v. London Assurance Corporation*, 20 Fed. Rep. 657; *Card v. Phoenix Ins. Co.*, 4 Mo. App. 424; *Malley v. Atlantic Fire and Marine Ins. Co.*, 51 Conn. 222, 250, 251.

The appellant urges that the protection of the policy should be extended to the new partner by virtue of the following words contained therein, viz.: "And the said Home Insurance Company hereby agree to make good unto the said assured, his executors, administrators, and assigns, all such immediate loss," etc. It is argued that the word "assigns" extends the insurance to the new partner's interest.

The policy is capable of no such construction; the clause in question is merely a covenant on the part of the company with the insured to pay to him, or his legal representatives or assigns, the amount of the loss that may become due to him under the terms of the policy.

The judgment and order appealed from should be affirmed, with cost.

All concur.

*Judgment accordingly.*¹

¹ See *Card v. Phoenix Ins. Co.*, 4 Mo. App. 424 (1877). — Ed.

PHENIX INS. CO. v. ASBURY.

SUPREME COURT OF GEORGIA, 1897. 102 Ga. 565.

ACTION on insurance policy. Before Judge SHEFFIELD. Terrell Superior Court. May term, 1896.

Mynatt & Willcoxon and M. C. Edwards, Jr., for plaintiff in error.
J. H. Guerry and J. A. Laing, contra.

COBB, J. 1. When this case was here at the March term, 1895 (95 Ga. 792) it was held that a conveyance under section 1969 of the Code of 1882 (Civil Code, § 2771) was an alienation of the property passing title to the grantee, and that consequently the making of such a conveyance by the insured vitiated a policy stipulating that it should be void "if the property should be sold, or the title or possession of the property, or any part thereof, transferred or changed, whether by legal process, judicial decree, conveyance, or otherwise." At the trial now under review it was affirmatively and conclusively shown that the deed made by the plaintiff below was void for usury. This being so, it did not pass title out of him, and therefore presented no obstacle to a recovery by him from the company. 2. This case is controlled by what is above stated; the trial judge committed no error in instructing the jury that the company was liable, leaving them to fix the amount; and it appearing that the verdict as to amount was sufficiently supported by the evidence, there is no cause for granting another hearing.

Judgment affirmed, all the justices concurring.

FARMERS' AND MERCHANTS' INS. CO. v. JENSEN.

SUPREME COURT OF NEBRASKA, 1898. 56 Neb. 284.

ERROR from the District Court of Saunders County. Tried below before SEDGWICK, J.

The opinion contains a statement of the case.

Halleck F. Rose and Wellington H. England, for plaintiff in error.
Clark & Allen, contra.

RAGAN, Com. This is an error proceeding instituted in this court by the Farmers' and Merchants' Insurance Company to review a judgment of the District Court of Saunders County pronounced against it in favor of Iver Jensen. Jensen in his petition declared upon an ordinary fire insurance policy. The insurer interposed as a defence to the action that the contract of insurance provided that it should cease to be in force "in case any change shall take place in the title . . . of the assured in the above mentioned property" without the

consent of the insurer thereto indorsed on the policy; that after the delivery of the policy the insured, his wife joining therein, conveyed the real estate on which the insured property was situate, by ordinary warranty deed, to one John H. Jensen, and that the latter afterward by an ordinary warranty deed conveyed the insured property to the wife of the insured, all without the knowledge or consent of the insurer. The insured attempted to meet this defence by a reply admitting the conveyance of the title by the insured to John H. Jensen and by him to the wife of the insured, but alleging that these conveyances were made in pursuance of an agreement between the insured and his wife that the latter should and would hold the title to the property for the use and benefit of the insured and subject to his direction and control.

The judgment of the District Court cannot stand. The provision in the policy that it should cease to be in force if a change should take place in the title of the insured without the consent of the insurer is a valid and reasonable provision. An insurance contract is a personal one between the insured and the insurer. An insurance company might be very willing to guaranty A against loss or damage of his property by fire, but unwilling to furnish such a guaranty to A's vendee; and it is for this reason that such a provision as the one under consideration is inserted in fire insurance policies, so that in case the insured shall transfer his title the insurer may have notice thereof and an opportunity to elect whether it will keep the policy in force in favor of the grantee or vendee; and it is because the courts recognize such a provision in an insurance policy to be a personal contract between the insurer and the insured that they hold that the violation thereof by the insured terminates the contract of insurance. *Milwaukee Mechanics' Mutual Ins. Co. v. Ketterlin*, 24 Ill. App. 188; *Langdon v. Minnesota Farmers' Mutual Fire Ins. Ass'n*, 22 Minn. 192; *Oakes v. Manufacturers' Fire & Marine Ins. Co.*, 131 Mass. 164; *Ehrsam Machine Co. v. Phenix Ins. Co.*, 43 Neb. 554.

Counsel for the defendant in error insist that since the wife of the insured holds the legal title to the insured property in trust for him there has been no violation of the provision of the policy under consideration by the assured. This contention we think untenable. The provision of the policy is that if any change should take place in the title of the assured, the policy should cease to be in force. Certainly the execution and delivery of the warranty deed by the assured and his wife to John H. Jensen vested the latter with the legal title to these premises; and the execution and delivery by the latter of the warranty deed to the wife of the assured vested her with the legal title to these premises. There has been, then, a change in the title of the assured. The authorities cited by counsel for defendant in error do not sustain their contention. One of these cases is *Grable v. German Ins. Co.*, 32 Neb. 645. In that case the assured, without the knowledge or consent of the insurer, entered into a contract in writing, agreeing to

sell the insured property and make a conveyance thereof upon the payment of certain sums of money in future by the purchaser. This contract was interposed as a defence to a suit on the insurance policy; but the insurance company was held liable upon the ground that the contract agreeing to sell and convey was not an alienation of the title to the property. Another case cited is *Bailey v. American Central Ins. Co.*, 13 Fed. Rep. 250. In that case the policy was issued to a mortgagee. He subsequently became the owner of the insured property, after which it was destroyed by fire. In a suit upon the policy the insurance company interposed the defence of a change of title without its knowledge or consent; but the court held that a mere increase of his interest in the insured property was not a change of title within the meaning of the contract.

The judgment of the District Court is

*Reversed and the cause remanded.*¹

(c) *Change in interest, title, or possession.*

WALRADT, AS ASSIGNEE, ETC., RESPONDENT, v. PHENIX
INSURANCE CO., APPELLANT.

COURT OF APPEALS OF NEW YORK, 1893. 136 N. Y. 375.²

ACTION upon a policy for \$1,500 insuring the plaintiff's assignor against loss by fire to a certain stock of goods described as then in a brick store in the village of Theresa, N. Y., for one year from April 13, 1889. The policy provided that "this entire policy . . . shall be void . . . if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured or otherwise." On Feb. 18, 1890, a judgment for \$1,019.13 was recovered against the insured. On April 2, 1890, an execution was issued upon this judgment. On April 3 the execution was delivered to the sheriff. On April 4 the sheriff levied upon the goods, caused the store to be closed, and took the keys. About midnight the property—worth about \$11,000—was entirely destroyed by fire. On April 5 the assured made a general assignment to the plaintiff for the benefit of creditors.

¹ *Acc.*: *Walton v. Agricultural Ins. Co.*, 116 N. Y. 317 (1889).

See *Oakes v. Manufacturers' F. & M. Ins. Co.*, 131 Mass. 164 (1881).

Compare *Kyte v. Commercial Union Assurance Co.*, 144 Mass. 43 (1887).—ED.

² The statement has been rewritten, upon the basis of the opinion, and with the aid of the report in 64 Hun, 129 (1892).—ED.

The defendant, at the close of the evidence, moved for a nonsuit. The court refused; and the defendant excepted. The jury having found a verdict for the plaintiff, and the General Term of the Supreme Court having affirmed an order denying a motion for a new trial, the defendant company brought this appeal.

A. H. Sawyer, for appellant.

C. W. Thompson, for respondent.

O'BRIEN, J.¹ . . . The defendant insists that, upon these facts, there was such a change of interest and change of the possession as avoids the policy, within the meaning of the above conditions. If there was a change of interest, within the meaning of the policy, that result was produced by the delivery of the execution to the sheriff, as the goods of the debtor are bound from that time (Code, § 1405). The levy was not necessary to work such change, and the only effect it had was to change the possession. We must first determine what the parties to the contract intended when they made use of the terms, "change in the interest, title, or possession of the subject of insurance." The interest which a person may have in property is affected in many ways without producing a change in such interest, as that term is generally understood; when he contracts a debt or incurs an obligation this, in a broad sense, may affect such interest, as the property constitutes the means of payment, and his pecuniary condition, in a general sense, depends upon what he has left after discharging all his debts and obligations. The debt assumes another form by the recovery of a judgment, and the execution is the process which, when delivered to the officer, clothes him with authority to enforce the collection of the debt. That is the foundation of all the subsequent steps, and while each event in the progress of proceedings for collection may bring the debtor and creditor into closer relations and press nearer upon the property of the debtor, yet his title or interest in the property is not divested or transferred until a sale is made which operates in law to transfer his interest to another. By the delivery of the execution and the levy thereunder the officer has simply obtained authority, at some future time and in the mode prescribed by law, to expose the property of the debtor for sale, and that is the final act which changes the title and interest of the debtor. The officer has, no doubt, in law and from the necessity of the case, a sufficient interest in the property levied upon to enable him to protect it by insurance or against the acts of wrongdoers, otherwise the proceedings for collection of the debt might be defeated; but still the owner retains the title in the same sense that he did after he made default in the payment of the debt, which, as we have seen, is the basis of every step in the process of enforcement. His interest is, no doubt, affected by the issuing of the execution and the levy, but that is also true, though perhaps in a more remote sense, by contracting the debt. The words "change of interest," as used in the policy, are substantially synonymous with the words "change of title," and

¹ After stating the case. — Ed.

neither event occurs until the sale upon the execution. It may be asked what effect is, under such construction, to be given to the word *interest*, as used in the condition. It must be borne in mind that the standard policy now in use is so framed as to contain words suitable and applicable to every subject of insurance, but all the provisions are not necessarily applicable in every case. That must always be so whenever a contract in the same form and expressed in the same language is sought to be applied to different things, or to different classes of property. The subject of insurance, its condition and situation and the surrounding circumstances, may vary so as to render words and phrases contained in the policy not strictly applicable. There is a large class of risks, however, to which the word "interest," as used in the condition under consideration, is, no doubt, applicable. Policies are frequently written in favor of parties who have a claim upon property in the nature of a lien to secure the payment of a debt and perhaps for other purposes.

When the debt is paid or transferred the interest of the insured in the subject of insurance is changed, and the indemnity of the policy cannot inure to the benefit of another in the absence of express provision or consent of the company. In such cases the word can have full effect and a perfectly natural and appropriate application. It is manifest that the parties to this contract knew and intended that in some respects the interest of the insured in the property covered by the insurance would be changing from day to day. The insured was a country merchant, who, after he had effected the insurance, was at liberty to carry on trade in the goods, to buy and sell and contract debts as before; and, under such circumstances to say that whenever an execution was delivered to the sheriff, or even the town constable, for any sum no matter how insignificant, the policy was thereby avoided, would be to give to this condition a very harsh and narrow construction, and one which, it seems to me, was never within the contemplation of the parties. The fair and reasonable construction which we are bound to give to the contract does not require us to go as far as that. *Quinlan v. Providence W. Ins. Co.*, 133 N. Y. 365. There are cases where it has been held that the recovery of a judgment and the levy of an execution avoided a policy, but that was in consequence of an express provision to that effect in the policy. These provisions have been omitted from this policy, and the same result cannot be accomplished by a condition against a change of interest.

That there was no such change of interest in this case, as is fairly contemplated by the policy, has been conclusively settled against the defendant's contention by a decision of this court. In *Green v. Homestead Fire Ins. Co.*, 82 N. Y. 517, the policy contained a condition rendering it void "if the interest of the insured be changed in any manner, whether by act of the insured or by operation of law." The subject of the insurance was real property, and a mechanics' lien had been filed and took effect thereon within the life of the policy and

before the loss. It was urged by the defendant that there could be no recovery in the case for the reason that there was a breach of the condition against any change of interest. Judge RAPALLO, giving the opinion of the court, disposed of the question in a single sentence, in which he said, "The notice filed in pursuance of the mechanics' lien law clearly did not affect any change of interest in the property insured," and the plaintiff recovered. I am unable to perceive that there is any satisfactory distinction to be made between the filing of a mechanics' lien upon real estate and the delivery of an execution against personal property, followed by a levy. So that upon authority and reasonable construction, as to the intention of the parties, there was no change of interest in the case at bar. 92 N. Y. 54; 71 id. 508.

The change of possession produced by the levy and the action of the sheriff remains to be considered. The policy is not avoided, by the terms of the condition referred to, by every change of possession that may take place in the property. A change of occupants, without increasing the hazard, is excepted from the operation of the condition and does not invalidate the insurance. The learned counsel for the defendant argues that the exception in the condition does not apply when personal property is the subject of the insurance, and does not apply in this case, as there cannot be an occupant of goods in a store, consistent with the ordinary and appropriate use of language. The General Term has shown that the word occupant is sometimes used with reference to personal property. When the subject of insurance is a ship, a building not attached to the soil, so as to become part of the realty, or other things of like character, the term "change of occupants" would be appropriate. When it is used in reference to goods in a store its fitness is not so apparent. But as the words of the policy were used to meet all cases we have no right to say that the exception in the condition was not designed to apply when goods were the subject of insurance, merely because the term "change of occupants" does not seem to be the most natural and appropriate. A large part of the contracts of insurance now entered into relate to personal property, and to hold that such an important exception, as that now under consideration, to the broad terms of a condition, had no application to such contracts, would make the rights of the parties turn upon the literal meaning of a word. What the parties intended was that a change in the control and dominion over the property should not avoid the policy, unless such change rendered the risk more hazardous. A change in the possession of a store of goods must, moreover, refer to the place where the goods are situated. In this case they are described as situated in a brick store. The place where the goods were kept, though not the subject of insurance, was an important element in the risk, and it was natural and proper for the parties to provide against a more hazardous change in the occupancy of that place, and hence the parties agreed that in case the possession of the goods changed that

fact alone would not avoid the policy unless the occupancy of the place where they were was also changed in such a manner as to become more hazardous. In this way the words of the exception can be given their ordinary and natural meaning and the exception itself can have effect. It is only in a plain case that we are warranted in saying that the parties have used language not intended to have any application to the subject-matter of the contract. Whether the change of possession that was shown in this case, followed by a change of occupants, was or was not more hazardous, depended upon the circumstances shown, and presented a question of fact, which the learned trial judge properly submitted to the jury, and was determined in favor of the plaintiff.¹ . . .

The judgment should be affirmed.

All concur, except EARL, PECKHAM, and GRAY, JJ., dissenting.

*Judgment affirmed.*²

GIBB ET AL. v. PHILADELPHIA FIRE INS. CO.

SUPREME COURT OF MINNESOTA, 1894. 59 Minn. 267.³

APPEAL from a judgment of the District Court of Hennepin County.

Kitchel, Cohen & Shaw, for appellant.

Fred W. Reed, for respondents.

CANTY, J. On February 29, 1892, the plaintiff Gibb was the owner in fee simple of the premises in question, subject to a mortgage of \$1,200, held by the plaintiff Hilles. On that day defendant issued a policy of insurance insuring Gibb to the amount of \$2,000, for three years from and after that day, against loss by fire to the buildings on the premises, loss, if any, payable to Hilles as her interest may appear; but providing that if, in case of loss, the insurer is not liable to the mortgagor or owner, it shall be subrogated to the rights of the mortgagee under her mortgage, and, upon paying the full amount due on the mortgage, shall receive an assignment of it. This mortgage clause also provided that the policy should not be invalidated as to the mortgagee by any act of the owner, or by any change in the title or ownership of the premises.

On February 28, 1893, there was a loss by fire amounting to \$1,462.62. The plaintiffs brought this action to recover this loss. The case was tried by the court without a jury, and judgment was ordered in favor of Hilles for \$1,200, the amount of her mortgage, and in favor of Gibb for the balance of said amount of the loss. From the judgment entered thereon, defendant appeals.

¹ The remainder of the opinion dealt principally with arguments from analogy. — Ed.

² *Acc.* : *Herman v. Katz*, 101 Tenn. 118 (1898).

Compare *Carey v. German American Ins. Co.*, 84 Wis. 80, 85-86 (1893). — Ed.

³ The reporter's statement has been omitted. — Ed.

The appellant concedes that the plaintiff Hilles is entitled to recover, but contends that a breach occurred, prior to the fire, which avoided the policy as to Gibb; that he is not entitled to recover; and that defendant is entitled, on payment to Hilles of the amount of her mortgage, to be subrogated to her rights under the mortgage. The policy contains the following provisions: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . if any change other than by the death of an insured take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment, or by voluntary act of the insured, or otherwise."

It is found by the court: That on March 23, 1892, plaintiff made a contract in writing with one Maggie J. Kelly, whereby he sold and agreed to convey to her the premises, consisting of five lots, by deed of warranty, on prompt and full performance by her of the agreement, and she agreed to pay therefor the sum of \$2,500, — \$300 cash, and \$1,000 in instalments of \$50 every sixty days thereafter until paid, the balance to be paid by her in assuming said mortgage, — she to have possession of the premises until default in payment; and in case of such default she agreed to surrender possession on demand, and that the agreement should be void at the option of the vendor. That at and from the time of making the policy of insurance, until the time of making the contract of sale, the buildings had been unoccupied, and that, on the making of said contract of sale, said Kelly entered into the possession of the buildings and premises, and occupied the same until the time of the fire, and made all her payments during that time, and was not in default in any manner upon said contract.

It is contended by appellant that, by the transactions with Kelly, there took place a change in the interest, title, and possession of Gibb, and the condition against any such change was broken, and the policy avoided as to him. It seems to us that there was a breach in the condition against any change of interest. It is not claimed by respondents that there was any waiver of this condition, and the authorities cited by counsel are nearly all cases where the breach claimed was not of a condition against a change of interest, but a change of title. It is held by the great weight of authority that, where the condition is against any change in the title, there is no breach unless there is a change in the legal title, — that, as long as the insured retains the legal title and an insurable interest in the premises, the policy is not avoided by a transfer of the equitable title or of equitable interests; but we cannot apply this doctrine to a condition against any change of interest. The terms are not synonymous, as contended by counsel. The word "interest" is broader than the word "title" and includes both legal and equitable rights. It is not necessary to consider the question of the change of possession, except so far as it has an influence on the change of interest by strengthen-

ing and fortifying the interest acquired by Kelly. This disposes of the case.

The plaintiff Hilles is entitled to judgment for the sum awarded her, but upon payment of the same the defendant is entitled to be subrogated to her rights under her mortgage, and the defendant is entitled to judgment against the plaintiff Gibb that he take nothing by this action. The judgment appealed from should be reversed, with directions to enter judgment in conformity with this opinion.

*So ordered.*¹

¹ *Contra*: Grable v. German Ins. Co., 32 Neb. 645 (1891).

See Hill v. Cumberland Valley Mut. Protection Co., 59 Pa. 474 (1868); Savage v. Howard Ins. Co., 52 N. Y. 502 (1873); Germond v. Home Ins. Co., 2 Hun, 540 (1874); Browning v. Home Ins. Co., 71 N. Y. 508 (1877); Pringle v. Des Moines Ins. Co., 107 Iowa, 742 (1898); Arkansas F. Ins. Co. v. Wilson, 67 Ark. 553 (1900).

In Washington F. Ins. Co. v. Kelly, 32 Md. 421 (1870), Beekman and Reeder procured insurance upon a building and afterwards made a contract for the sale of the insured property, under which contract part payment was made, but possession was not taken. For a loss subsequently occurring, it was held that there could be a recovery, notwithstanding a provision that the policy should be void "if the said property shall be sold or conveyed." MILLER, J., at pp. 453-455, said:—

"On the 11th of February, 1868, Beekman and Reeder entered into a written agreement with Budd, by which they 'agree to sell' to the latter the grounds, 'with the buildings and improvements thereon erected,' for \$462,000, which Budd agrees to pay—\$10,000 in cash, \$52,000 on *delivery of the deed*, to assume payment of the mortgage debts, amounting to \$350,000, and to execute a mortgage on the premises to secure the balance of \$50,000, the deed and necessary papers to be *delivered on or before the 1st of April, 1868*. On the same day, Budd assigned this contract to the appellee, and directed the conveyance to be made to him. The \$10,000 was paid, but possession was not given, nor was anything else done under the contract *before the fire*. On the 5th of March, three days *after the fire*, the deed was executed and delivered to the appellee, and the grantors on the same day agreed, in writing, to collect the amounts due on the insurance policies and apply the same for the benefit of the appellee. A formal written assignment of the policies, and of the claims arising thereon, was subsequently, on the 1st of June following, executed to the appellee. On this state of facts, one of the positions of the appellant, presented by its fifth prayer, is, that the contract of the 11th of February was a sale or conveyance of the property before loss, within the meaning and purpose of the provision in the body of the policy, making it void if the insured property '*shall be sold or conveyed*' without the assent of the company. Without any such provision against alienation, a sale of the property insured, by a fire policy, by which the assured parts with his whole interest therein, and is, therefore, deprived of all interest in its preservation, will prevent a recovery for a subsequent loss. The law requires he should have an insurable interest at the time of loss. Most policies, however, guard against this contingency by an express stipulation instead of relying solely upon the rule of law. Hence, clauses against alienation, couched in different phraseology, are constantly to be met with, sometimes in different parts of the policy, and sometimes in the same provision, and in immediate connection with that relating to the assignment of the policy itself. The latter fact does not seem to have been regarded as of importance, or as warranting any different construction than if it stood as a separate clause. The provision in this policy is in the simplest and least stringent form prohibiting a *sale or conveyance*, terms of equivalent import with, and certainly not more comprehensive than, '*alienation by sale or otherwise*.' The decided weight of authority upon the construction of clauses thus expressed is, that to call them into action or preclude the right to enforce the insurance, there must be an actual and complete alienation, and hence a contract of sale will not fall within its terms so long as the

WOOD, RESPONDENT, v. AMERICAN FIRE INS. CO.,
APPELLANT.

COURT OF APPEALS OF NEW YORK, 1896. 149 N. Y. 382.

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department,¹ entered upon an order made May 8, 1894, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Circuit without a jury.

The nature of the action and the facts, so far as material, are stated in the opinion.

Michael H. Cardozo and *Shedden & Booth*, for appellant.

T. F. Conway, for respondent.

O'BRIEN, J. The plaintiff recovered upon a policy of insurance, of which she was the assignee, issued by the defendant, upon a building used as a store, January 9, 1891, and which was destroyed by fire March 31, 1891. The only defences interposed by the answer, which were proven and found at the trial, were: (1) That Wood Bros., a firm composed of six brothers, which owned the property and procured the insurance, had not, at the time, the sole and unconditional title or ownership of the property; and (2) that the property covered by the policy had been sold upon judgment and execution against the firm some days before the loss. The contract was made by means of what is known as the standard policy, which contained the condition that it "shall be void . . . if the interest of the insured shall be other than unconditional and sole ownership, or . . . if any change, other than by the death of an assured, take place in the interest, title, or possession of the subject of the insurance . . . whether by legal process or judgment, or by the voluntary act of the insured or otherwise."

With respect to the defence first referred to, it appeared that in the year 1885 one of the individuals composing the firm made a general assignment of his individual property for the benefit of his creditors, and also of his interest in the firm. That in 1888 his assignee

vendor retains the legal title and continues to have an interest in the preservation of the premises, as security for the payment of the purchase money, or, at all events, until the terms of sale are so far fulfilled as to invest the vendee with the full equitable ownership, and entitle him to the immediate possession of the property sold. 2 Amer. Lead. Cases (notes by Hare & Wallace), 626, and cases there cited; also, Hitchcock's Case, 26 N. Y. Rep., 68, and Smith's Case, 50 Maine, 96. I rest my opinion on this point entirely upon the weight of authority within which the present case clearly falls. The contract was executory, nothing having been done under it at the time of loss save payment of the \$10,000; possession had not been delivered, and, by its terms, could not have been demanded until the deed was executed. Placing my opinion upon this ground, it becomes unnecessary to inquire what rights the parties to this contract might have had in a Court of Equity, or in what light that court would have regarded the transaction, or how it would have deemed the title to the property as affected thereby." — ED.

¹ Reported in 78 Hun, 109 (1894). — ED.

sold whatever interest in the firm property that passed to him by the assignment to a third party, and before the policy was issued had accounted and been discharged. The assignee had no accounting with the firm in order to ascertain what interest the assignor had, if any, in the surplus, if any, and no claim was ever made upon the firm for anything passing by the assignment. It appeared by the proofs and findings that the defendant's agents, who were, as may be fairly inferred, general agents, knew, at the time of issuing the policy and before, all the facts and circumstances with respect to the individual assignment and the transfer of that interest as above stated.

The answer to the defence, based upon these facts, is twofold: (1) That since the title to the real estate held by a partnership is in the firm and not in the individual members of it, the transfer of the interest of one of the members, before the insurance, had no effect upon the unconditional and sole ownership of the firm. That an assignment by one partner of his share in the partnership stock simply transfers any interest he may have in any surplus remaining after payment of the firm debts and the settlement of the firm accounts. Whether the purchaser of such an interest takes anything whatever by the transfer cannot be known until all the partnership affairs have been settled and adjusted. *Menagh v. Whitwell*, 52 N. Y. 146. The title to the real property, which was the subject of the insurance, was in the partnership firm, and was not affected by the assignment of one of the members. It still remained firm property, since the assignee had no interest in it as such, and whether the sale or transfer by the individual member was anything more than a mere form, or conveyed anything to the assignee, must depend upon the existence of a surplus after the partnership affairs are adjusted. It does not even appear in this case that there would then be any surplus to divide, though that circumstance cannot be regarded as material upon the question whether such a transfer by a member affects or changes the estate or interest which the firm has in the partnership realty.¹ . . .

It appears from the findings that on the 20th of March, 1891, about ten days before the fire, the real estate which was the subject of the insurance was sold by the sheriff under an execution duly issued to him against the firm and a certificate of sale in due form delivered by him to the purchaser, one Aurelia O. Wood, and the remaining and perhaps most important question is whether this sale worked such a change in the interest, title, or possession of the property as to avoid the policy within the meaning of the conditions to which reference has been made. In *Walradt v. Phoenix Ins. Co.*, 136 N. Y. 375, we held that when the subject of the insurance was personal property, that the conditions of the policy were not violated by the mere levy of an execution upon the goods insured. The reasoning of that case, however, plainly leads to the conclusion that it would be otherwise in case the levy had been followed by a sale. The sale of personal property upon an

¹ The omitted passage held that this defence was overthrown by waiver. — ED.

execution divests the owner of his title to the property sold and transfers it to another. But what was said in that case with respect to the effect of a sale upon execution applies to personal property. There was no question in the case with respect to the effect of a sale of real estate, and nothing was decided upon that question. The effect of a sale of real estate upon execution is declared by statute, and no other effect can be given to it. The judgment debtor, or his assignee, or his creditors, may redeem the same within fifteen months thereafter, and the right and title of the judgment debtor is not divested by the sale until the expiration of the period for redemption. (Code C. P. § 1440.) During that time the debtor is entitled to the possession and use or the rents and profits. At the time, therefore, that the property in question was destroyed by fire, the interest, title, or possession of the insured had not been changed. The statute had operated to postpone the effect of the sale upon the interest, title, or possession of the owners until the expiration of the period for redemption. In *Browning v. Home Ins. Co.*, 71 N. Y. 508, the policy contained a provision that if the property be sold or transferred, or any change take place in the title or possession, then in either such case the policy shall be void. The insured entered into a contract in writing for the sale of the premises, and this court held that the conditions of the policy were not violated. It was said that an executory contract for the sale of the property without change of possession did not work a breach of the conditions against a sale or transfer or change in title or possession. That such a condition applies only to a legal transfer which divests the insured of title to or control over the property. Before we could assent to the proposition that in this case there was a breach of the conditions of the policy by the sheriff's sale we would be compelled to overrule numerous cases in this court which, in principle, decide otherwise. *Baley v. Homestead Fire Ins. Co.*, 80 N. Y. 21; *Cone v. Niagara Fire Ins. Co.*, 60 N. Y. 619; *Haight v. Cont. Ins. Co.*, 92 N. Y. 51, 55; *Green v. Homestead F. Ins. Co.*, 82 N. Y. 517.

The judgment must, therefore, be affirmed, with costs.

All concur, except GRAY, J., who dissents upon the ground that the policy was avoided by the change of interest effected by the sale of the property.

*Judgment affirmed.*¹

¹ As to the effect of a judicial sale, see the authorities cited *ante*, p. 613, n.; and also *Collins v. London Assurance Corporation*, 165 Pa. 298, 306-309 (1895); and *Greenlee v. North British & Mercantile Ins. Co.*, 102 Iowa, 427 (1897). — ED.

LAMPASAS HOTEL AND PARK CO. v. PHOENIX
INSURANCE CO.COURT OF CIVIL APPEALS OF TEXAS, 1896. 38 S. W. Rep. 361.¹

THIS was an action upon a policy insuring a hotel. The defence was that the assured corporation had made a deed of trust in breach of a condition contained in the policy. The policy was of the New York standard form, and contained this condition:—

“This entire policy shall be void . . . if the interest of the insured be other than unconditional and sole ownership, or if the subject of the insurance be a building on ground not owned by the insured in fee simple, or if the subject of the insurance be personal property, and be or become incumbered by a chattel mortgage, or if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed, or if any change other than by the death of the insured² take place in the interest, title, or possession of the sub-

¹ The statement has been based upon the opinion. — Ed.

² In *Burbank v. Rockingham Mut. F. Ins. Co.*, 24 N. H. 550 (1852), the insurance was on a grist-mill, and there was a provision that “when any house or other building shall be alienated by sale or otherwise, the policy shall thereupon be void.” A loss occurred after the death of the assured, intestate. It was *held* that there could be a recovery.

In *Lappin v. Charter Oak F. & M. Ins. Co.*, 58 Barb. 325 (1870), a policy on a dwelling-house and furniture promised “to make good unto the said assured, his executors, administrators, and assigns, all such immediate loss . . . as shall happen by fire to the property,” and there was a provision that “in case of any sale, transfer, or change of title, in the property insured . . . , or of any interest therein, such insurance shall be void and cease.” A loss occurred after the death of the assured, intestate. It was *held* that there could be no recovery.

In *Sherwood v. Agricultural Ins. Co.*, 73 N. Y. 447 (1878), the insurance was on a dwelling-house and furniture, and there was a provision that “if without the written consent of this company first had and obtained, the said property shall be sold or conveyed, or the interest of the parties therein be changed in any manner, whether by act of the parties or by operation of law, . . . this policy shall be null and void.” A loss occurred after the death of the assured, testate. It was *held*, affirming the decision of the General Term of the Supreme Court, reported in 10 Hun, 593 (1877), that there could be no recovery.

In *Hine v. Woolworth*, 93 N. Y. 75 (1883), a policy on a dwelling-house and furniture promised “to make good unto the said insured, his heirs, executors, administrators, and assigns, all such loss or damage . . . as shall happen by fire or lightning to the property,” and contained a provision that “if the interest of the insured therein be changed in any manner, whether by act of the insured or by operation of law, . . . this policy shall be null and void until the written consent of the company . . . is obtained.” A loss occurred after the death of the assured, intestate. It was *held*, affirming the decision of the General Term of the Supreme Court, reported *sub nom.* *Hine v. Homestead F. Ins. Co.*, 29 Hun, 84 (1883), that there could be no recovery.

In *Richardson v. German Ins. Co.*, 89 Ky. 571 (1890), a policy on a dwelling-house and furniture promised “to make good unto the said assured, his executors, adminis-

ject of insurance (except change of occupants without increase of hazard), whether by legal process, or judgment, or by voluntary act of the insured, or otherwise."

The policy was for one year. It was issued on July 25, 1894. There was then a deed of trust on the property. On December 26, 1894, the assured company executed another deed of trust on the property, to secure a debt of \$29,500, of which about \$25,000 covered the debt and interest secured by the first deed of trust and the remainder covered money borrowed for running expenses. The property was destroyed by fire on February 10, 1895.

In the District Court of Harris County there was judgment for the defendant. The plaintiff appealed.

Hutchison, Campbell, and Sears, for appellant.

Wm. Thompson, for appellee.

FLY, J.¹ . . . There is authority to sustain the proposition that a renewal of a mortgage that was known by the insurer to exist when the policy was issued will not forfeit the policy. *Insurance Co. v. Saindon* (Kan.), 35 Pac. 15; s. c. 36 Pac. 983; *Bowlus v. Insurance Co.* (Ind. Sup.), 32 N. E. 319. The new mortgage given was more than a renewal of the former mortgage. It was given not only to secure the original debt and accrued interest, but was given as security for other debts, not connected with the original debt. The original mortgage was given to secure a debt due to the Commercial National Bank of Houston, and the last one was given to secure the debt of the bank and one of George Sealey. The last mortgage was given without the knowledge or consent of appellee, and must be viewed as though the first had never existed. . . .

We should conclude that the language of the policy shows that it was not intended that a mortgage given on real property should vitiate the policy, and will call attention to those portions of the policy which indicate this. There is no clause in the policy requiring the disclosure of the existence of any mortgage, and, of course, had there been no disclosure relating thereto, no forfeiture could have been claimed on that ground. It would seem that there was no attempt, therefore, in the policy to guard against existing mortgages. . . . As if to empha-

trators, and assigns, all such immediate loss or damage . . . as shall happen by fire or lightning to the property," and contained a provision that "if the property, or any part thereof, shall be sold, conveyed, incumbered by mortgage or otherwise, or any change takes place in the title, use, occupation, or possession thereof whatever, or if foreclosure proceedings shall be commenced, or if the interest of the insured in said property, or any part thereof, now is or shall become any other or less than a perfect legal and equitable title or ownership, free from any lien whatever, . . . this policy shall be void." A loss occurred after the death of the assured, intestate. It was held that there could be a recovery.

And see *Forest City Ins. Co. v. Hardesty*, 182 Ill. 39 (1899). — ED.

¹ The passages omitted here and elsewhere in the opinion were devoted principally to stating the case and quoting from *Walradt v. Phoenix Ins. Co.*, ante, p. 625 (1893), and *Green v. Homestead F. Ins. Co.*, 82 N. Y. 517 (1880). — ED.

size this line of action, and to show clearly that mortgages on insured real estate were not prohibited, it is specially provided that, "if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage," then the policy should become void. The language used seems to exclude the idea that it was contemplated that the execution of a mortgage on real property would work a forfeiture of the policy. If the words "any change of interest" would include mortgages on real estate, why would it not include mortgages on personal property? . . . It was not claimed by appellee in the lower court, nor is it claimed here, that the execution of the mortgage would operate as a forfeiture by virtue of any other than the provision in regard to change of interest. It is not claimed that the risk was increased by the execution of the mortgage, but, on the other hand, it was agreed by appellee in the lower court that the mortgage did not "in any way increase the hazard or the risk of the insurance company," and that it did not lessen the plaintiff's vigilance and care in preventing the destruction or loss of the property by fire.

It is contended by appellee that the case of *Insurance Co. v. Clarke*, 79 Tex. 23, 15 S. W. 166, is decisive of this, but we are of the opinion that the decision in that case is not applicable to the contract of insurance in this case. In that case it was provided in the policy that the insured warranted that there was no mortgage, trust deed, or lien upon the property insured, or any part of the same, and that the policy would become void "if the interest of the assured in the property, whether as owner, trustee, consignee, agent, mortgagee, or lessee, or otherwise, is not truly stated in this policy, or if any change take place in the title, location, interest, or possession (except in case of succession by reason of death of the assured), whether by sale, transfer, or conveyance, in whole or in part, or by legal process, or by judicial decree." The sole defence was that the insured had, without the knowledge or consent of the insurer, executed a mortgage on the property. There was no attempt to pass upon what constituted a change of interest, but it was held that the execution and delivery of a mortgage operated a forfeiture of the policy, because a mortgage was a "conveyance" within the terms of the contract. There was in that contract a special provision requiring disclosure of the fact that a mortgage existed when the policy existed. There was no special provision as to the execution of mortgages on personal property, and there was a provision that a change of interest by a conveyance of the property in whole or in part should render the contract void. We are, however, construing other and different language from that employed in the policy in that case, and what is said in it is not applicable to this. It may be well to note that the case of *Insurance Co. v. Clarke* is in conflict with the construction placed by a number of the ablest courts in America upon the identical language construed in it. Judge *v. Insurance Co.*, 132 Mass. 521, and authorities therein cited. . . . As has been so often said by courts, forfeitures are not favored by the law, and

the language of an insurance policy will not, by judicial construction, be given sufficient elasticity to encompass a forfeiture, but the language used must plainly show that a forfeiture was intended by the parties to the contract to result in certain contingencies. We are of the opinion that under the facts appellant was entitled to a judgment, and the judgment of the District Court is therefore reversed, and judgment here rendered in favor of appellant for the amount sued for, as well as interest and costs.¹

¹ *Acc.*: Sun Fire Office v. Clark, 53 Ohio St. 414 (1895); Koshland v. Hartford Ins. Co., 31 Ore. 402 (1897); Peck v. Girard F. & M. Ins. Co., 16 Utah, 121 (1897).

Contra: Edmands v. Mutual Safety F. Ins. Co., 1 Allen, 311 (1861); Sossaman v. Pamlico Banking & Ins. Co., 78 N. Car. 145 (1878).

See Ayres v. Hartford F. Ins. Co., 17 Iowa, 176 (1864).

In Sun Fire Office v. Clark, *supra*, MINSHALL, C. J., for the court, said:—

"It seems well settled in this state and elsewhere, that the making of a mortgage does not violate a provision in a policy of insurance, that any change in the title, interest, or possession of the assured in the property, without the assent of the insurer, shall avoid the policy.

"The mortgage being simply a security for the debt, is extinguished by its payment without any re-conveyance. The mortgage of itself does not make the mortgagee a freeholder, and a judgment recovered against him does not become a lien on the land, nor is it liable to the dower-rights of his wife. It has none of the incidents of a legal or equitable title. True, upon foreclosure and sale, the mortgagee may by purchase at the sale become the owner of the land; but this is a right he enjoys in common with all others. It is also true, that as between the mortgagor and mortgagee, the latter, on condition broken, is regarded as the legal, but not as the equitable owner. The mortgagor remains the equitable owner until the property is sold under the order of the court. Until then, he may, by paying the debt, redeem the land. So that his insurable interest in the property remains the same—which is the *interest* meant by the use of the word in the language of the policy, where it occurs. If lost by fire he remains liable on the debt, and has, by reason of the loss, so much the less property with which to pay it. Hence, he has the same interest in its preservation after as before making the mortgage; and the moral hazard of the insurer is not increased. Byers v. Insurance Co., 35 Ohio St. 606; Kronk v. Insurance Co., 91 Pa. St. 300; Insurance Co. v. Stinson, 103 U. S. 25, 29; Barry v. Insurance Co., 110 N. Y. 1; Judge v. Insurance Co., 132 Mass. 521; Bryan v. Insurance Co., 145 Mass. 389; Insurance Co. v. Spankeble, 52 Ill. 53; Insurance Co. v. Lawrence, 2 Peters Rep. 25; Jecko v. Insurance Co., 7 Mo. App. 308; Guest v. Insurance Co., 66 Mich. 98; May on Insurance, sec. 272.

"The general current of authority is in accordance with these cases; and while a different view has been taken by the courts of some of the states, it will be found that, as a rule, this has proceeded from the old conception that a mortgage is to be regarded as a conveyance; or from a more rigid adherence to the terms of the policy, in disregard of the rule that provisions imposing forfeitures should be strictly construed.

"In giving effect to the language of any instrument, regard must be had to its purpose. A mere change in title, where the owner retains the same actual interest in the property—the same insurable interest—is not within the reason of the language employed. The object of the provision containing the language was to protect the insurer against a possible change in the owner's insurable interest in the property by a sale, transfer, or conveyance, whereby the hazards of the contract into which he had entered might be increased without his consent. Hence, the generality of the language employed must be restrained to the reason and object of its use by the parties. To do otherwise would be to stick in the letter of the language employed by

the parties to express their meaning, without regard to its spirit. May on Insurance, sec. 273; *Ayres v. Insurance Co.*, 17 Iowa, 176, 185."

On alienation and the like, in general, see also:—

- Adams v. Rockingham Mut. F. Ins. Co.*, 29 Me. 292 (1849);
- Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6, 26-27 (1875);
- Keeney v. Home Ins. Co.*, 71 N. Y. 396 (1877);
- Manufacturers' F. & M. Ins. Co. v. Western Assurance Co.*, 145 Mass. 419 (1888);
- Brown v. Cotton and Woolen Mfrs.' Mut. Ins. Co.*, 156 Mass. 587 (1892);
- Gerling v. Agricultural Ins. Co.*, 39 W. Va. 689, 698-701 (1892);
- Lodge v. Capital Ins. Co.*, 91 Iowa, 103, 106-107 (1894);
- Orr v. Hanover F. Ins. Co.*, 158 Ill. 149 (1895);
- Milwaukee Trust Co. v. Lancashire Ins. Co.*, 95 Wis. 192 (1897);
- Pioneer S. & L. Co. v. St. Paul F. & M. Ins. Co.*, 68 Minn. 170 (1897);
- Westchester F. Ins. Co. v. Jennings*, 70 Ill. App. 539 (1897). — ED.

SECTION III.

*Life Insurance.*¹

NIGHTINGALE AND ANOTHER, EXECUTORS, v. STATE MUTUAL LIFE INS. CO.

SUPREME COURT OF RHODE ISLAND, 1857. 5 R. I. 38.²

ASSUMPSIT by the executors of the Rt. Rev. J. P. K. Henshaw, Bishop of Rhode Island, to recover the amount of a policy upon the testator's life. The policy took effect April 1, 1848, and the annual premiums were paid until the testator's death, which occurred July 20, 1852. The policy provided that: "The person whose life is thus assured may reside constantly anywhere within the limits of New England, or of the states of New York, New Jersey, Pennsylvania, and Ohio; . . . if such person . . . shall, between the first day of July and the fifteenth day of October, go into any other portion of the United States, beyond the limits of constant residence permitted herein, and be in such other portions of the United States more than five days, . . . this policy shall be void, and all payments thereon forfeited to the company; but in case of forfeiture from the above or any other cause, the party interested shall have the benefit of such equitable adjustment as may, from time to time, be provided for by the board of directors."

In July, 1852, the testator went to Maryland, to exercise temporarily the episcopal functions of an absent bishop. After being thus engaged for about ten days, he was stricken with apoplexy, and died. The death was neither caused nor hastened by change of climate, but was due exclusively to constitutional causes. The executors applied to the board of directors for the whole or some portion of the sum insured, as a matter of equitable adjustment. The directors voted to pay the office value for surrender of the policy, viz. \$169.65. The executors did not accept this offer, but brought action for \$1,500, the amount of the policy. By agreement, the case was submitted to the court both as to law and as to facts.

T. A. Jenckes, for the plaintiffs.

Abraham Payne, for the defendants.

AMES, C. J. It is admitted that the late Bishop Henshaw did, without consent of the defendant company issuing this policy, "first had and indorsed thereon," and between the 1st day of July and the 15th day of October, 1852, go into the state of Maryland, a portion of

¹ For express conditions avoiding the contract because of misstatements in the application, see *ante*, Chap. V., sect. III.—ED.

² The statement has been rewritten.—ED.

the United States beyond the limits of constant residence permitted by the policy, and there remain more than five days, to wit, about ten days, at the end of which period, and about the 20th day of July of that year, he died. The holy errand on which he went, the absence of all connection between his going and remaining, and the cause of his death, are not permitted to swerve our judgment from the legal effect of so plain a breach of a condition of this policy, upon the occurring of which it is, by its own terms, "to be void, and all payments thereon to be forfeited to the company." It is true, that by the qualifying clause of the condition of forfeiture, the executors of the assured would have been entitled to the benefit of any equitable adjustment provided for by existing rules established by the directors, or accorded by their special act. Whether such rules should be established, or such special dispensation from the forfeiture should be granted, was, as it seems to us, left by this qualifying clause wholly to the discretion of the directors, who "from time to time" might act in the matter; except indeed, that they would not be permitted to change, to the injury of the assured, an established rule of adjustment existing at the time of the act or omission of forfeiture. The construction which supposes that such discretion was designed by both parties to the contract to be reposed in the directors, as fair arbiters for all interested, borrows support from the fact, that, under the charter of this company, the directors are elected by the joint votes of the assured and holders of the guaranty stock, and are to be chosen in moieties, out of these two classes of the members of the corporation. No rule of equitable adjustment applicable to the case at bar appears to have been established by the directors of this company, and the request made to them by the claimants for special action in their favor was, upon full consideration, rejected. We cannot interfere with their discretion in this matter without doing violence to the contract upon which we are called to adjudicate, and must therefore render

*Judgment for the defendants.*¹

HAMMOND v. AMERICAN MUTUAL LIFE INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1858. 10 Gray, 306.

ACTION of contract upon a policy of insurance, insuring the life of John Hammond, in consideration of a premium "to be paid annually in advance, during the term of this policy, or half or quarter yearly in advance, with interest on each portion deferred;" and payable to the plaintiff "within ninety days after proof of the death of the said John Hammond, provided this policy is then in force." The policy upon its

¹ See *Hathaway v. Trenton Mut. L. & F. Ins. Co.*, 11 Cush. 448 (1853). — ED.

face declared that "in case the premium charged hereon shall not be paid annually in advance, or half or quarter yearly in advance, on or before the day, at noon, on which the same shall become due and payable," it should "cease and terminate, and neither the whole nor any part of the sum herein agreed to be paid shall be due or payable;" and that the policy was "granted and accepted in reference to all the conditions herein contained," and others annexed. The "conditions of insurance" annexed to the policy, provided that "policies are null and void during the nonpayment of any premium due; but the company will, at their discretion, receive a payment after due, and continue the policy, if satisfied that the party remains in perfect health."

Upon the back of the policy were these words: "Premiums payable 1st January; or 1st January and 1st July; or 1st January, 1st April, 1st July, and 1st October, at noon."

The parties submitted the case to the decision of the court upon the policy and the following facts: John Hammond paid the premiums quarter yearly, as provided by the policy, and was taken sick on the 24th of September, and afterwards confined to his house, but not thought to be past recovery until the morning of Sunday, October 1st, 1854, and on that day, between the hours of two and four in the afternoon, died, without having paid the premium for the quarter which began on that day. The defendants' office was not open on Sunday, and no one was there to receive the premium, but this was not known to the plaintiff, and no attempt was made to pay it until Monday, October 2d, in the forenoon, when it was tendered and refused. The death of the assured was notified by the plaintiff to the defendants on the 18th of December, 1854.

L. Mason, for the plaintiff.

H. A. Scudder, for the defendants.

DEWEY, J. There can be no doubt as to the character of this contract, and that the policy would be forfeited and avoided by the neglect of the assured to pay the premium chargeable thereon at any quarter day when the same became due and payable. The policy was granted by the one party and accepted by the other with a recital therein that the same was to be taken "in reference to all the conditions herein contained." Among those conditions it is provided that "in case the premium charged hereon shall not be paid annually in advance, or half or quarter yearly in advance, on or before the day, at noon, on which the same shall become due and payable," then the same shall "cease and terminate, and neither the whole nor any part of the sum agreed to be paid shall be due or payable."

The whole inquiry is reduced to this point, When was the quarter yearly payment for the quarter succeeding that commencing on the 1st of July, 1854, due, and by law required to be paid? Adopting the proper division of the year into four quarters, and commencing on the 1st of April, 1854, the third quarter would commence on the 1st of October, and the premium to be paid for that quarter, irrespectively

of the circumstance that the first day of October occurred on Sunday, would be required to be paid on that day. The assured had, however, until the 1st of October at noon to pay the premium. He was not in default before that time, unless it be that in case the 1st of October occurring on Sunday, he was required to pay the premium on the Saturday preceding. The only question in the case seems to be whether Sunday is to be excluded as a day of payment, and the payment properly postponed till Monday, or whether the party, to save his policy from being forfeited, must make his quarterly payment on or before Saturday, when the quarter day falls on Sunday.

We have on the one hand the rule as to commercial paper, or negotiable notes payable with grace, requiring payment to be made on Saturday where the third day of grace falls on Sunday; and on the other a rule, generally adopted as to other contracts to pay money or perform other specific duties on a certain day named, that if such day falls on Sunday the day of performance is postponed till Monday. *Salter v. Burt*, 20 Wend. 205.

In reference to notes payable on a certain day, but entitled to three days' grace, it is said that in such case the note by its terms would be due and payable two days earlier than Saturday, and that what was originally a mere indulgence to casualty or oversight should not be extended, and therefore if the last of three days of grace falls on Sunday, the payment must be made on Saturday, and that it was more reasonable to take from than to add to a period of time thus originally allowed as mere grace and favor. But as to other contracts, which by the face of the instrument required a payment on a day which proves to be Sunday, to discharge literally the promise or duty, the law seems to sanction the postponement of the time for doing the same till the Monday following. In other words, Sunday is not a legal day for the performance of contracts and doing secular business. The statute law forbids all such acts. The party paying and the party receiving money on that day in discharge of a contract would subject themselves to a penalty for so doing. Sunday was not a day contemplated by the parties as embraced in the stipulation to pay a quarterly premium on the first day of October in each and every year during the life of the party assured. The defendants had no office open on that day, and were under no obligation to receive the payment of the premium on that day, if the same had been tendered by the assured. Such being the case, the assured was under no obligation to do what would have been not only an illegal act, but also one which the other party was not bound to recognize. In this view of the case there was no such default on the part of the assured, in not paying the premium fully due on the 1st of October, as should be held to terminate the policy.

It is urged on the part of the defendants that this was not an ordinary contract to be performed on a day certain, and that the assured was under no legal obligation to pay subsequent premiums after the expiration of a quarter of a year; but such payment was a voluntary

act, to be done or not done at his election; and therefore that the rule of law applied to a contract binding a party to do some act at some future named period, which proved to be Sunday, has no proper application here. But we think the rule as to the time of making the payment is the same in both cases. It was the purpose of the assured to obtain a policy to continue during his life. Such policy was issued to him, but upon condition that he should make his quarter yearly payments regularly in advance. It was obligatory on him to pay, if he would continue the policy in force. The day of payment was on this occasion the first day of October. That day, as it appears, fell on Sunday; and this being so, he was entitled to the ordinary privilege of discharging his obligation on the Monday following. The quarter yearly payment, it is true, in terms became payable on Sunday noon; but that day was not a day for secular business, and therefore, legally speaking, Sunday was not the day "at which the same become payable;" and so, by the very provisions of the policy, properly construed, the quarterly premium was seasonably tendered on Monday.

*Judgment for the plaintiff.*¹

WILLIAMS v. WASHINGTON LIFE INS. CO.

SUPREME COURT OF IOWA, 1871. 31 Iowa, 541.²

APPEAL from Dubuque Circuit Court.

The action was upon a policy of insurance procured by Mary F. Williams upon her own life for the benefit of her daughter, Isabella Williams. After paying an initial premium of \$16.66 and one quarterly premium of \$16.67, Mary F. Williams surrendered the policy in consideration of the receipt of \$40.00. She died shortly after the next quarterly premium would have been payable; but it was not paid. The action was brought by Isabella Williams. Under instructions the jury found for the plaintiff. The defendant appealed.

Shiras, Van Duzee & Henderson, for the appellant.

Adams & Robinson, for the appellee.

COLE, J. The court instructed the jury that, "by the terms of the policy, a mere omission to pay the premiums when due would not alone work a forfeiture; if a forfeiture of the policy is claimed for the non-payment of premiums, it must be shown that an agent of the company presented a receipt for the premiums to a person liable to pay it, and such person refused or neglected to make the payment thereof." This is assigned as error.

The language of the policy is: "If the said premiums shall not be

¹ *Acc.*: Campbell v. International L. Ass. Co., 4 Bosworth, 298 (1859). — ED.

² The statement has been rewritten. — ED.

paid on or before the days above mentioned for the payment thereof, at the office of the company in the city of New York (unless otherwise expressly agreed in writing), or to the agents when they produce receipts signed by the president and secretary, then, and in every such case, the company shall not be liable for the payment of the sum insured or any part thereof," etc. In our view, the true construction of this clause of the policy is, that the premiums are to be paid on the days fixed by the policy (as amended by the agreement for quarterly payments) in any event; and the assured might pay, *on those days*, either at the office of the company in New York, or to agents; but the payment could only be made to such agents as should have and produce receipts therefor signed by the president or secretary — the receipts thus signed being evidence of the authority of the agents to receive the premiums.

This construction is in accord with the plain and ordinary meaning of the language used, with the uniform rule of insurance, requiring prompt and advance payments, and with even a technical construction of the language. The policy fixes *the time* for payment, and then says it may be made to the company or to agents when they produce receipts, etc. *When* means *at which time* (Bouv. Law Dic.). Payment may, therefore, be made to the company at the time fixed, or to agents *at which time*, to wit: the time fixed in the policy for the payment, they producing receipts, etc.

It being conceded that the premiums due on September 1 and December 1, 1869, were without excuse not paid nor offered to be paid, it is fatal to plaintiff's case. We need not, therefore, inquire whether the mother could or could not for a consideration surrender or cancel the policy. It having been done, and no objection made to it, no premiums paid or act done or claim made under the policy until after the death of the assured, the plaintiff cannot recover. It was error to give the instruction.

Reversed.

NEW YORK LIFE INS. CO. v. STATHAM ET AL.

SAME v. SEYMS.

MANHATTAN LIFE INS. CO. v. BUCK, EXECUTOR.

SUPREME COURT OF THE UNITED STATES, 1876. 93 U. S. 24.

THE first of these cases is here on appeal from, and the second and third on writs of error to, the Circuit Court of the United States for the Southern District of Mississippi.

The first case is a bill in equity, filed to recover the amount of a policy of life assurance, granted by the defendant (now appellant) in 1851, on the life of Dr. A. D. Statham, of Mississippi, from the proceeds of certain funds belonging to the defendant attached in the

hands of its agent at Jackson, in that state. It appears from the statements of the bill that the annual premiums accruing on the policy were all regularly paid, until the breaking out of the late civil war, but that, in consequence of that event, the premium due on the 8th of December, 1861, was not paid; the parties assured being residents of Mississippi, and the defendant a corporation of New York. Dr. Statham died in July, 1862.

The second case is an action at law against the same defendant to recover the amount of a policy issued in 1859 on the life of Henry S. Seyms, the husband of the plaintiff. In this case, also, the premiums had been paid until the breaking out of the war, when, by reason thereof, they ceased to be paid, the plaintiff and her husband being residents of Mississippi. He died in May, 1862.

The third case is a similar action against the Manhattan Life Insurance Company of New York, to recover the amount of a policy issued by it in 1858, on the life of C. L. Buck, of Vicksburg, Miss.; the circumstances being substantially the same as in the other cases.

Each policy is in the usual form of such an instrument, declaring that the company, in consideration of a certain specified sum to it in hand paid by the assured, and of an annual premium of the same amount to be paid on the same day and month in every year during the continuance of the policy, did assure the life of the party named, in a specified amount, for the term of his natural life. Each contained various conditions, upon the breach of which it was to be null and void; and amongst others the following: "That in case the said [assured] shall not pay the said premium on or before the several days hereinbefore mentioned for the payment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured, or in any part thereof, and this policy shall cease and determine." The Manhattan policy contained the additional provision, that, in every case where the policy should cease or become null and void, all previous payments made thereon should be forfeited to the company.

The non-payment of the premiums in arrear was set up in bar of the actions; and the plaintiffs respectively relied on the existence of the war as an excuse, offering to deduct the premiums in arrear from the amounts of the policies.

The decree and judgments below were against the defendants.

Mr. *Matt. H. Carpenter* and Mr. *James A. Garfield*, for the appellant in the first case, and for the plaintiff in error in the second. The third case was submitted by Mr. *Alfred Pitman* for the plaintiff in error.

Mr. *Clinton L. Rice*, for the appellees in the first case, and Mr. *Joseph Casey*, for the defendant in error in the second. The third case was submitted by Mr. *W. P. Harris*, for the defendant in error.

Mr. JUSTICE BRADLEY, after stating the case, delivered the opinion of the court.

We agree with the court below, that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. It has been contended that the payment of each premium is the consideration for insurance during the next following year,—as in fire policies. But the position is untenable. It often happens that the assured pays the entire premium in advance, or in five, ten, or twenty annual instalments. Such instalments are clearly not intended as the consideration for the respective years in which they are paid; for, after they are all paid, the policy stands good for the balance of the life insured, without any further payment. Each instalment is, in fact, part consideration of the entire insurance for life. It is the same thing, where the annual premiums are spread over the whole life. The value of assurance for one year of a man's life when he is young, strong, and healthy, is manifestly not the same as when he is old and decrepit. There is no proper relation between the annual premium and the risk of assurance for the year in which it is paid. This idea of assurance from year to year is the suggestion of ingenious counsel. The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount assured, a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole insurance.

But whilst this is true, it must be conceded that promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of the premiums when due, but on compounding interest upon them. It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter confusion. It is like the forfeiture of shares in mining enterprises, and all other hazardous undertakings. There must be power to cut off unprofitable members, or the success of the whole scheme is endangered. The insured parties are associates in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all; for out of the coexistence of many risks arises the law of average, which underlies the whole business. An essential feature of this scheme is the mathematical calculations referred to, on which the premiums and amounts assured are based. And these calculations, again, are based on the assumption of average mortality, and of prompt payments and compound interest thereon. Delinquency cannot be tolerated nor redeemed, except at the option of the company. This has always been the understanding and the practice in this de-

partment of business. Some companies, it is true, accord a grace of thirty days, or other fixed period, within which the premium in arrear may be paid, on certain conditions of continued good health, &c. But this is a matter of stipulation, or of discretion, on the part of the particular company. When no stipulation exists, it is the general understanding that time is material, and that the forfeiture is absolute if the premium be not paid. The extraordinary and even desperate efforts sometimes made, when an insured person is *in extremis*, to meet a premium coming due, demonstrates the common view of this matter.

The case, therefore, is one in which time is material and of the essence of the contract. Non-payment at the day involves absolute forfeiture, if such be the terms of the contract, as is the case here. Courts cannot with safety vary the stipulation of the parties by introducing equities for the relief of the insured against their own negligence.

But the court below bases its decision on the assumption that, when performance of the condition becomes illegal in consequence of the prevalence of public war, it is excused, and forfeiture does not ensue. It supposes the contract to have been suspended during the war, and to have revived with all its force when the war ended. Such a suspension and revival do take place in the case of ordinary debts. But have they ever been known to take place in the case of executory contracts in which time is material? If a Texas merchant had contracted to furnish some Northern explorer a thousand cans of preserved meat by a certain day, so as to be ready for his departure for the North Pole, and was prevented from furnishing it by the civil war, would the contract still be good at the close of the war five years afterwards, and after the return of the expedition? If the proprietor of a Tennessee quarry had agreed, in 1860, to furnish, during the two following years, ten thousand cubic feet of marble, for the construction of a building in Cincinnati, could he have claimed to perform the contract in 1865, on the ground that the war prevented an earlier performance?

The truth is, that the doctrine of the revival of contracts suspended during the war is one based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive.

In the case of life insurance, besides the materiality of time in the performance of the contract, another strong reason exists why the policy should not be revived. The parties do not stand on equal ground in reference to such a revival. It would operate most unjustly against the company. The business of insurance is founded on the law of averages; that of life insurance eminently so. The average rate of mortality is the basis on which it rests. By spreading their risks over a large number of cases, the companies calculate on this average with reasonable certainty and safety. Anything that interferes with it deranges the security of the business. If every policy lapsed by reason of the war should be revived, and all the

back premiums should be paid, the companies would have the benefit of this average amount of risk. But the good risks are never heard from; only the bad are sought to be revived, where the person insured is either dead or dying. Those in health can get new policies cheaper than to pay arrearages on the old. To enforce a revival of the bad cases, whilst the company necessarily lose the cases which are desirable, would be manifestly unjust. An insured person, as before stated, does not stand isolated and alone. His case is connected with and co-related to the cases of all others insured by the same company. The nature of the business, as a whole, must be looked at to understand the general equities of the parties.

We are of opinion, therefore, that an action cannot be maintained for the amount assured on a policy of life insurance forfeited, like those in question, by non-payment of the premium, even though the payment was prevented by the existence of the war.

The question then arises, Must the insured lose all the money which has been paid for premiums on their respective policies? If they must, they will sustain an equal injustice to that which the companies would sustain by reviving the policies. At the very first blush, it seems manifest that justice requires that they should have some compensation or return for the money already paid, otherwise the companies would be the gainers from their loss; and that from a cause for which neither party is to blame. The case may be illustrated thus: Suppose an inhabitant of Georgia had bargained for a house, situated in a Northern city, to be paid for by instalments, and no title to be made until all the instalments were paid, with a condition that, on the failure to pay any of the instalments when due, the contract should be at an end, and the previous payments forfeited; and suppose that this condition was declared by the parties to be absolute and the time of payment material. Now, if some of the instalments were paid before the war, and others accruing during the war were not paid, the contract, as an executory one, was at an end. If the necessities of the vendor obliged him to avail himself of the condition, and to resell the property to another party, would it be just for him to retain the money he had received? Perhaps it might be just if the failure to pay had been voluntary, or could, by possibility, have been avoided. But it was caused by an event beyond the control of either party,—an event which made it unlawful to pay. In such case, whilst it would be unjust, after the war, to enforce the contract as an executory one against the vendor, contrary to his will, it would be equally unjust in him, treating it as ended, to insist upon the forfeiture of the money already paid on it. An equitable right to some compensation or return for previous payments would clearly result from the circumstances of the case. The money paid by the purchaser, subject to the value of any possession which he may have enjoyed, should, *ex æquo et bono*, be returned to him. This would clearly be demanded by justice and right.

And so, in the present case, whilst the insurance company has a right to insist on the materiality of time in the condition of payment of premiums, and to hold the contract ended by reason of non-payment, they cannot with any fairness insist upon the condition, as it regards the forfeiture of the premiums already paid; that would be clearly unjust and inequitable. The insured has an equitable right to have this amount restored to him, subject to a deduction for the value of the assurance enjoyed by him whilst the policy was in existence; in other words, he is fairly entitled to have the equitable value of his policy.

As before suggested, the annual premiums are not the consideration of assurance for the year in which they are severally paid, for they are equal in amount; whereas, the risk in the early years of life is much less than in the later. It is common knowledge, that the annual premiums are increased with the age of the person applying for insurance. According to approved tables, a person becoming insured at twenty-five is charged about twenty dollars annual premium on a policy of one thousand dollars, whilst a person at forty-five is charged about thirty-eight dollars. It is evident, therefore, that, when the younger person arrives at forty-five, his policy has become, by reason of his previous payments, of considerable value. Instead of having to pay, for the balance of his life, thirty-eight dollars per annum, as he would if he took out a new policy on which nothing had been paid, he has only to pay twenty dollars. The difference (eighteen dollars per annum during his life) is called the equitable value of his policy. The present value of the assurance on his life exceeds by this amount what he has yet to pay. Indeed, the company, if well managed, has laid aside and invested a reserve fund equal to this equitable value, to be appropriated to the payment of his policy when it falls due. This reserve fund has grown out of the premiums already paid. It belongs, in one sense, to the insured who has paid them, somewhat as a deposit in a savings-bank is said to belong to the person who made the deposit. Indeed, some life-insurance companies have a standing regulation by which they agree to pay to any person insured the equitable value of his policy whenever he wishes it; in other words, it is due on demand. But whether thus demandable or not, the policy has a real value corresponding to it, — a value on which the holder often realizes money by borrowing. The careful capitalist does not fail to see that the present value of the amount assured exceeds the present value of the annuity or annual premium yet to be paid by the assured party. The present value of the amount assured is exactly represented by the annuity which would have to be paid on a new policy; or, thirty-eight dollars per annum in the case supposed, where the party is forty-five years old; whilst the present value of the premiums yet to be paid on a policy taken by the same person at twenty-five is but little more than half that amount. To forfeit this excess, which fairly belongs to the assured, and is fairly due from the company, and

which the latter actually has in its coffers, and to do this for a cause beyond individual control, would be rank injustice. It would be taking away from the assured that which had already become substantially his property. It would be contrary to the maxim, that no one should be made rich by making another poor.

We are of opinion, therefore, first, that as the companies elected to insist upon the condition in these cases, the policies in question must be regarded as extinguished by the non-payment of the premiums, though caused by the existence of the war, and that an action will not lie for the amount insured thereon.

Secondly, that such failure being caused by a public war, without the fault of the assured, they are entitled *ex æquo et bono* to recover the equitable value of the policies with interest from the close of the war.

It results from these conclusions that the several judgments and the decree in the cases before us, being in favor of the plaintiffs for the whole sum assured, must be reversed, and the records remanded for further proceedings. We perceive that the declarations in the action at law contain no common or other counts applicable to the kind of relief which, according to our decision, the plaintiffs are entitled to demand; but as the question is one of first impression, in which the parties were necessarily somewhat in the dark with regard to their precise rights and remedies, we think it fair and just that they should be allowed to amend their pleadings. In the equitable suit, perhaps, the prayer for alternative relief might be sufficient to sustain a proper decree; but, nevertheless, the complainants should be allowed to amend their bill, if they shall be so advised.

In estimating the equitable value of a policy, no deduction should be made from the precise amount which the calculations give, as is sometimes done where policies are voluntarily surrendered, for the purpose of discouraging such surrenders; and the value should be taken as of the day when the first default occurred in the payment of the premium by which the policy became forfeited. In each case the rates of mortality and interest used in the tables of the company will form the basis of the calculation.

*The decree in the equity suit and the judgments in the actions at law are reversed, and the causes respectively remanded to be proceeded with according to law and the directions of this opinion.*¹

MR. CHIEF JUSTICE WAITE. I agree with the majority of the court in the opinion that the decree and judgments in these cases should be

¹ Other cases on war are. *O'Reily v. Mutual Life Ins. Co.*, 2 Abb. Pr. n. s. 167 (1866); *Robinson v. International L. Ass. Soc.*, 42 N. Y. 54 (1870); *New York L. Ins. Co. v. Clopton*, 7 Bush, 179 (1870); *Manhattan L. Ins. Co. v. Warwick*, 20 Gratt. 614 (1871); *Dillard v. Manhattan L. Ins. Co.*, 44 Ga. 119 (1871); *Statham v. N. Y. Life Ins. Co.*, 45 Miss. 581 (1871); *Hamilton v. Mutual Life Ins. Co.*, 9 Blatch. 234 (1871);

reversed, and that the failure to pay the annual premiums as they matured put an end to the policies, notwithstanding the default was occasioned by the war; but I do not think that a default, even under such circumstances, raises an implied promise by the company to pay the assured what his policy was equitably worth at the time. I therefore dissent from that part of the judgment just announced which remands the causes for trial upon such a promise.

MR. JUSTICE STRONG. While I concur in a reversal of these judgments and the decree, I dissent entirely from the opinion filed by a majority of the court. I cannot construe the policies as the majority have construed them. A policy of life insurance is a peculiar contract. Its obligations are unilateral. It contains no undertaking of the assured to pay premiums; it merely gives him an option to pay or not, and thus to continue the obligation of the insurers, or terminate it at his pleasure. It follows that the consideration for the assumption of the insurers can in no sense be considered an annuity consisting of the annual premiums. In my opinion, the true meaning of the contract is, that the applicant for insurance, by paying the first premium, obtains an insurance for one year, together with a right to have the insurance

New York L. Ins. Co. v. White, 2 Ins. L. J. 917 (Va. Special Court of Appeals, 1872), s. c. 4 Bigelow's L. & A. Ins. Rep. 471; Cohen v. New York Mut. L. Ins. Co., 50 N. Y. 610 (1872); Sands v. New York L. Ins. Co., 50 N. Y. 626 (1872); Martine v. International L. Ins. Co., 53 N. Y. 339 (1873); Hancock v. New York L. Ins. Co., 11 Fed. Cas. 402 (1873); Tait v. New York L. Ins. Co., 1 Flippin, 288 (1873); Mutual Benefit L. Ins. Co. v. Atwood, 24 Gratt. 497 (1874); Mutual Benefit L. Ins. Co. v. Hill-yard, 37 N. J. L. (8 Vroom) 444 (1874); Worthington v. Charter Oak L. Ins. Co., 41 Conn. 372 (1874); Bird v. Penn Mutual L. Ins. Co., 3 Fed. Cas. 430 (1876); Smith v. Charter Oak L. Ins. Co., 64 Mo. 330 (1876); Insurance Co. v. Davis, 95 U. S. 425 (1877); Owen v. New York L. Ins. Co., 1 Hughes, 322 (1877); Diboll v. Ætna L. Ins. Co., 32 La. Ann. 179, 182 (1880); Ellis v. Connecticut Mut. L. Ins. Co., 19 Blatch. 383 (1881); Abell v. Penn Mut. L. Ins. Co., 18 W. Va. 400, 422-440 (1881); Clemmitt v. New York Life Ins. Co., 76 Va. 355 (1882).

In Roehner v. Knickerbocker Life Ins. Co., 63 N. Y. 160, 167-168 (1875), FOLGER, J., for the court, said:—

"The contract of life insurance is *sui generis*. It is one-sided. By a strict observance of the conditions of it, the insured may hold the insurers to their contract, while they have not the power or the right to compel him to remain in contract relations with them longer than he chooses. Thus it differs widely from a lease. For this reason the clauses of forfeiture in policies of life insurance have been construed literally, and on breach of condition the policies have been held avoided in favor of the insurers without demand or other notice of election on their part."

In Thompson v. Insurance Co., 104 U. S. 252, 260 (1881), BRADLEY, J., for the court, said:—

"Courts do not favor forfeitures, but they cannot avoid enforcing them when the party by whose default they are incurred cannot show some good and stable ground in the conduct of the other party, on which to base a reasonable excuse for the default. . . We do not accept the position that the payment of the annual premium is a *condition precedent* to the continuance of the policy. That is untrue. It is a condition subsequent only, the non-performance of which may incur a forfeiture of the policy, or may not, according to the circumstances. It is always open for the insured to show a waiver."—*Ed*

continued from year to year during his life, upon payment of the same annual premium, if paid in advance. Whether he will avail himself of the refusal of the insurers, or not, is optional with him. The payment *ad diem* of the second or any subsequent premium is, therefore, condition precedent to continued liability of the insurers. The assured may perform it or not, at his option. In such a case, the doctrine that accident, inevitable necessity, or the act of God, may excuse performance, has no existence. It is for this reason that I think the policies upon which these suits were brought were not in force after the assured ceased to pay premiums. And so, though for other reasons, the majority of the court holds; but they hold, at the same time, that the assured in each case is entitled to recover the surrender, or what they call the "equitable value of the policy." This is incomprehensible to me. I think it has never before been decided that the surrender value of a policy can be recovered by an assured, unless there has been an agreement between the parties for a surrender; and certainly it has not before been decided that a supervening state of war makes a contract between private parties, or raises an implication of one.

Mr. JUSTICE CLIFFORD, with whom concurred Mr. JUSTICE HUNT, dissenting.

Where the parties to an executory money-contract live in different countries, and the governments of those countries become involved in public war with each other, the contract between such parties is suspended during the existence of the war, and revives when peace ensues; and that rule, in my judgment, is as applicable to the contract of life insurance as to any other executory contract. Consequently, I am obliged to dissent from the opinion and judgment of the court in these cases.

KLEIN v. INSURANCE COMPANY.

SUPREME COURT OF THE UNITED STATES, 1881. 104 U. S. 88.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The facts are stated in the opinion of the court.

Mr. *Hiram Barber, Jr.*, for the appellant.

Mr. *Francis H. Kales*, contra.

Mr. JUSTICE WOODS delivered the opinion of the court.

On Sept. 1, 1866, a policy of insurance was issued by the New York Life Insurance Company upon the life of Frederick W. Klein, in the sum of \$5,000, payable to his wife, Caroline Klein, within sixty days after his death and due notice and proof thereof.

The policy is in the usual form. The consideration for its issue was the payment to the company by Caroline Klein of an annual premium of \$173, in semi-annual instalments of \$86.50 each, on the first day of September and the first day of March of every year during the life of Frederick W. Klein.

The policy contains the following provision: "And it is also understood and agreed by the within assured to be the true intent and meaning hereof that . . . in case the said Caroline Klein shall not pay the said premiums on or before the several days herein mentioned for the payment thereof, with any interest that may be due thereon, then and in every such case the said company shall not be liable for the payment of the sum assured or any part thereof, and this policy shall cease and determine."

The premiums were punctually paid until March, 1871, when default was made in the payment of the semi-annual instalment which matured on the first day of that month, and it remained unpaid until the death of Frederick W. Klein, which occurred March 18, 1871.

The agent of the company, after proof of the death of Klein, offered to pay Caroline Klein the surrender value of the policy. She declined to accept any sum less than the amount of the insurance, and on the company then insisting upon the absolute forfeiture of the policy, according to its terms, she filed this bill.

She therein alleges as the ground of relief that the policy was taken out by Frederick W. Klein without her knowledge; that she had received no information of its terms or conditions until after his death; that about February 1 he was taken down by the illness of which he died; that for about twenty days prior to March 1, and thence up to the time of his death, he was, in consequence of his sickness, deranged in mind and incapable of attending to any matter of business whatever, and for that reason, and that alone, failed to pay the premium when it was due, and that she failed to pay it because she was ignorant of the existence of the policy and of its terms.

The prayer of the bill is as follows: "That the said New York Life Insurance Company may be prevented from insisting upon and taking advantage of the alleged forfeiture of said policy of insurance, and that your oratrix may be relieved from said alleged default upon her part, and the accidental default of the said Frederick W. Klein in the non-payment of said semi-annual premium maturing March 1, 1871, and that the said New York Life Insurance Company may be decreed to pay to your oratrix the said sum of \$5,000," &c.

The answer of the company denies its liability upon the policy of insurance, and insists that the contract ceased and determined by reason of the non-payment of the premium due March 1, 1871, and denies the equity of the bill.

The bill was dismissed upon final hearing. The cause was then brought to this court for review, by the appeal of the complainant.

Conceding, for the sake of argument, that the case made by the bill

is sustained by the evidence, the question is presented whether, upon the facts, the appellant was entitled to the relief prayed for.

In *New York Life Insurance Co. v. Statham*, 93 U. S. 24, it was held by this court, Mr. Justice Bradley delivering its opinion, that a life insurance policy "is not a contract of insurance for a single year, with the privilege of renewal from year to year by paying the annual premium, but that it is an entire contract for assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums."

But, in the same case, the court further said: "In policies of life insurance time is material and of the essence of the contract, and non-payment at the day involves absolute forfeiture, if such be the terms of the contract."

While conceding this to be the rule which would apply if an action at law were brought upon the policy, the appellant insists that she is entitled to be relieved in equity against a forfeiture, by reason of the excuses for non-payment of the premium set out in the bill, and this contention raises the sole question in this case.

We cannot accede to the view of the appellant. Where a penalty or a forfeiture is inserted in a contract merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory. *Sloman v. Walter*, 1 Bro. Ch. 418; *Sanders v. Pope*, 12 Ves. Jr. 282; *Davis v. West*, id. 475; *Skinner v. Dayton*, 2 Johns. (N. Y.) Ch. 526.

But in every such case the test by which to ascertain whether relief can or cannot be had in equity, is to consider whether compensation can or cannot be made.

In *Rose v. Rose*, Amb. 331, 332, Lord Hardwicke laid down the rule thus: "Equity will relieve against all penalties whatsoever; against non-payment of money at a day certain; against forfeitures of copyholds: but they are all cases where the court can do it with safety to the other party; for if the court cannot put him in as good condition as if the agreement had been performed, the court will not relieve."

A life insurance policy usually stipulates, first, for the payment of premiums; second, for their payment on a day certain; and, third, for the forfeiture of the policy in default of punctual payment. Such are the provisions of the policy which is the basis of this suit.

Each of these provisions stands on precisely the same footing. If the payment of the premiums, and their payment on the day they fall due, are of the essence of the contract, so is the stipulation for the release of the company from liability in default of punctual payment. No compensation can be made a life insurance company for the general want of punctuality on the part of its patrons.

It was said in *New York Life Insurance Co. v. Statham*, *supra*, that "promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothe-

sis of prompt payments. They not only calculate on the receipt of premiums when due, but upon compounding interest upon them. It is on this basis that they are enabled to offer insurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Delinquency cannot be tolerated or redeemed except at the option of the company."

If the assured can neglect payment at maturity and yet suffer no loss or forfeiture, premiums will not be punctually paid. The companies must have some efficient means of enforcing punctuality. Hence their contracts usually provide for the forfeiture of the policy upon default of prompt payment of the premiums. If they are not allowed to enforce this forfeiture they are deprived of the means which they have reserved by their contract of compelling the parties insured to meet their engagements. The provision, therefore, for the release of the company from liability on a failure of the insured to pay the premiums when due is of the very essence and substance of the contract of life insurance. To hold the company to its promise to pay the insurance, notwithstanding the default of the assured in making punctual payment of the premiums, is to destroy the very substance of the contract. This a court of equity cannot do. *Wheeler v. Connecticut Mutual Life Insurance Co.*, 82 N. Y. 543. See also the opinion of Judge Gholson in *Robert v. New England Life Insurance Co.*, 1 Disney (Ohio), 355.

It might as well undertake to release the assured from the payment of premiums altogether as to relieve him from forfeiture of his policy in default of punctual payment. The company is as much entitled to the benefit of one stipulation as the other, because both are necessary to enable it to keep its own obligations.

In a contract of life insurance the insurer and assured both take risks. The insurance company is bound to pay the entire insurance money, even though the party whose life is insured dies the day after the execution of the policy, and after the payment of but a single premium.

The assured assumes the risk of paying premiums during the life on which the insurance is taken, even though their aggregate amount should exceed the insurance money. He also takes the risk of the forfeiture of his policy if the premiums are not paid on the day they fall due.

The insurance company has the same claim to be relieved in equity from loss resulting from risks assumed by it as the assured has from loss consequent on the risks assumed by him.

Neither has any such right.

The bill is, therefore, based on a misconception of the powers of a court of equity in such cases.

There is another answer to the case made by the bill. The engagement of the insurance company was with Caroline Klein, and not with Frederick W. Klein. It entered into no contract with the latter. It agreed to pay Caroline Klein the insurance, provided she paid with

punctuality the premiums. She was never incapacitated from making payment. The alleged fact that she had no knowledge of the existence and terms of the policy does not relieve her default. If the fact be true, her ignorance resulted from the neglect of her husband, who, in respect to this contract of insurance, was her agent, in not informing her about the insurance upon his life and the terms of the policy. The bill is, therefore, an effort by her to obtain relief in equity against the appellee from the consequences of the carelessness or neglect of her own agent.

We are of opinion that the decree of the Circuit Court is right, and should be *Affirmed*.¹

¹ *Acc.*: *Wheeler v. Connecticut Mut. L. Ins. Co.*, 82 N. Y. 543 (1880); *Yoe v. Benjamin C. Howard Masonic Mut. B. Assn.*, 63 Md. 86 (1884); *Carpenter v. Centennial Mut. L. Assn.*, 68 Iowa, 453 (1886); *Hawkshaw v. Supreme Lodge*, 29 Fed. R. 770 (U. S. C. C., N. D. Ill., 1887); *Pitts v. Hartford Life and Annuity Ins. Co.*, 66 Conn. 376 (1895).

In *Robert v. New England Mut. L. Ins. Co.*, 1 Disn. 355, 361-365, 368-369 (Cincinnati Superior Court, special term, 1857), GHOLSON, J., said:—

“As a general rule, when the terms of a contract between parties are ascertained, what those terms require is the law of the case and must determine the rights involved. . . .

“To the strict and rigorous rule of the common law, as to the construction and enforcement of contracts and conditions, an exception has been established by which relief is given, in certain cases, upon principles of equity, against penalties and forfeitures. In some cases this relief has been obtained in a court of law; in others, an application to a court of equity has been required. . . .

“It is the intention of the parties which is to be looked at, to ascertain whether, in a particular case, there be a proper ground for relief; whether the case be one of the exaction of a forfeiture, or the relief, if granted, would destroy the substance of the contract, according to the real intention of the parties. And this intention is to be ascertained from the nature of the agreement rather than from the language of the contract. *Price v. Green*, 16 M. & W. 346, 354. Of this the cases as to liquidated damages present an obvious illustration. . . . I proceed to the direct question, whether there can be relief against the prescribed consequence, in a policy of life insurance, of the non-payment of the premium at the time it becomes payable, according to the contract between the parties. . . .

“I shall, therefore, inquire, in the first place, as to the ordinary annual premium, in a life policy, whether its non-payment at the stipulated day really forfeits any further right, or whether the condition requiring such payment is a mere penalty, as to which relief will be given on the payment of interest, and thus though, while the premium remained unpaid, the assured died. To the proposition thus generally and simply stated, there can, I think, be but one answer; and until it was presented in the examination of the case, I had never supposed there could be any doubt but that, from the very nature of the contract of life insurance, the prompt and punctual payment of the premiums was of the very substance of the contract.

“An attempt was made, in an early case, to assimilate the conditions in a life policy, requiring the payment of the premium, to the condition annexed to a deed conveying real estate. But the court said that the analogy did not hold, and that the rules applicable to conditions with respect to lands did not apply. ‘This is a contract of assurance, and must be construed according to the meaning of the parties, expressed in the deed or policy.’ *Want v. Blunt*, 12 East, 183. . . .

“There is, however, to my mind, a still stronger reason why, as to the ordinary annual premium in a life policy, there can be no relief in case of its non-payment on the day specified. The contract is of the description which is termed unilateral. To have it

continue from year to year is in the nature of a privilege, secured by the agreement of the company. It may be waived or abandoned by the party, and the company has no right to thrust it upon him without his consent, expressed in the mode and at the time appointed, and the very nature of the business of the company requires that they should know, at the time, whether their agreement is to continue. The principle upon which relief has been refused, in the case of a privilege of purchase, fully applies. *Davis v. Thomas*, 1 Russ. & M. 506. . . .

"If the breach of such a condition is a good defence at law, the absence of any case in which relief has been given in equity, upon the general ground of the jurisdiction to relieve against forfeitures, is a forcible objection to the propriety of extending that branch of the jurisdiction to such cases. . . . There are, to my mind, serious objections to any such relief in this case. . . .

"The contract of life insurance is one of a peculiar nature. The company, for example, is called on, in this case, for the consideration of \$90.40, to pay \$8,000.00. If such demands are enforced, as they undoubtedly may be when there has been a compliance with the terms of contract, in what mode is the loss to be made up unless by the receipt of premiums and the judicious investment and use of the money received? It is very justly said, in the printed form of the application of the company, which is a mutual insurance company, that the 'stability and permanence of such a company depends: 1. Upon an adequate premium being demanded. 2. Upon its being paid, or sufficiently secured, so that the company shall not run a risk on lives any further than each one contributes his just proportion to the funds of the company.' To carry out and enforce this principle is, in my opinion, the object of the clause which, in effect, makes the continuance of any interest in the funds dependent on a strict compliance with the obligation, as assumed, to contribute to them."

On the topic of this section, see also:—

Want v. Blunt, 12 East, 183 (1810);
Simpson v. Accidental Death Ins. Co., 2 C. B. N. s. 257 (1857);
Notman v. Anchor Assurance Co., 4 C. B. N. s. 464 (1858);
Casler v. Connecticut Mut. L. Ins. Co., 22 N. Y. 427 (1860);
Pitt v. Berkshire L. Ins. Co., 100 Mass. 500 (1868);
McAllister v. New England Mut. L. Ins. Co., 101 Mass. 558 (1869);
Stone v. United States Casualty Co., 34 N. J. L. (5 Vroom) 371, 373 (1871);
Welts v. Connecticut Mut. L. Ins. Co., 48 N. Y. 34 (1871);
Ayer v. New England Mut. L. Ins. Co., 109 Mass. 430 (1872);
Currier v. Continental L. Ins. Co., 53 N. H. 538, 547-549 (1873);
Chickering v. Globe Mut. L. Ins. Co., 116 Mass. 321 (1874);
Connecticut Mut. L. Ins. Co. v. Home Ins. Co., 17 Blatch. 142 (1879);
Holly v. Metropolitan L. Ins. Co., 105 N. Y. 437 (1887);
D'Orlu v. Bankers' and Merchants' Mut. L. Assn., 46 Fed. R. 355 (1891).—Ed.

CHAPTER VII.

THE PERIL.

SECTION I.

Marine Insurance.

(A) THE KIND OF PERIL INSURED AGAINST.

ROHL v. PARR.

NISI PRIUS, KING'S BENCH, 1796. 1 Esp. 444.

CASE on a policy of insurance on the ship "Zumbee," from St. Bartholomew to the river Gombroon on the coast of Africa, and from thence to the West Indies, during her stay. There was a memorandum, "to be free from average, under ten per cent, for loss in boats, and from five per cent for loss from insurrection."

The ship sailed from St. Bartholomew on the 1st of September, 1792, arrived safe on the coast of Africa, and began to trade. In the month of September following, there was an insurrection of the slaves on board the ship. They had then forty-nine on board, and seven were killed, and one died by accident in consequence of a fall.

After this, being about to return, it was found that the worm had taken her bottom, and had destroyed it so effectually, that the ship could barely get to Cape Coast, where she was condemned as irreparable.

Upon these facts two points arose in the case, first, whether this was a total loss arising from the perils of the sea; or, secondly, a partial loss above five per cent, for which the plaintiff was entitled to recover.

Gibbs, for the plaintiff, contended, that the destruction of the ship's bottom from the worms having arisen in the course of her voyage, was a peril of the sea. If the ship had struck against a rock under water, and her bottom been destroyed, that would have been clearly within the policy; there it proceeded from an inanimate substance striking against the ship's bottom. The present case was that of an animated substance moving to destroy it.

Erskine, contra, insisted it could not come under that description of loss, as not arising from any peril of the sea.

Lord KENYON said, that it appeared to him a question of fact rather than of law, such as the jury were competent to decide on, from the opinion on the subject adopted by the underwriters and merchants.

The jury (which was a special one) found, that this was not a loss within the term of "perils of the sea" in policies of insurance, and of course that the plaintiff could not recover for a total loss.¹ . . .

Lord KENYON expressed his assent to the finding of the jury on both points.² *The plaintiff had a verdict for an average loss.*

Gibbs, Smith, and Park, for the plaintiff.

Erskine and Garrow, for the defendant.

¹ Passages as to the partial loss have been omitted. — Ed.

² *Acc.*: *Martin v. Salem Marine Ins. Co.*, 2 Mass. 420 (1807).

In *Lovell v. McMillan*, Faculty Decisions, 1808–1810, p. 341 (Court of Session, Scotland, 1809), s. c. *Morison's Dictionary*, 1808–1812, p. 9, Lords CULLEN and GLENLEE "stated that they considered destruction by worms not to be one of those perils of the sea undertaken by the underwriters; perils are what we term casualties. But destruction by worms is not a casualty or a thing that happens by chance, but may be foreseen and guarded against."

In *Hazard v. New England Ins. Co.*, 8 Pet. 557, 583–585 (1834), McLEAN, J. for the court, approving an instruction that "if the jury should find that in the Pacific Ocean worms ordinarily assail and enter the bottoms of vessels, then the loss of a vessel destroyed by worms would not be within the policy," said, after citing *Rohl v. Parr*: —

"It was well remarked by Lord Kenyon, that whether a destruction by worms be within the policy was a question of fact rather than of law, and could be best ascertained by a jury from the opinion of underwriters and merchants. This was a *nisi prius* decision; but it gave such general satisfaction to both merchants and underwriters and all others concerned, as never to have been questioned in England. It was the establishment of a usage by the opinions of those most competent to judge of its reasonableness and propriety; and the approbation which has since been given to it in England by acquiescence, may well constitute it a rule in that country by which contracts of insurance are governed. And independent of the fact of its having been adopted by the Supreme Court of Massachusetts, is not the decision entitled to great consideration in this country? It comes from the same source from which the principles of our commercial law are derived, and to some extent, the forms of our commercial contracts. Would it not be reasonable to suppose that these contracts are entered into with a knowledge of the rule by which they are construed in the most commercial country, if our own courts had adopted no rule on the subject? But in the present case, the opinion of Lord Kenyon having been adopted in Massachusetts, the rule must certainly apply to all contracts made and to be executed in that State.

"The court, in their instruction, did not lay down the rule broadly, that a destruction by worms was not within the policy; but the jury were told, that if, 'in the Pacific Ocean, worms ordinarily assail and enter the bottoms of vessels, then the loss of a vessel destroyed by worms would not be a loss within the policy.' In other words, if the vessel was lost by an ordinary occurrence in the Pacific Ocean, it was a loss against which the underwriters did not insure. In an enlarged sense, all losses which occur from maritime adventures may be said to arise from the perils of the sea; but the underwriters are not bound to this extent. They insure against losses from extraordinary occurrences only; such as stress of weather, winds and waves, lightning, tempests, rocks, &c. These are understood to be the 'perils of the sea' referred to in the policy, and not those ordinary perils which every vessel must encounter.

"If worms ordinarily perforate every vessel which sails in a certain sea, is not a risk of injury from them, as common to every vessel which sails on that sea, as the ordinary wear and decay of a vessel on other seas? The progress of the injury may be far more rapid in the one case than in the other; but do they not both arise from causes peculiar to the different seas, and which affect, in the same way, all vessels

FURTADO v. RODGERS.

COMMON PLEAS, 1802. 3 B. & P. 191.¹

ASSUMPSIT on a policy of insurance dated Oct. 19, 1792, on the ship "Petronelli," "at and from Bayonne to Martinique, and at and from thence to return to Bayonne." The declaration averred that on November 12, 1793, while the ship was at Martinique, the island was attacked by the English and the ship was captured as a prize. The general issue was pleaded. Before Lord ALVANLEY, C. J., a verdict was found for the plaintiff, subject to the opinion of the court upon a case stating that the plaintiff, the owner of the ship, was a French subject, resident in France, and that France and Great Britain were in amity when the policy was effected and until February, 1793.

Bayley, Serjt., for the plaintiff. The question is whether, after the cessation of hostilities between England and France, a Frenchman is entitled to recover in the English courts upon a policy of insurance effected in England before the commencement of hostilities for a loss by British capture during the war.

Best, Serjt., for the defendant.

Cur. adv. vult.

The opinion of the court was now delivered by

Lord ALVANLEY, C. J. As it is of infinite importance to the parties that this case should be decided as speedily as possible, and as we entertain no doubts upon the subject, we think it right to deliver the judgment of the court without any further delay; at the same time considering the magnitude of the question, we shall allow the parties to convert this case into a special verdict, in order that the opinion of the highest court in this kingdom may be taken, if it should be thought necessary. There are two questions for our consideration: First, whether it be lawful for a British subject to insure an enemy from the effect of capture made by his own government? Secondly, whether, if that be illegal, the insurance in this case having been made previous to the commencement of hostilities will make any difference? As to the first point, it has been understood for some years past to have been the opinion of all Westminster Hall, and I

that enter into them? In one sea, the aggregation of marine substances which attach to the bottom of the vessel may possibly produce a loss; in another, a loss may be more likely to occur through the agency of worms. Can either of these losses be said to have been produced by extraordinary occurrences? Does not the cause of the injury exist in each sea, though in different degrees, and against which it is as necessary to guard as to prevent the submersion of a ship by having its seams well closed?

"In the form in which the instruction under consideration was given, this court think there is no error. If it be desirable to be insured against this active agent which infests Southern seas, it may be specially named in the policy." — ED.

¹ The statement has been rewritten. — ED.

believe of the nation at large, that such insurances are not strictly legal or capable of being enforced in a court of justice.¹ . . . By the terms of the policy the underwriters certainly undertake to indemnify the plaintiff against all captures and detentions of princes, without any exception in respect of the acts of the government of their own nation. The question then is, whether the law does not make that exception, and whether it be competent to an English underwriter to indemnify persons who may be engaged in war with his own sovereign against the consequences of that war? We are all of opinion that on the principles of the English law it is not competent to any subject to enter into a contract to do any thing which may be detrimental to the interests of his own country; and that such a contract is as much prohibited as if it had been expressly forbidden by act of Parliament. It is admitted that if a man contract to do a thing which is afterwards prohibited by act of Parliament, he is not bound by his contract. This was expressly laid down in *Brewster v. Kitchell*, 1 Salk. 198. And on the same principle, where hostilities commence between the country of the underwriter and the assured, the former is forbidden to fulfil his contract. With respect to the expediency of these insurances, it seems only necessary to cite a single line from Bynkershoek, *Quæst. Juris. Pub. lib. 1, c. 21*, Marshall, p. 31, and part of a passage in Valin, p. 32, Marshall, p. 32. The former says, “*Hostium pericula in se suscipere quid est aliud quam eorum commercia maritima promoveri*,” and the latter, speaking of the conduct of the English during the war of 1756, who permitted these insurances, says, “The consequence was, that one part of that nation restored to us by the effect of insurance what the other took from us by the rights of war.” . . . We are all of opinion that to insure enemies’ property was at common law illegal, for the reasons given by the two foreign jurists to whom I have referred. If this be so, a contract of this kind entered into previous to the commencement of hostilities must be equally unavailable in a court of law, since it is equally injurious to the interests of the country; for if such a contract could be supported, a foreigner might insure previous to the war against all the evils incident to war. But it is said that the action is suspended, and that the indemnity comes so late that it does not strengthen the resources of the enemy during the war. The enemy, however, is very little injured by captures for which he is sure at some period or other to be repaid by the underwriter. Since the case of *Bell v. Potts*,² it has been universally understood that all commercial intercourse with the enemy is to be considered as illegal at common law (though previous to that case a very learned judge³ appears to have entertained doubts on that subject), and that consequently all insurances founded upon such intercourse are also

¹ In reprinting the opinion, the discussion of the English authorities has been omitted. — Ed.

² Reported, *sub nom.* *Potts v. Bell*, ante, p. 502 (1800). — Ed.

³ Mr. Justice BULLER in *Bell v. Gilson*, 1 B. & P. 345 (1798). — REF

illegal. Why are they illegal? Because they are in contravention of His Majesty's object in making war, which is by the capture of the enemies' property, and by the prohibition of any beneficial intercourse between them and his own subjects to cripple their commerce. The same reasoning which influenced the Court of King's Bench in their decision in *Bell v. Potts*, seems decisive in the present case. For it being determined that during war all commercial intercourse with the enemy is illegal at common law, it follows that whatever contract tends to protect the enemy's property from the calamities of war, though effected antecedent to the war, is nevertheless illegal. . . . The ground upon which we decide this case is, that when a British subject insures against captures, the law infers that the contract contains an exception of captures made by the government of his own country; and that if he had expressly insured against British capture, such a contract would be abrogated by the law of England. With respect to the argument insisted upon by way of answer to the public inconvenience likely to arise from permitting such contracts to be enforced, viz. that all contracts made with an enemy enure to the benefit of the King during the war, and that he may enforce payment of any debt due to an alien enemy from any of his subjects, we think it is not entitled to much weight. Such a course of proceeding never has been adopted; nor is it very probable that it ever will be adopted, as well from the difficulties attending it, as the disinclination to put in force such a prerogative. The plaintiff, I am sorry to say, is not entitled to a return of premium, because the contract was legal at the time the risk commenced, and was a good insurance against all other losses but that arising from capture by the forces of Great Britain.

*Judgment for the defendant.*¹

THOMPSON v. WHITMORE.

COMMON PLEAS, 1810. 3 Taunt. 227.

THIS was an action upon a policy of assurance effected upon the ship "Collingwood," lost or not lost, at, and from, and to all ports and places whatsoever and wheresoever, at sea and in port, and in all and every service the ship might be ordered, for six calendar months, from the 8th of February, 1809, to the 7th day of August, 1809, to return 20s. per month for every uncommenced month, on being discharged government service. The plaintiff averred that the ship, by the waves, winds, and perils of the sea, was bilged, strained, broken, and destroyed. Upon the trial of this cause, at the Sittings at Guildhall, after Trinity

¹ See *Gist v. Mason*, 1 T. R. 88 (1786); *Brandon v. Nesbitt*, 6 T. R. 23, 28 (1794); *Bell v. Gilson*, 1 B. & P. 345, 354 (1798); *Brandon v. Curling*, 4 East, 410, 416-418, (1803). — Ed.

Term, 1810, before MANSFIELD, C. J., it was proved that the vessel, which was in the employ of government as a transport, and was a narrow-floored vessel of 244 tons, burthen, had, under the direction of the officers of the transport board, been carefully laid down on Gosport Beach to be cleaned and caulked, in a situation where vessels equally narrow-floored, and also vessels of a much greater bulk, therefore much more liable to injury, even of the burthen of 800 tons, had usually been laid down with safety for the same purpose. The ship lay there easy on the first day, when the tide left her; but she was found on the following day full of water, which rose in her with the rising of the circumambient tide: and upon examination it appeared, that the planks of her side on which she lay, had given way, and that some of her foot-hooks were broken. Shepherd, Serjt., for the defendant, objected, that this was not a loss occasioned by any perils of the sea, and cited a case of *Rowcroft v. Dunsmore*, B. R., tried in 1801, before Lord Kenyon, C. J., in which Lord Erskine was of counsel for the plaintiff: the ship was hove down, and while heaving down, she could not bear the strain: she was drawn on the land, where she bilged; and the question was made, whether, it being necessary to perform this operation on her, this damage was occasioned by a peril of the sea. Lord Kenyon thought it was not a loss by a peril of the sea, but an accident that happened; so in the present case, whether the ship were laid down negligently or not, she bilged: if the blocks that supported her had fallen down, that also would have been an accident, but certainly would not have been a loss by perils of the sea. MANSFIELD, C. J., thought, that although the tides knocked away the shoars which supported the “Collingwood,” and thereby occasioned the mischief, and although the ship was in the service of government at the time, and not under the control of the plaintiff, yet as the damage happened upon the land, it could not be considered as a loss sustained by the perils of the sea, and nonsuited the plaintiff, with liberty to move to enter a verdict with £8 41s. damages, if the court should be of opinion that the plaintiff was, under the circumstances, entitled to recover.

Lens, Serjt., on this day moved to set aside the nonsuit, and enter a verdict for the plaintiff; but

The court were unanimous that the direction of the Chief Justice was right.

*Rule refused.*¹

¹ See *Davidson v. Burnand*, L. R. 4 C. P. 117 (1868).

Compare *Swift v. Union Mut. M. Ins. Co.*, 122 Mass. 573 (1877). — Ed.

SMITH AND OTHERS v. SCOTT.

COMMON PLEAS, 1811. 4 Taunt, 126.

THIS was an action upon a policy of insurance upon the ships "Helena" and "Merlin," at and from the bay of Honduras to their port or ports of discharge in Great Britain, and a loss was averred to have happened to the "Helena" by the circumstance, that while she was proceeding on her voyage, a certain other ship on the high seas, by and through the force of the winds and waves, was carried and sailed against the "Helena," without any neglect or default of the persons on board the "Helena," and the "Helena" became lost and stranded by the perils of the seas. Upon the trial of the cause, at the London Sittings after Trinity Term, 1811, before MANSFIELD, C. J., the evidence was, that a ship named the "Margaret" ran foul of the "Helena" by the grossest neglect; for when, upon the shock being given, some of the "Helena's" crew went on board the "Margaret," they found only one man on the deck, and he was asleep. Hereupon it was objected by the counsel for the defendant, that the occasion of the injury was not the perils of the seas, but the gross negligence of the crew of the "Margaret," and that this was a fatal variance from the loss averred. The jury, however, found a verdict for the plaintiff, subject to this point, which the Chief Justice reserved.

Accordingly, *Lens*, Serjt., on this day moved for a rule *nisi* to set aside the verdict and enter a nonsuit, adding, that the plaintiff had his remedy against the owners of the "Margaret."

MANSFIELD, C. J. I do not know how to make this out not to be a peril of the sea. What drove the "Margaret" against the "Helena"? The sea! What was the cause that the crew of the "Margaret" did not prevent her from running against the other, — their gross and culpable negligence? But still the sea did the mischief. It is reasonable enough that the plaintiffs should permit the defendant to use their names as plaintiffs against the owners or crew of the "Margaret," so as to recover whatever the plaintiffs would be entitled to as against the "Margaret," and to apply it in diminution of their loss; but it would lead to endless discussion, if it were required that no cause except the cause of loss alleged in the declaration should be conducive to the loss.

HEATH, J. If this doctrine were to prevail, it might go still further, and it might be contended, that if a master conducts his ship so unskillfully as to run it on a rock, that is not a peril of the sea, but a peril of the unskillfulness of the master.

*Rule refused.*¹

¹ See *Wilson v. Xantho*, *post*, p. 670, n. (1) (H. L. 1887). — ED.

HUNTER v. POTTS.

NISI PRIUS, KING'S BENCH, 1815. 4 Camp. 203.

THIS was an action on a policy of insurance on goods by the ship "Rebecca," at and from London to Honduras, with leave to touch at Antigua, and discharge and take in goods.

The first count laid the loss by the perils of the seas. The second count alleged, that whilst the ship was sailing and proceeding with the goods on board thereof upon her said voyage, and before her arrival at Honduras, and during the course of the said voyage, to wit, on the twenty-fifth day of February, 1804, the said ship and the goods so on board thereof, were by certain perils, losses, and misfortunes, which came to the hurt, detriment, and damage of the said goods and the said ship, broken, spoiled, injured, lost, and destroyed, and the said goods thereby became, and were wholly lost to the proprietors thereof, to wit, at, etc.

It appeared that the ship, having touched at Antigua, was detained there for a considerable time by the sickness of the crew, and that while she lay at that island, the rats, which had increased to a great extent, eat holes in her transoms, and other parts of her bottom. In consequence, a survey was called, and she was found so much injured, that she was unfit to proceed to Honduras. She was thereupon condemned, and the cargo was sold. The plaintiff sought to recover a loss of £64 16s. 6d. per cent.

LORD ELLENBOROUGH, however, was clearly of opinion, that this was not a loss within any of the perils insured against, and

*The plaintiff was nonsuited.*¹

Garrow, A. G., Park, and Puller, for the plaintiff.

Topping and Richardson, for the defendant.

¹ Compare *Garrigues v. Cox*, 1 Binn. 592 (1809).

See *Laveroni v. Drury*, 22 L. J. N. S. Ex. 2 (1852), s. c. 8 Ex. 166.

In *Hamilton v. Pandorf*, 12 App. Cas. 518 (H. L. 1887), it was held that, under a charterparty and bills of lading excepting "dangers and accidents of the seas," ship-owners are excused from liability if rats gnaw a hole in a pipe and if the result is that sea water enters and damages the cargo.

LORD HALSBURY, L. C. (for whose language it has seemed well to follow partly, 57 L. T. Rep. N. S. 726), said: "One of the dangers which both parties to the contract would have in their mind would, I think, be the possibility of the water getting into the vessel from the sea upon which the vessel was to sail in accomplishing her voyage; it would not necessarily be by a storm, the parties have not so limited the language of the contract; it might be by striking on a rock, or by excessive heat, so as to open some of the upper timbers; these and many more contingencies that might be suggested would let the sea in, but what the parties, I think, contemplated was that any accident (not wear and tear, or natural decay) should do damage by letting the sea into the vessel, that that should be one of the things contemplated by the contract. . . .

"Now cases have been brought to your Lordships' attention in which the decision has turned, not, I think, upon the question of whether it was a sea peril or accident, but whether it was an accident at all. I think the idea of something fortuitous and

CULLEN v. BUTLER.

KING'S BENCH, 1816. 5 M. & S. 461.

ASSUMPSIT on a policy of insurance for £200, upon goods on board the ship "Industry," at and from London to the Canary Islands, the interest being averred in the plaintiff. The plaintiff declared in the first count, upon a loss by the perils and misfortunes of the seas; and in the second count, he averred, that the ship, with the goods on board, departed and set sail from London in prosecution of her intended voyage, and before her arrival at the Canary Islands, to wit, on the 7th of

unexpected is involved in both words, 'peril' or 'accident'; you could not speak of the danger of a ship's decay; you would know that it must decay, and the destruction of the ship's bottom by vermin is assumed to be one of the natural and certain effects of an unprotected wooden vessel sailing through certain seas.

"One ought, if it is possible, to give effect to all the words that the parties have used to express what this bargain is, and I think in this case it was a danger, accident, or peril, in the contemplation of both parties, that the sea might get in and spoil the rice. I cannot think it was less such a peril or accident because the hole through which the sea came was made by vermin from within the vessel, and not by a sword-fish from without,—the sea water did get in."

LORD WATSON said: "If the respondents were preferring a claim under a contract of marine insurance, expressed in ordinary terms, I should be clearly of opinion that they were entitled to recover, on the ground that their loss was occasioned by a peril of the sea within the meaning of the contract. When a cargo of rice is directly injured by rats, or by the crew of the vessel, the sea has no share in producing the damage, which in that case is wholly due to a risk not peculiar to the sea, but incidental to the keeping of that class of goods, whether on shore or on board a voyaging ship. But in the case where rats make a hole, or where one of the crew leaves a port-hole open, through which the sea enters and injures the cargo, the sea is the immediate cause of mischief, and it would afford no answer to the claim of the insured to say that, had ordinary precaution been taken to keep down vermin, or had careful hands been employed, the sea would not have been admitted and there would have been no consequent damage."

LORD BRAMWELL said: "As I have said elsewhere, I think the definition of Lopes, L. J., very good: 'It is a sea damage, occurring at sea, and nobody's fault.' What is the 'peril?' It is that the ship or goods will be lost or damaged; but it must be 'of the sea.' 'Fire' would not be a peril of the sea; so loss or damage from it would not be insured against by the general words. So of lightning. In the present case the sea has damaged the goods. That it might do so was a peril that the ship encountered. It is true that rats made the hole through which the water got in, and if the question were whether rats making a hole was a peril of the sea, I should say certainly not. If we could suppose that no water got it, but that the assured sued the underwriter for the damage done to the pipe, I should say clearly that he could not recover. But I should equally say that the underwriters on goods would be liable for the damages shown in this case. Then I am of opinion that 'perils of the seas' is a phrase having the same meaning in bills of lading and charterparties as in policies of insurance. . . . An attempt was made to show that a peril of the sea meant a peril of what I feel inclined to call the sea's behavior or ill-condition. But that is met by the argument, that if so, striking on a sunken rock, on a calm day, or against an iceberg, and consequent foundering, is not a peril of the sea or its consequence. No question of negligence exists in this case. The damage was caused by the sea in the course of navigation with no default in any one. I am, therefore, of opinion that the damage was caused by peril of the sea within the meaning of the bill of lading."—ED.

July, &c., in the night of that day, the master and crew of a certain British ship called the "Midas," believing the ship in the policy mentioned to be an enemy's ship, and that the persons on board thereof were then and there in a hostile manner about to attack the "Midas" and attempt to board and take her as prize, did then and there, for the purpose of defending themselves and the "Midas" against such apprehended attack, but without any fault committed or done by the master or crew of the ship in the policy mentioned, fire at and against, and strike and pierce with shot the ship in the policy mentioned, whereby the said ship, with the goods on board, was sunk in the sea and lost. Plea, non-assumpsit.

At the trial before Lord ELLENBOROUGH, C. J., at the London Sittings after last Hilary Term, the jury found that the ship and cargo were lost in the manner, and under the circumstances stated in the second count. And they found a general verdict for the whole subscription, subject to the opinion of the court upon a case stating the above facts. And the question was, whether this was a loss covered by the policy, under the words, "perils of the seas," or under the general words, "all other perils, losses," &c. The case was argued at Serjeant's Inn before this term, by *Parke* for the plaintiff, and *Burnewall* for the defendant.

Cur. adv. vult.

Lord ELLENBOROUGH, C. J., now delivered the judgment of the court.

As the court is of opinion that the plaintiff is entitled to recover upon the second count of this declaration, framed upon the special circumstances of this case, which clearly seem to fall within the general and comprehensive words in the policy subjoined to the particular causes of loss therein specified, viz. "all other perils, losses, and misfortunes which had or should come to the hurt, detriment, and damage of the said goods and merchandises, and ship, &c. or any part thereof," it becomes less material to consider whether the plaintiff would be entitled to recover as for a loss "by perils of the sea," in the proper and strict sense of the words, i. e. *ex marinæ tempestatis discrimine*, as described by Emerigon; which loss by perils of the sea is the specific loss stated in the first count. If it be a loss by perils of the sea, merely because it is a loss happening upon the sea, as has been contended, all the other causes of loss specified in the policy are, upon that ground, equally entitled so to be considered; and it would be unnecessary as to them ever to assign any other cause of loss than a loss by perils of the sea. But as that has not been the understanding and practice on the subject hitherto, and inasmuch as the very insertion of the general or sweeping words, as they are called, in the policy after the special words, imports that the special words were not understood to include all perils happening on the sea, but that some more general words were required to be added, in order to extend the responsibility of the underwriters unequivocally to other risks not included within the proper scope of any of those enumerated perils, I shall think it necessary only to advert shortly to some of the reasons upon which we think that

the general words, thus inserted, comprehend a loss of this nature. The extent and meaning of the general words have not yet been the immediate subject of any judicial construction in our courts of law. As they must, however, be considered as introduced into the policy in furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words, they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of this instrument; and which will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes. Emerigon, in c. 12, s. 1, p. 360. of his Treatise on Insurances, in discussing the general rule, that assurers answer for all loss and damages that happen on the sea, says, that it is to prevent doubts and vain disputes, that, in the printed formulas (of policies) the following words have been inserted; and then he instances the general words to be found in the formulas of most of the principal commercial ports on the Continent: "All inconveniences, perils, and *cas fortuits* (which may be translated as misfortunes, accidents, &c.) which may happen," and generally of "all perils and fortunes which may happen in what manner soever, and which can be imagined," is the provision to be found in the formulas of Bourdeaux and Antwerp. Generally of "all perils, fortunes, or accidents which may happen, in what manner soever, foreseen or unforeseen," is the formula of Nantes. And that of Rouen and Genoa, "generally of all inconveniences, foreseen or unforeseen." The formula of Hamburgh is of all *Cogitatis vel imaginatis, usitatis vel inusitatis, nullis exceptis*. But although there be an express exclusion of any exception by the terms of the last-mentioned policy, the reason of the thing ingrafts an implied exception, even upon these words, general as they are, that is, in the case of damage occasioned by the fault of the assured; as to which the rule is, *Si casus evenerit culpa assecurati, non tenentur assecuratores*. And Emerigon (s. 2. p. 364) says, "This is a general rule, from which it is not allowed to derogate by a pact to the contrary;" *Nulla pactione effici potest ut dolus præstetur*; and he quotes Pothier, where he says, "I cannot effectually (*valablement*) contract with any one that he shall charge himself with the faults which I shall commit." But this is a case in which the assured is, by the terms of the declaration and finding thereupon, expressly exempted from the imputation of blame in respect to the loss in question. It is no objection to the plaintiff's right to recover against the underwriters in this case, that he may have also a right to recover against the persons by whose immediate act the damage was occasioned. That has been decided in the case of a damage at sea by collision. The only inconvenience which can be suggested as likely to arise from a limited construction of the words "perils of the seas," occurring in policies of assurance, and from the effect attributed to the general words, is, that in doubtful cases the plaintiff will feel it

necessary to introduce a special count, stating the particular circumstances by which the loss was occasioned, instead of relying upon a count framed upon the special head of loss in the policy, viz. by perils of the seas, or the like. But this inconvenience will be well compensated to the assured, by the advantage of certainty, by which the risk of nonsuit at the trial, and the expenses attendant thereupon, will be avoided.

*Judgment for the plaintiff.*¹

¹ See *Davidson v. Burnand*, L. R. 4 C. P. 117 (1868).

In *Wilson v. Xantho*, 12 App. Cas. 503 (H. L. 1887), it was held that foundering caused by the negligence of another vessel is within a bill of lading's exception of "dangers and accidents of the sea."

LORD HERSCHELL said: "I think it clear that the term 'perils of the sea,' does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves, which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding. It is beyond question, that if a vessel strikes upon a sunken rock in fair weather and sinks, this is a loss by perils of the sea. And a loss by foundering, owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category. Indeed, I am aware of only one case which throws a doubt upon the proposition that every loss by incursion of the sea, due to a vessel coming accidentally (using that word in its popular sense) into contact with a foreign body, which penetrates it and causes a leak, is a loss by a peril of the sea. I refer to the case of *Cullen v. Butler*, where a ship having been sunk by another ship firing upon her in mistake for an enemy, the court inclined to the opinion that this was not a loss by perils of the sea. I think, however, this expression of opinion stands alone, and has not been sanctioned by subsequent cases."

LORD BRAMWELL said: "Was it by a peril of the sea that the defendants' ship foundered? The facts are, that the sea-water flowed into her through a hole, and flowed in such quantities that she sank. It seems to me that the bare statement shows she went to the bottom through a peril of the sea. If the hole had been small, there being a piece of bad wood, a plank starting, or a similar cause, it would be called a leak, and no one would doubt that she foundered from a peril of the sea. Does it make any difference that the hole was large, and occasioned by collision? I cannot think it does. It is admitted that if the question had arisen on an insurance against loss by perils of the sea this would have been within the policy a loss by perils of the sea. Are the words to have different meanings in the two instruments? Why should they? Different consequences may follow. The insurer may be unable to defend himself on the ground that the loss was brought about by the negligence of the crew, while the freighter may maintain an action on the ground that it was. But how is the loss a loss by perils of the sea in one case and not in the other? The argument is, that wind and waves did not cause the loss, but negligence in some one. But surely, if that were so, a loss by striking in calm weather on a sunken rock not marked on the chart would not be a loss by perils of the seas within the bill of lading; or striking on a rock from which the light had been removed, or an iceberg, or a vessel without lights. I cannot bring myself to see that such cases are not losses by perils of the sea. Is not the chance of being run against by a clumsy rider one of the perils of hunting?" — ED.

WATERS v. MERCHANTS' LOUISVILLE INS. CO.

SUPREME COURT OF THE UNITED STATES, 1837. 11 Pet. 213.¹

ON a certificate of division from the Circuit Court for the District of Kentucky.

The questions certified were as to the sufficiency of six pleas, which were to the effect that the officers and crew of the insured vessel managed the cargo so negligently that there was an explosion, causing the loss; and, more specifically, that the officers and crew, or some of them, negligently carried a lighted candle or lamp into the hold, where cargo was stored, and thus caused the explosion; and further, that the risk was increased by having gunpowder on board.

Crittenden, for the defendants.

No counsel *contra*.

Mr. Justice STORY delivered the opinion of the court.

This is a case certified to us from the Circuit Court for the District of Kentucky upon certain questions upon which the judges of that court were opposed in opinion.

The action was brought by Waters, the plaintiff, on a policy of insurance underwritten by the Merchants' Louisville Insurance Company, whereby they insured and caused to be insured, the plaintiff "lost or not lost, in the sum of 6,000 dollars, on the steamboat 'Lioness,' engine, tackle, and furniture, to navigate the western waters usually navigated by steamboats, particularly from New Orleans to Natchitoches on Red River, or elsewhere, the Missouri and Upper Mississippi excepted (Captain Waters having the privilege of placing competent masters in command at any time, 6,000 dollars being insured at New Albany, Indiana), whereof William Waters is at present master; beginning the adventure upon the said steamboat, from the 12th of September, 1832, at twelve o'clock meridian, and to continue and endure until the 12th of September, 1833, at twelve o'clock, meridian (twelve months)." The policy further provided, that "It shall be lawful for the said steamboat, during said time, to proceed to, touch, and stay at, any point or points, place or places, if thereunto obliged by stress of weather or other unavoidable accidents, also at the usual landings for wood and refreshments, and for discharging freight and passengers, without prejudice to this insurance. Touching the adventures and perils, which the aforesaid insurance company is contented to bear, they are, of the rivers, fire, enemies, pirates, assailing thieves, and all other losses and misfortunes, which shall come to the hurt, detriment, or damage of the said steamboat, engine, tackle, and furniture, according to the true intent and meaning of this policy." The premium was nine per cent. The declaration avers a total loss;

¹ The reporter's statement has been omitted. — Ed.

and that the said steamboat and appurtenances insured "were, by the adventures and perils of fire and the river, exploded, sunk to the bottom of Red River aforesaid, and utterly destroyed."

The defendants pleaded six several pleas, to which a demurrer was put in by the plaintiff; and in the consideration of the demurrer, the following questions and points occurred:

1. Does the policy cover a loss of the boat by a fire, caused by the barratry of the master and crew?

2. Does the policy cover a loss of the boat by fire, caused by the negligence, carelessness, or unskillfulness of the master and crew of the boat, or any of them?

3. Is the allegation of the defendants in their pleas, or either of them, to the effect that the fire, by which the boat was lost, was caused by the carelessness, or the neglect, or unskilful conduct of the master and crew, a defence to this action?

4. Are the said pleas, or either of them, sufficient?

These questions constituted the points on which the division of the judges took place in the court below; and they are those upon which we are now called to deliver our opinion upon the argument had at the bar.

As we understand the first question, it assumes that the fire was directly and immediately caused by the barratry of the master and crew, as the efficient agents; or, in other words, that the fire was communicated and occasioned by the direct act and agency of the master and crew, intentionally done from a barratrous purpose. In this view of it, we have no hesitation to say, that a loss by fire caused by the barratry of the master or crew is not a loss within the policy. Such a loss is properly a loss attributable to the barratry, as its proximate cause, as it concurs as the efficient agent, with the element, *eo instanti*, when the injury is produced. If the master or crew should barratrously bore holes in the bottom of the vessel, and the latter should thereby be filled with water and sink, the loss would properly be deemed a loss by barratry, and not by a peril of the seas or of rivers, though the flow of the water should co-operate in producing the sinking.

The second question raises a different point, whether a loss by fire, remotely caused by the negligence, carelessness, or unskillfulness of the master and crew of the vessel, is a loss within the true intent and meaning of the policy. By unskillfulness, as here stated, we do not understand in this instance, a general unskillfulness, such as would be a breach of the implied warranty of competent skill to navigate and conduct the vessel, but only unskillfulness in the particular circumstances remotely connected with the loss. In this sense, it is equivalent to negligence or carelessness in the execution of duty, and not to incapacity.

This question has undergone many discussions in the courts of England and America, and has given rise to opposing judgments in

the two countries. As applied to policies against fire on land, the doctrine has for a great length of time prevailed, that losses occasioned by the mere fault or negligence of the assured or his servants, unaffected by fraud or design, are within the protection of the policies; and as such recoverable from the underwriters. It is not certain upon what precise grounds this doctrine was originally settled. It may have been from the rules of interpretation applied to such policies containing special exceptions, and not excepting this; or it may have been, and more probably was, founded upon a more general ground, that as the terms of the policy, covered risks by fire generally, no exception ought to be introduced by construction, except that of fraud of the assured, which, upon the principles of public policy and morals, was always to be implied. It is probable, too, that the consideration had great weight, that otherwise such policies would practically be of little importance, since, comparatively speaking, few losses of this sort would occur which could not be traced back to some carelessness, neglect, or inattention of the members of the family.

Be the origin of it, however, what it may, the doctrine is now firmly established both in England and America. We had occasion to consider and decide the point at the last term, in the case of the *Columbia Insurance Company of Alexandria v. Lawrence*, 10 Peters' R. 517, 518; which was a policy against the risk of fire on land. The argument addressed to us on that occasion, endeavored to establish the proposition, that there was no real distinction between policies against fire on land and at sea; and that in each case the same risks were included: and that as the risk of loss by fire occasioned by negligence was not included in a marine policy, unless that of barratry was also contained in the same policy, it followed, that as the latter risk was not taken on a land policy, no recovery could be had. In reply to that argument, the court made the comments which have been alluded to at the bar, and the correctness of which it becomes now necessary to decide.

It is certainly somewhat remarkable that the question now before us should never have been directly presented in the American or English courts; viz. whether, in a marine policy (as this may well enough be called), where the risk of fire is taken, and the risk of barratry is not (as is the predicament of the present case), a loss by fire, remotely caused by negligence, is a loss within the policy. But it is scarcely a matter of less surprise, considering the great length of time during which policies against both risks have been in constant use among merchants; that the question of a loss by negligence in a policy against both risks should not have arisen in either country until a comparatively recent period.

If we look to the question upon mere principle, without reference to authority, it is difficult to escape from the conclusion, that a loss by a peril insured against, and occasioned by negligence, is a loss within a marine policy; unless there be some other language in it,

which repels that conclusion. Such a loss is within the words, and it is incumbent upon those who seek to make any exception from the words, to show that it is not within the intent of the policy. There is nothing unreasonable, unjust, or inconsistent with public policy, in allowing the insured to insure himself against all losses from any perils not occasioned by his own personal fraud. It was well observed by Mr. Justice Bayley, in delivering the opinion of the court in *Bush v. The Royal Exchange Assurance Company*, 2 Barn. and Ald. 79, after referring to the general risks in the policy, that "the object of the assured, certainly, was to protect himself against all the risks incident to a marine adventure. The underwriter being therefore liable, *prima facie*, by the express terms of the policy, it lies upon him to discharge himself. Does he do so by showing that the fire arose from the negligence of the master and mariners?" "If, indeed, the negligence of the master would exonerate the underwriter from responsibility, in case of a loss by fire; it would also in cases of a loss by capture, or perils of the sea. And it would, therefore, constitute a good defence in an action upon a policy, to show, that the captain had misconducted himself in the navigation of the ship, or that he had not resisted an enemy to the utmost of his power." There is great force in this reasoning, and the practical inconvenience of carving out such an implied exception from the general peril in the policy, furnishes a strong ground against it; and it is to be remembered, that the exception is to be created by construction of the court, and is not found in the terms of the policy. The reasons of public policy, and the presumption of intention in the parties to make such an exception, ought to be very clear and unequivocal, to justify the court in such a course. So far from any such policy or presumption being clear and unequivocal, it may be affirmed that they lean the other way. The practical inconvenience of creating such an exception would be very great. Lord Tenterden alluded to it in *Walker v. Maitland*, 5 Barn. & Ald. 174. "No decision (said he) can be cited, wherein such a case (the loss by a peril of the sea) the underwriters have been held to be excused in consequence of the loss having been remotely occasioned by the negligence of the crew. I am afraid of laying down any such rule. It will introduce an infinite number of questions, as to the *quantum* of care, which, if used, might have prevented the loss. Suppose, for instance, the master were to send a man to the mast-head to look out, and he falls asleep, in consequence of which the vessel runs upon a rock, or is taken by the enemy; in that case it might be argued, as here, that the loss was imputable to the negligence of one of the crew, and that the underwriters are not liable. These, and a variety of other such questions, would be introduced, in case our opinion were in favor of the underwriters." His lordship might have stated the argument from inconvenience, even in a more general form. If negligence of the master or crew were under such circumstances a good defence, it would be perfectly competent and proper to examine

on the trial any single transaction of the whole voyage, and every incident of the navigation of the whole voyage, whether there was due diligence in all respects, in hoisting or taking in sail, in steering the course, in trimming the ship, in selecting the route, in stopping in port, in hastening or retarding the operations of the voyage; for all these might be remotely connected with the loss. If there had been more diligence, or less negligence, the peril might have been avoided or escaped, or never encountered at all. Under such circumstances, the chance of a recovery upon a policy for any loss, from any peril insured against, would of itself be a risk of no inconsiderable hazard.

This is not all: we must interpret this instrument according to the known principles of the common law. It is a well-established principle of that law, that in all cases of loss we are to attribute it to the proximate cause, and not to any remote cause: *causa proxima non remota spectatur*: and this has become a maxim, not only to govern other cases; but, (as will be presently shown) to govern cases arising under policies of insurance. If this maxim is to be applied, it disposes of the whole argument in the present case; and why it should not be so applied we are unable to see any reason.

Let us now look to the authorities upon the point.¹ . . .

The third and fourth questions are completely answered by the reasoning already stated. Those pleas contain no legal defence to the action, in the form and manner in which they are pleaded; and are not sufficient to bar a recovery by the plaintiff.

Some suggestion was made at the bar, whether the explosion, as stated in the pleas, was a loss by fire, or by explosion merely. We are of opinion, that as the explosion was caused by fire, the latter was the proximate cause of the loss. The fifth plea turns upon a different ground. It is that the taking of gunpowder on board was an increase of the risk. If the taking of the gunpowder on board was not justified by the usage of the trade, and therefore was not contemplated as a risk by the policy, there might be great reason to contend, that if it increased the risk, the loss was not covered by the policy. But in our opinion the facts are too defectively stated in the fifth plea, to raise the question.

Our opinion will be certified to the Circuit Court accordingly. On the first question, in the negative; on the second question, "in the affirmative; and on the third and fourth questions, in the negative."²

¹ Here were discussed *Busk v. Royal Exchange Assurance Co.*, 2 B. & Ald. 73 (1818); *Walker v. Maitland*, 5 B. & Ald. 171 (1821); *Bishop v. Pentland*, 7 B. & C. 219 (1827); *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222 (1830); and *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507 (1836), s. c., but not s. p., *ante*, p. 247. — ED.

² *Acc.*: *Dixon v. Sadler*, *ante*, p. 475 (1839), s. c. *sub nom.* *Sadler v. Dixon*, 8 M. & W. 895 (Ex. Ch. 1841); *Richelieu & Ontario Navigation Co. v. Boston M. Ins. Co.*, 26 Fed. R. 596, 602 (U. S. C. C., E. D. Mich. 1886); *Crescent Ins. Co. v. Packet Co.*, 69 Miss. 208 (1891).

In *Trinder v. Thames and Mersey M. Ins. Co.*, '98, 2 Q. B. 114 (C. A.), the action

STARBUCK v. NEW ENGLAND MARINE INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1837. 19 Pick. 198.

ASSUMPSIT on a policy of insurance, dated November 1, 1832, on the ship "Loper," of Nantucket, and her outfits, bound on a whaling voyage.

At the trial, before PUTNAM, J., it appeared that the "Loper" sailed from Nantucket, on the 24th of November, 1832, and pursued her voyage into the Pacific Ocean; that while there, in November, 1833, she experienced a violent shock, which caused her to tremble, and created much alarm among her crew; that she continued, however, whaling until the 8th of March, 1835, when she put into Talcahuana, to prepare for her homeward voyage; that she did not leak more than ships frequently do; that such repairs were made upon the vessel, at Talcahuana, as the master supposed to be necessary, but that her bottom was not repaired or examined; and that, on the 24th of March, she sailed from Talcahuana for Nantucket, and, on the 20th of the following May, foundered and was abandoned by her crew, and the whole property insured was lost.

In order to show adequate cause for the foundering of the vessel, the plaintiff introduced evidence tending to prove that it was occasioned by a blow received by some horned fish in November, 1833.

The defendants contended, that the plaintiff was not entitled to recover, inasmuch as the ship, after receiving such blow, and during the existence of the defect caused thereby, put into the port of Talcahuana, where it could have been discovered and repaired, but left that port without repairing it.

The jury were instructed, that if the vessel sailed from Talcahuana with a defect in her bottom, which afterwards caused her loss, yet that the defendants were liable therefor, unless the captain had reasonable cause to suspect the existence of the defect at the time when the vessel was at Talcahuana, or had reasonable cause to believe that she could not proceed safely home without having the same repaired.

The jury returned a verdict for the plaintiff for a total loss.

was brought in behalf of owners of a vessel, upon a policy on freight; and it was held to be no bar to recovery that the vessel was stranded by the negligence, not wilful, of one of the owners, who was the master.

In *Trinder v. North Queensland Ins. Co.*, '98, 2 Q. B. 114, 129 (C. A.), the action was brought upon a policy on a ship, in behalf of the part owner—the master—for whose sole benefit the insurance was effected; and affirming the judgment of KENNEDY, J., in the Commercial Court, 2 Commercial Cas. 216 (1897), s. c. 66 L. J. N. S. Q. B. 802, and 77 L. T. Rep. N. S. 80, it was held to be no bar to recovery that the loss was due to the negligence, not wilful, of this part owner.

On barratry, see *Phyn v. Royal Exchange Assur. Co.*, 7 T. R. 505 (1798); *Earle v. Rowcroft*, 6 East, 126 (1806); *Todd v. Ritchie, Starkie*, 240 (1816); *Jones v. Nicholson*, 10 Exch. 28 (1854); *Germania Ins. Co. v. Sherlock*, 25 Ohio St. 33 (1874).—ED.

If the instructions given to the jury were erroneous, the verdict was to be set aside, and a new trial granted ; otherwise, judgment was to be rendered on the verdict.

W. D. Sohler, for the defendants.

C. P. Curtis and *B. R. Curtis*, for the plaintiff.

PER CURIAM. It is suggested on the part of the assured, that the loss arose from a blow received sixteen months before, which created some alarm at the time, but not causing a leak, was not much thought of afterwards. The loss was subsequently attributed to it, because there was no other apparent cause. The defendants contend, that the master should have examined the ship at Talcahuana, and repaired her. The argument is, that the assured is bound to have the ship seaworthy at the commencement of the voyage, and if she is not, the insurers are not responsible for subsequent loss, even if it arises from another cause, as, if she has not proper papers, or is struck by lightning ; that this is a condition precedent, without which no liability attaches. This principle is correct ; but the defendants go further, and contend that she is to be seaworthy, not only at the beginning, but during every stage of the voyage. But the obligation of the assured to keep her seaworthy depends upon different considerations and imposes different duties. If the assured does not make her seaworthy at first, she is not a vessel, not capable of being navigated ; and the contract being made under mutual mistake, the consequence follows, that the subject matter, respecting which the insurance was made, did not exist, and neither party is bound. But if she meets with an accident after the beginning of a voyage, as the very contract of insurance supposes that she may, it is the duty of the assured to make repairs. But the nature and extent of this duty are to depend on circumstances and have a reasonable construction ; and this was the ground of decision in *Paddock v. Franklin Ins. Co.* If the ship become unseaworthy on the voyage, it is the duty of the owner, as soon as he discovers it, to make her good ; but he cannot do it before he discovers it. If he does not repair when he reasonably ought to do so, and a loss arises from it, the assured cannot recover, because it is not a loss by any of the perils insured against ; but if the loss arises from another cause, he may recover. The difference is this : if the vessel is not seaworthy at first, the policy never attaches ; in the other case, the insurers, having become responsible, continue liable for all losses not arising from the fault of the owners. There are often latent defects at the commencement of the voyage, and distressing cases happen, in consequence, because the policy does not attach. The counsel for the defendants contend, that the law is the same if the injury took place in the course of the voyage ; but we cannot accede to this doctrine. There is nothing in the opinion in *Paddock v. Franklin Ins. Co.* that warrants the position. A distinction is there taken between unseaworthiness at the beginning, which is a breach of warranty, and a defect arising on the voyage, which is not repaired through the fault of the owner, and for which the owner is

responsible if the loss is from that cause. But the owner, or his agents, must know of the defect or there is no fault. Suppose an accident occurs at sea, what is the master to do? He is to ascertain, as soon as he can, the extent of the damage, and to take into consideration the relative distances of ports, and where he can repair, and the course of winds, trade winds, &c., and to exercise his best judgment, under a view of all the circumstances. If the ship is sinking, he must go to the port he can reach soonest; if not, it may be most reasonable to go to a more distant port, where he can get more effectual and permanent repairs. He must exercise a sound judgment, for the best interests of all concerned.

The question then is, whether the instructions to the jury were right; and we are of opinion that they were. An accident happened, in consequence of which there was much trembling of the vessel; and it was supposed she had been struck by a swordfish or a whale. If she could then have been examined, it would have been the duty of the master to have had it done; but she was in the ocean, and an examination could not be made. After a long trial, however, it was found, she did not leak. Then was the master bound, at all events, to leave her out when she arrived at a port? We think he was merely bound to exercise sound discretion.

But even if had hove her down, and not repaired her, and afterwards she sunk, the defect not being discovered, it is argued that the insurer would be discharged. If unseaworthiness at the time of sailing from Talcahuana was a condition precedent, this would undoubtedly be correct, because then the assured would take the risk of latent and unknown defects. But we think it was not so, and that the master must have known, or have had reason to believe, that there was a defect, in order to throw the risk from this cause upon the assured.¹

¹ In *Peters v. Phoenix Ins. Co.*, 3 S. & R. 25 (1817), TILGHMAN, C. J., said: "When a ship which has received damage puts into port to repair, the captain or agent who superintends the repairs is bound to use due diligence. But it may be impossible to make a complete repair, either for want of materials or of skilful workmen or of accommodations for heaving the ship down in order to make a thorough search. . . . The law implies no warranty of seaworthiness except at the commencement of the voyage. To say, therefore, that a ship which has suffered damage by a peril insured against must, at all events, be so repaired at the port she puts into, as to render her seaworthy, is to add to the contract a condition not contained in it."

In *Copeland v. New England M. Ins. Co.*, 2 Met. 432, 439-440 (1841), SHAW, C. J., for the court, after citing *Paddock v. Franklin Ins. Co.*, 11 Pick. 227, 234 (1831), and *Hazard v. New England M. Ins. Co.*, 1 Sumner, 218 (1832), said: "Upon these principles and authorities, we consider it a rule of the law of insurance, as settled here, that in addition to the implied warranty which applies to the state of the vessel at the commencement of the voyage, and must be strictly complied with as a condition precedent, it is the duty of the assured, from time to time during the voyage, to repair her and keep her in a suitable condition for the service in which she is engaged, and if they fail to do so, and a loss happens which is attributable to that cause, the assured, and not the underwriters, must sustain it. And although there are some recent English cases which seem to wear a different aspect, or leave the point in doubt, yet, upon a full consideration and comparison, we are inclined to think they are not opposed

to this doctrine. . . . The doctrine of implied warranty of seaworthiness would go but a little way in securing the performance of the duties of the assured, because, as it has often been said, that warranty is complied with, if the vessel is seaworthy when she sails, although she becomes unseaworthy in twenty-four hours after. But if it can be definitely settled what are the duties of the assured, in regard to the conduct of the voyage, after its inception, and to what extent they are responsible for the acts and the negligence of the master, officers, and crew, and of all other persons who may have an agency in the navigation of the vessel and conduct of the voyage, it will be a question, in each particular case, whether the loss is one for the insurers or owners to bear. The modern cases go far to establish the rule, that for the conduct of the master or mariners, in the practical navigation, care, and management of the vessel, after the commencement of the voyage, the insurers are responsible, provided the actual loss arise from one of the perils insured against, although such peril was occasioned or increased by the negligence, carelessness, bad seamanship, or other misconduct of the master and mariners, not amounting to barratry."

In *Merchants' Mut. Ins. Co. v. Sweet*, 6 Wis. 670, 674-675 (1858), COLE, J., for the court, said: "The underwriters in this country are held discharged from any loss which can be distinctly shown to have arisen from the negligence or misconduct of the assured in not keeping the ship in a proper state of repair. . . . And we suppose there may be a breach . . . arising as much from a neglect to keep the vessel properly ballasted as from any other cause. A vessel may become unnavigable or unseaworthy as well from overloading or a want of sufficient ballast as from some defect in the equipment or provision of the vessel. . . . There are undoubtedly certain mistakes of judgment and instances of negligence on the part of officers or crew which the underwriters are responsible for. A loss occasioned by a mistake of judgment or neglect of duty on the part of a commanding officer while acting purely in his official and professional character may be one of the perils covered by the policy. Or such a default as . . . where the master raised too much sail or neglected to have the pumps properly worked, in consequence of which the vessel was lost, is a risk incident to navigation and assumed by the insurers."

In *Union Ins. Co. v. Smith*, 124 U. S. 405, 427 (1888), BLATCHFORD, J., for the court, said: "The principle adopted by the Circuit Court in laying the case before the jury was the proper one. In the insurance of a vessel by a time policy, the warranty of seaworthiness is complied with if the vessel be seaworthy at the commencement of the risk, and the fact that she subsequently sustains damage, and is not properly refitted at an immediate port, does not discharge the insurer from subsequent risk or loss, provided such loss be not the consequence of the omission. A defect of seaworthiness, arising after the commencement of the risk, and permitted to continue from bad faith or want of ordinary prudence or diligence on the part of the insured or his agents, discharges the insurer from liability for any loss which is the consequence of such bad faith, or want of prudence or diligence, but does not affect the contract of insurance as to any other risk or loss covered by the policy and caused or increased by such particular defect."

And see *McDowell v. General Mut. Ins. Co.*, 7 La. Ann. 684 (1852); *Fawcus v. Sarsfield*, 6 E. & B. 192 (1856); *Thompson v. Hopper*, E., B. & E. 1038 (Ex. Ch. 1858); *Dudgeon v. Pembroke*, 2 App. Cas. 284, 296-298 (1877).—ED.

PERRIN'S ADMINISTRATORS v. PROTECTION INS. CO.

SUPREME COURT OF OHIO, 1842. 11 Ohio, 147.¹

ACTION was brought on a policy to insure one-half of three-eighths of "the hull, tackle, and apparel of the steamboat 'Moselle.'" The risks insured against were "of the seas, rivers, fires, enemies, pirates, rovers, assailing thieves, and all other perils, losses, and misfortunes which shall come to the damage of the said steamboat, according to the true intent and meaning of this policy, as herein expressed." Within the time covered by the policy, there was a boiler explosion, by which the steamboat was destroyed. The defendant contended that the loss occurred through the negligence of the assured, the master, and the crew. The plea was the general issue. A verdict was taken for the amount of the loss, under the direction of the court. Thereupon this motion for a new trial was made, because (1) the court did not permit expert testimony that the explosion was due to negligence, and (2) the court did not instruct the jury that a loss by explosion of the boilers from an internal cause is not covered by the policy, and (3) there was newly discovered evidence.

Wright, Coffin & Miner, and *H. Starr*, for defendant, in support of the motion for new trial.

Charles Fox, for plaintiff.²

LANE, C. J. The newly discovered evidence is cumulative, only. At the trial, it was shown that preparations were made before starting, to overtake another boat; that fires were kept burning, with great fierceness; and that the boilers had become very hot; that the escape of steam was attended with a peculiar shrill noise, denoting great pressure, and so loud as to awaken notice and alarm. The new evidence is, the testimony of a witness, who, going on board, was terrified by the violence of the fires, the intensity of the heat, and the glimmer from the ascent of heated air, "which seemed to make the boilers creep and move in their beds," and goes little further than to furnish additional evidence of facts already before the jury.

That a loss, arising from an explosion of the boiler, is covered by the policy, seems plain to us, when we consider the subject insured, and the nature of the risks to which it is, of necessity, exposed. The insurance was on a steamboat. The policy is in the form which has long been in use for marine risks, and the words which describe the perils are large enough to embrace all such as arise in the ordinary use of the thing insured. A policy on ships covers losses arising from accidents to the power which moves them, and it must be presumed that the parties contemplated the same protection to a steamboat when

¹ The statement has been rewritten. — Ed.

² The arguments on each side were voluminous and valuable. The passages bearing on explosion are found in 11 Ohio, 154-156, 163-166. — Ed.

the loss occurs to her motive agencies. The other causes for which the new trial is asked, depend upon the right of the defendant to use the negligence of those managing the boat as a defence against this liability.¹ . . .

*Motion overruled. Judgment for plaintiff on the verdict.*²

WASHINGTON MUTUAL INSURANCE CO. v. REED ET AL.

SUPREME COURT OF OHIO, 1851. 20 Ohio, 199.

ERROR to the Supreme Court of Hamilton County.

The original action was assumpsit, in the Commercial Court of Cincinnati. Reed and Brown, the plaintiffs below, declared specially, on a policy of insurance effected by the defendant below, the Insurance Company, on 750 barrels of whiskey, to be shipped in a No. 1 flat boat, from Lawrenceburg, Indiana, to New Orleans.

¹ The discussion of this question has been omitted. — ED.

² *Acc.*: Citizens' Ins. Co. v. Glasgow, 9 Mo. 406 (1845); and West India and Panama Telegraph Co. v. Home and Colonial M. Ins. Co., 6 Q. B. D. 51 (C. A., 1880); but this latter case has been disapproved by the House of Lords in Thames and Mersey M. Ins. Co. v. Hamilton, 12 App. Cas. 484 (1887).

Compare Miller v. California Ins. Co., 76 Cal. 145 (1888).

In Citizens' Ins. Co. v. Glasgow, *supra*, NARON, J., for the court, in commenting on Perrin v. Protection Ins. Co., said: "The court seemed to consider that this was a peril incident to navigation of a river by steam vessels, as much so as a loss by wind would be a peril of the sea, to which vessels propelled by that element are liable. It is no answer to this view of the subject to say that a peril by steam is not peculiar to the water, but may happen on land as well as at sea, for the same may be said in relation to the dangers arising from the violence of the winds. An injury to the motive power of a sea vessel by inevitable accident is admitted to be within the enumerated perils of a marine policy; for the same reason, an injury to the motive power of a steam vessel arising from inevitable accident, is within the perils of the river incident to such vessels. If steam were a power entirely within the control of man, the conclusion would be different. But I apprehend that whatever natural philosophers may think of this, the elements which combine to create the power of steam are as entirely within the reach of accident, and are no more subject to fixed laws than the elements which propel the ship at sea. Whatever may be the theories on either subject, universal experience is that no human skill can entirely guard against accidents, either in the one case or the other."

In Thames and Mersey M. Ins. Co. v. Hamilton, *supra*, the policy insured a steamship and its machinery, including donkey-engine and pumps, against "perils . . . of the seas, . . . fire, . . . barratry, . . . and of all other perils." While the steamship was at anchor, awaiting orders, an attempt was made to fill the main boilers by means of the donkey-pump and engine, in the usual way. In the pipe from the donkey-pump to the main boilers, a valve, which ought to have been open when the boilers were pumped up, either had been left closed by the negligence of an engineer or had been accidentally salted up. When the donkey-pump was set to work, the pipes and water-chamber of the donkey-pump were overcharged, and water was forced into the air-chamber, which in consequence split. For this damage to the donkey-pump it was held that there could be no recovery. — ED.

The declaration avers that while the policy was in force, said boat, "by a peril of the river, grounded and became, and was fast upon a bar . . . in the bed . . . of the river, whereby, and by reason of the beating of the waves against said flat boat, the same sprung a leak, whereby . . . the said 750 barrels of whiskey on board said boat, the property of plaintiffs, became, and were wholly lost." ¹. . .

The parties in the court below having submitted their evidence, the jury returned a verdict for the defendant below, and judgment was entered. During the trial the plaintiffs excepted to the charge of the court to the jury, and submitted a motion for a new trial, which was overruled.

The cause was removed to the Supreme Court of Hamilton County, and the judgment was reversed for error in the charge of the court below.

This is a writ of error to reverse the judgment of the Supreme Court of Hamilton County. . . .

The policy of insurance, as far as is material to a correct undertaking of the decision of this court, is as follows: . . . "Touching the perils which the said insurance company are content to bear, and take upon themselves in the premises, they are of the *seas, rivers, fires, jettisons*, enemies, pirates, and overpowering thieves (but not other thieves). Provided, that the insurers shall not be liable except in cases of general average for loss or damage on said property, unless it amounts to five per cent on the whole sum at risk. . . .

Coffin & Mitchell, for plaintiff in error.

Fox & French, for defendants in error.

CALDWELL, J.² . . . The Supreme Court reversed the judgment of the Commercial Court, on the following ground, as stated in the record of reversal. "Because the court below, at the request of the defendants, charged the jury that if they were of the opinion that the loss, declared on by the plaintiff, arose from an ordinary swell in the river, produced by the passage of an ordinary steamboat, by the flat boat, while on her course in the river, then it was not a loss by a peril within the policy, and the plaintiff could not recover, whereas the court ought not so to have charged." . . .

The charge has been substantially given above. It was, that the insurance company was not liable for the losses arising from the common and ordinary perils to which boats are necessarily exposed in navigating to New Orleans, and that if the jury were of the opinion that the loss in this case arose from an *ordinary* swell in the river, produced by the passage of an *ordinary* steamboat, by the flat boat, while in her course in the river, then it was not a loss by a peril within the policy, and the plaintiff could not recover. In Phillips on Insurance, vol. 1, p. 635, it is said: "Under perils of the sea, which

¹ The reporter's statement has been abbreviated. — ED.

² From the opinion have been omitted passages not discussing the accuracy of the charge. — ED.

constitute a part of the risks in almost every marine policy, are comprehended those of the winds, waves, lightning, rocks, shoals, running foul of other vessels, and in general, all causes of loss and damage to the property insured, arising from the elements, and inevitable accidents, other than those of capture and detentions." In this case, it appears from the evidence that at the time the flat boat sprung the leak, the steamboat "John Drennan" was passing her, so close that a person could have jumped from one boat to the other; that the steamboat "John Drennan," in passing out of the deep into the shoal water, made a very heavy swell, and that when the flat boat struck the swell, about mid-ship, the boat cracked, as if something was breaking; that in a short time the water was coming into the boat faster than it could be pumped out, and that on examination it was found that the splicing of the gunwales had given way, &c.

Now, injury arising from the action of the waves is one of the perils insured against, and we do not see, in reason, the difference between a wave raised by the wind and one raised by a steamboat. Nor have we been able to find that any such distinction has ever been held to exist. Nor do we think that any such discrimination, as appears to be presupposed by the terms "ordinary swells" and "ordinary steamboats," exists. Whether the gale was a severe one, or whether it was moderate; whether it produced heavy swells, or only those that were moderately so, is not important in determining whether the insurer is liable or not; it is only necessary, to fix his liability, that the waves should have caused the injury. Whether the steamboat was very large, or only ordinary, whether the swell was extraordinary or not, is not the question; but the question is, did the swell cause the damage to the boat? We see no more reason in making the liability of the insurance company depend on whether the boat was an ordinary one, and the swell an ordinary one, or whether they were both extraordinary, than there would be in making its liability depend on whether the snag against which the boat ran was an ordinary or extraordinary one. Now, if the steamboat had run against this boat, and run her under, there is no question but such collision would have been a peril within the policy; and we are unable to see any difference, in principle, between running a boat under by directly striking her with another boat, or by running so close to her as to cause the waves to sink or break her. The boat causing the injury would be equally liable in the one case as in the other, and so would the insurance company.

But it is said that the peril arising from the waves of steamboats is one of the ordinary perils to which flat boats are subjected, and when it is not of an extraordinary character, it is not one of the perils insured against. The time has been, within the recollection of many, when danger to a flat boat, from the waves of a steamboat, on our waters, would have been a rare occurrence — when it would have been an extraordinary peril; but we do not suppose that the fact that the number of steamboats has so increased, that it has become an ordinary peril, has altered the law of insurance.

The flat boat, although not so highly appreciated as a means of transportation as formerly, has lost none of her legal rights; they must still be extended to her, if for no other reason, for the good she has done. Counsel for plaintiff in error have cited us to a number of authorities, in which it is said that the insurers are not liable for ordinary perils, but only for such as are of an extraordinary kind. I have been able to find no specific definition of what perils are to be considered ordinary and what extraordinary, in the sense in which these terms are used in this connection. The term "ordinary peril," is not used as of similar meaning with common or frequent peril, or peril likely to be encountered; nor does it have any relation, so far as I have been able to discover, to how great or how small the force may be that is brought to bear or is encountered. The term, I think, is used rather in contradistinction to *accident*. The insurer does not become liable for inherent defects in the thing insured; he does not insure against wear and tear—such things as all vessels must necessarily be subjected to; does not insure against certain loss, but insures against *accidents*.

The question how great the force was that produced the injury may be an important item of evidence, going to show seaworthiness or the reverse, or the like; but if the force produces the injury on a seaworthy vessel, the insurer is liable, if the peril belong to the class insured against, although such force may have been ever so small. The case that gives the most color to the distinction that plaintiff's counsel have drawn between *ordinary* and *extraordinary perils*, is the case of Hazard's Administrator v. The New England Insurance Co., 8 Pet. 557. In that case the court say, that the policy does not cover *ordinary perils*, but *extraordinary ones*; and yet we think it falls far short of sustaining their position. In that case, the judge, on the circuit, had charged "that if the jury should find that in the Pacific Ocean worms ordinarily assail and enter the bottom of vessels, then the loss of a vessel destroyed by worms would not be a loss within the policy." The Supreme Court sustained this charge. They based their decision principally on the case of Rohl v. Parr, 1 Esp. Judge McLean, however, remarks in delivering the opinion of the court: "If worms ordinarily perforate every vessel which sails in a certain sea, is not a risk of injury from them, as common to every vessel which sails on that sea as the ordinary wear and decay of a vessel on other seas? The progress of the injury may be far more rapid in the one case than in the other; but do they not both arise from causes peculiar to the different seas, and which affect, in the same way, all vessels that enter into them?" This case, I think, clearly keeps up, and is based on, the distinction between injuries that must necessarily occur, and accidents that may or are likely to occur. If all vessels that sail in the Pacific Ocean must necessarily be perforated with worms, it could not be an *accident* that the particular vessel in question was perforated by them.

We think the Commercial Court erred in their charge to the jury, and that the Supreme Court decided correctly in reversing their judgment.

The judgment of the Supreme Court will therefore be affirmed.

MAGNUS AND OTHERS v. BUTTEMER.

COMMON PLEAS, 1852. 11 C. B. 876.

THIS was an action of assumpsit on a policy of assurance on the ship "Elizabeth" for twelve calendar months, in port or at sea, in all services, in the coast and coasting trade of the United Kingdom.

The declaration stated, that, during the time covered by the policy, and while the ship was in service in the coasting trade in the United Kingdom, with a cargo of timber on board, by the said ship taking the ground, and by and through the hardness and unevenness of the ground, and the perils and dangers of the seas, the ship was strained, broken, damaged, and injured; and that an average loss was thereby incurred of £19 19s. 7d. per cent.

Pleas, — non assumpsit, and a denial of the loss in manner and form as alleged.

Issue being joined, and the cause ripe for trial, it was agreed that the captain and mate of the "Elizabeth" should be examined *viva voce* before one of the masters of this court, and that the facts disclosed on such examination should be stated in a special case for the opinion of this court. The material facts were as follows :—

The "Elizabeth" sailed from Rochester to Sunderland. On her arrival at Sunderland, the vessel went up the river abreast of Laing's shipyard. She had to wait four or five days before she could go in to discharge. She was moored head and stern, and floated when the tide was in, and was aground, but not dry, at low water. She took three days to discharge. The beach was hard, shingly, and steep. When the vessel took ground, she listed towards the beach about two planks. When the first tide was ebbing, a creaking noise was heard as she took the ground, and it occurred when she floated again. This happened every tide, and sounded as if something was breaking. The cabin door, which would open and shut freely when the vessel was afloat, would not do so when she was aground. After first lying on the beach, the vessel made more water than usual. The mate saw that she was "hogged," after having taken the ground. He observed that some of the trenails had started, and that some of the planks had left the trenails.

The question for the opinion of the court was, whether, under these circumstances, there was a loss by perils of the seas.

Tomlinson, for the plaintiffs. The facts stated in the case disclose a loss by a peril insured against. The vessel was unloading in the ordinary manner, and at an ordinary place, when the stranding took place. *Fletcher v. Inglis*, 2 B. & Ald. 315, is not to be distinguished from this case; the facts are almost identical. In that case, a transport, in government service, was insured for twelve months, during which she was ordered into a dry harbor, the bed of which was hard and uneven, and, on the tide leaving her, she received damage by taking the ground; and it was held that this was a loss by a peril of the sea. That case was recognized in *Phillips v. Barber*, 5 B. & Ald. 161. [CRESSWELL, J. *Phillips v. Barber* was not a case of loss by a peril of the sea. MAULE, J. In *Fletcher v. Inglis*, there was a loss by a peril of the sea. Here, however, nothing happened that was extraordinary or unexpected; the ship took the ground as she naturally would in a tide-harbor. In *Bishop v. Pentland*, 7 B. & C. 219, 1 M. & R. 49, a ship having goods on board which were insured, but warranted free from average, unless general, or the ship should be stranded, was compelled, in the course of her voyage, to put into a tide-harbor, and was there moored alongside a quay, in the usual place for ships of her burden. It became necessary, in addition to the usual moorings, to fasten her by tackle to posts on the shore, to prevent her falling over, upon the tide leaving her. The rope with which she was so fastened, not being of sufficient strength, broke when the tide left the vessel, and she fell over upon her side, and was thereby stove in, and greatly damaged: and it was held that this was a stranding within the meaning of that word in the policy, although the stranding might have been occasioned remotely by the negligence of the crew in not providing a rope of sufficient strength to fasten the ship to the shore. There, the damage was the result of an accident. But, taking the ground under such circumstances as are stated here is hardly a peril of the sea.] The cause of damage was very similar to what was held in *Devaux v. J'Anson*, 5 N. C. 619, 7 Scott, 517, to be a loss by a peril of the sea.

James Wilde, contra. The damage sustained by this vessel was not the result of a peril which the underwriter insures against: it arose solely from the weight of the vessel, when loaded, pressing and resting upon a hard and uneven beach. In Kent's Commentaries, the learned commentator, in describing what are "perils of the sea," says, 3 Kent's Com. 300: "Those words apply to all those natural perils and operations of the elements which occur without the intervention of human agency, and which the prudence of man could not foresee, nor his strength resist. *Quod fato contingit, et cuius patrifamilias quamvis diligentissimo possit contingere.* The imprudence or want of skill in the master may have been unforeseen, but it is not a fortuitous event. The underwriter undertakes only to indemnify against extraordinary perils of the sea, and not against those ordinary ones to which every ship must inevitably be exposed." In *Stevens on Average*, 4th ed. p. 150, after speaking of those injuries to a ship which do not come within

the description of particular average, the author says: "Having thus stated what is particular average, it may perhaps be useful to state what is not. It is not customary to consider the repairs of the ship, in consequence of springing a leak at sea, as a claim for which the underwriters are liable; for, in all cases of particular average, the *onus* is thrown on the assured (the owner of the ship). It is not for the insurer to account for the cause of the accident. The assured must show that the damage for which he has a claim is the direct effect of a fortuitous accident. In the absence of such proof, the springing a leak is to be attributed either to the working and straining of the vessel, — which is the wear and tear of the voyage, — or to some insufficiency or inherent defect; for neither of which are the underwriters liable. But, where the evidence derived from the log-book, and confirmed by the mariners, is sufficiently clear to show that the leak was occasioned by a stroke of the sea; for instance, when a ship has been suddenly thrown on her beam-ends, and immediately on her righting it is discovered that she has sprung a leak, there is no doubt this comes under the head of a partial loss for which underwriters are liable." So, in *Park on Insurance* (8th ed. p. 240, citing *Hearne v. Edmunds*, 1 Brod. & B. 388, 4 J. B. Moore, 15) it is said, that, "where it is certain that, in the ordinary course of the navigation, the vessel would, by the flux and reflux of the tide, be left on the mud, it was held that this was not a stranding within the meaning of that term in the policy." *Carruthers v. Sydebotham*, 4 M. & Selw. 77, and *Rayner v. Godmond*, 5 B. & Ald. 225, were both cases of accidental damage. And in *Bishop v. Pentland*, LITTLEDALE, J., takes the distinction expressly: he says, — "where a vessel is on the ground or strand, in such a situation as she ought not to be in while prosecuting the voyage on which she is bound, that is a stranding within the meaning of the policy." In *Fletcher v. Inglis*, there are two things which might have occasioned the damage, — the taking the ground on the receding of the tide, — and the bumping which was consequent on the swell: the court do not say on which ground their decision proceeded; but it is evident it must have been the latter. In *Devaux v. J'Anson*, the statement in the declaration shows a clear accident. The question underwent full discussion in *Wells v. Hopwood*, 3 B. & Ad. 20. Lord TENTERDEN there lays down this intelligible rule: "Several of the cases hitherto decided on this subject are, as to their facts, very near each other, and not easily distinguishable. But it appears to me that a general principle and rule of law may, although not explicitly laid down in any of them, be fairly collected from the greater number. And that rule I conceive to be this: Where a vessel takes the ground, in the ordinary and usual course of navigation and management, in a tide-river or harbor, upon the ebbing of the tide, or from natural deficiency of water, so that she may float again upon the flow of the tide or increase of water, such an event shall not be considered a stranding within the sense of the memorandum. But, where the ground is taken under any extraordinary

circumstances of time or place, by reason of some unusual and accidental occurrence, such an event shall be considered as a stranding within the meaning of the memorandum." According to that rule, there clearly was no stranding here, no loss by a peril of the sea.

Tomlinson, in reply, cited *Phillips v. Nairne*, 4 C. B. 343.

JERVIS, C. J. I am of opinion that the loss in this case was not a loss by perils of the sea, but a damage falling within the description of ordinary wear and tear. No doubt the question is one of importance; but I think it has been very unnecessarily brought before the court; for the matter seems to have been perfectly understood and settled by all the text-writers upon this branch of the law. To make the underwriters liable, the injury must be the result of something fortuitous or accidental occurring in the course of the voyage. Here the vessel, upon her arrival at Sunderland, goes up the river, and, in consequence of the rising and falling of the tide, rests upon the river's bed, and receives damage. There was nothing unusual, no peril, no accident. To hold that the assured were covered in such a case, would be virtually making the policy a warranty against the wear and tear and ordinary repairs of the vessel. I think the defendant is entitled to judgment.

MAULE, J. I am of the same opinion; and I concur with the Lord Chief Justice in thinking that this is a very clear case. Stevens and the other text-writers referred to express no sort of doubt, but are evidently well acquainted with the distinction between wear and tear, for which the underwriters are *not* liable, and accidents, the occurrence of something out of the ordinary course of the voyage, for which they *are* liable. This distinction has been well understood for many years. To hold the underwriters liable in such a case as this, would be tantamount to holding that the ordinary repairs of a vessel are to be comprehended within the perils insured against. The case of *Fletcher v. Inglis* was sufficiently distinguished in the course of the argument; the statement of damage there is this: "Between nine and ten at night, the tide having then left the vessel, a cracking noise was heard in the ship, proceeding, as the witness believed, from something breaking. Some time after this, on the return of the tide, there was a considerable swell in the harbor, and the ship struck the ground hard several times; in the morning, eighteen of her knees were found to be broken." There were in that case some circumstances which also occur here; but there was another circumstance there, which is wanting here, to make the cases parallel. There was *casus fortuitus*, — the swell that set in, after which the ship's knees were found to be broken. That, I apprehend, was the ground of the decision in that case; and that is quite consistent with the argument of Mr. Scarlett, who was not likely to lay down a general doctrine which did not meet the assent of the court, so familiar as they were at that time with insurance law. The case evidently proceeded upon the extraordinary and accidental circumstance of the great swell setting in the harbor. Suppose, instead of the swell, the case had stated, or the evidence shown, that a violent

storm had arisen, and that the vessel was dashed against a rock, and injured, nobody could have doubted that that was a loss by perils of the sea. That only differs in degree from the actual case of *Fletcher v. Inglis*; but it differs very materially from the present case, which shows a mere subsiding of the ship upon the shore or beach on the receding of the tide, in the usual and expected course. According to sound law and common sense, the assured was entitled to recover in that case; whereas here, nothing has happened which the assured could have wished or anticipated to happen otherwise than it did happen. They intended the ship to take the ground as she did. There was no accident. We are asked, therefore, to assume a loss by perils of the sea, when the facts disclosed to us absolutely negative the existence of sea peril. No instance is to be found of underwriters being held liable where the voyage has been conducted to its termination without anything happening but what was expected and intended, and where the sole cause of the damage was the insufficiency of the ship to bear the ordinary stress of the voyage to which she was exposed. Authority and common sense concur in showing that this is not a liability which ought to be cast upon the underwriters.

CRESSWELL, J. I am of the same opinion, and should only be repeating what has already been said if I gave my reasons for concurring with the rest of the court.

WILLIAMS, J. This clearly is a case of ordinary wear and tear, and not accident.

*Judgment for the defendant.*¹

¹ Compare *Potter v. Suffolk Ins. Co.*, 2 Sumner, 197 (1835).

In *Paterson v. Harris*, 1 B. & S. 336 (1861), the owner of a share in the Atlantic Telegraph Company procured a policy of marine insurance on that share, the policy being in the ordinary form and having annexed to it this memorandum: "It is understood and agreed that this insurance shall cover and include the successful working of the cable when laid down." The cable having failed to work successfully by reason of the chemical action of sea water, such chemical action being due to a defect in the insulation caused by an accident occurring before shipment, it was held that as to this cause of loss there could be no recovery, *COCKBURN, C. J.*, for the court, saying: "We are of opinion that this is not an injury which can properly be referred to perils of the seas, under which head of damage it was contended for the plaintiff that the loss fell. We are of opinion that an injury of this nature, not arising from the external violence or mechanical action of the winds or waves, but which was the natural and necessary consequence of the ordinary action of the sea water on the cable, in the state in which it was when immersed in the sea, is not comprehended in the perils insured against. The injury, so far as the damage occasioned by the sea is concerned, was the inevitable consequence of the immersion of the cable in its then state in the sea water. But the purpose of insurance is to afford protection against contingencies and dangers which may or may not occur; it cannot properly apply to a case where the loss or injury must inevitably take place in the ordinary course of things. The wear and tear of a ship, the decay of her sheathing, the action of worms on her bottom, have been properly held not to be included in the insurance against perils of the seas, as being the unavoidable consequences of the service to which the vessel is exposed. The insurer cannot be understood as undertaking to indemnify your losses which, in the nature of things, must necessarily happen. For these reasons, we are of opinion that the plaintiff is not entitled to recover in respect to this portion of his claim."

In *Merchants' Trading Co. v. Universal Mar. Ins. Co.*, 2 Aspinall's Maritime Cas. n. s.

TAYLOR v. DUNBAR.

COMMON PLEAS, 1869. L. R. 4 C. P. 206.¹

THIS was an action upon a policy of insurance, in the usual form, against perils of the seas and all other perils, on goods per steamer from Hamburg to London. The case was stated for the opinion of the court. There were two claims for loss, one of twenty-six packages of pork on the "Leopard," and the other of thirty-two quarters of beef on the "Ostrich." The "Leopard" sailed from Hamburg on November 3, 1866, encountered hard gales of wind and most tempestuous weather, accompanied by high running seas which frequently broke over the ship; and on November 5 the ship was put back to Cuxhaven. On November 6 the ship put to sea again, again encountering hard gales and high running seas, and again was put back to Cuxhaven. On November 8 the ship finally sailed from Cuxhaven, and throughout the voyage experienced most boisterous weather and shipped much water. The pork was in no way injured by the sea or by the storm; but on November 10 it was discovered that the pork, owing to the length of time to which the voyage was protracted and delayed by the weather, had become putrid, and it was necessarily thrown overboard at sea.

The facts as to the beef on the "Ostrich" were in effect the same, with different dates.

The ordinary voyage of these steamers from Hamburg to London is fifty hours. If the voyages had been of the ordinary duration, the pork

431, n. (C. P. 1870), the question being whether Lush, J., had misdirected the jury, BOVILL, C. J., for the court, said: "He further explained to the jury that the terms 'perils of the sea' denoted all marine casualties resulting from the violent action of the elements of the wind and waters, lightning, tempest, stranding, striking on a rock, and so on — all casualties of that description as distinguished from the silent natural gradual action of the elements upon the vessel itself, though the latter properly belonged to wear and tear, and that what the underwriters insured were casualties that might happen, not consequences which must happen, casualties which might occur and were incident to navigation arising from the violent action of the elements upon the ship. The learned judge proceeded to say, 'that in the peculiar circumstances of this case, the voyage having scarcely commenced, the vessel being in still water at the time when this casualty happened, . . . two questions apparently different in form appeared to him to become merged in the one practical question, which was this, Was the leak, the extraordinary leak which occurred while the vessel was lying at anchor, attributable to injury and violence from without or weakness within?' . . . The perils mentioned by the learned judge do not include all the risks and perils covered by the policy, but from the nature of the question that was raised in this case, which was as to the cause of the sudden rushing of the water into the vessel, whether it was the inherent weakness of the vessel in consequence of original defects and construction, or neglected rust, or some unaccountable accident resulting in foundering, and with reference to the evidence, the attention of the jury was in our opinion properly called to such of the perils as were material."

On stranding, see *Bishop v. Pentland*, 7 B. & C. 219 (1827); *Wells v. Hopwood*, 3 B. & Ad. 20 (1832); *Lake v. Columbus Ins. Co.*, 13 Ohio, 48 (1844). — Ed.

¹ The statement has been rewritten. — Ed.

and beef would have arrived in good condition. The damage was due solely to the delay.

The question for the court was whether the plaintiff, whose interest was admitted, was entitled to recover the agreed amount of the two losses.

Beasley, for the plaintiff. The question is, whether the loss was proximately caused by perils of the seas, within the meaning of this policy. The expression "perils of the seas" is thus defined in 1 Phillips on Insurance, 3d ed. 626, § 1099. "Under perils of the seas, which constitute a part of the risks in almost every marine policy, are comprehended those of the winds, waves, lightning, rocks, shoals, collisions, and in general all causes of loss and damage to the property insured, arising from the elements and inevitable accidents other than those of capture and detention." Chancellor Kent, 3 Com. 10 ed. 407, says: "Those words apply to all those natural perils and operations of the elements which occur without the intervention of human agency, and which the prudence of man could not foresee, nor his strength resist." And Emerigon, p. 286 (by Meredith), says: "Perils of the sea (*fortunes de mer*), properly termed, are those which proceed from rocks and tempests, *cæ marinæ tempestatis discrimine*. But, in the matter of insurance, by perils of the sea is understood all losses and damages which happen at sea by a fortuitous event, and even sometimes under the same denomination are understood accidents which happen in the course of the voyage through the misconduct of the captain and of the mariners. Thus, perils of the sea (*fortunes de mer*) is a generic term, comprehending everything for which the insurers are responsible." In *Montoya v. London Assurance Co.*, 6 Ex. 451; 20 L. J. (Ex.) 254, where tobacco was damaged by the ill-flavor imparted to it from the putrefaction of hides caused by the shipping of sea-water, Pollock, C. B., says: "I think it may be laid down as a general rule, that when mischief arises from perils of the seas, and the natural and almost inevitable consequence of that mischief is to create further mischievous results, the underwriters in such case are responsible for the further mischief so occasioned." In *Lawrence v. Aberdeen*, 5 B. & A. 107, a policy was effected on living animals, warranted free from mortality and jettison. Some of the animals, in consequence of the agitation of the ship in a storm, were killed, and others from the same cause received such injury that they died before the termination of the voyage; and this was held to be a loss by perils of the sea. The like was held in *Gabay v. Lloyd*, 3 B. & C. 793, where horses were killed by reason of the breaking down of the partitions which separated them, in consequence of the agitation of the ship in a storm. So, here, the loss arose from damage sustained by the meat in consequence of its being knocked about in the storm.

[MONTAGUE SMITH, J. The case states that the pigs and beef were in no degree affected or injured by the sea-water or by the storm or tempest, but became putrid by the retardation and delay of the voyage.

The present case more clearly resembles *Tatham v. Hodgson*, 6 T. R. 656. There, upon an insurance of slaves against perils of the sea, their death by failure of sufficient and suitable provisions, occasioned by extraordinary delay in the voyage from bad weather, was held not to be a loss within the policy.]

The loss here was the proximate result of the bad weather which the vessels encountered. Speaking of the general clause, "and of all other perils, losses, and misfortunes," &c., Mr. Arnould (2 Arnould on Insurance, 3d ed. p. 727), says: "This general and sweeping clause, it is now decided, covers other cases of marine damage of the like kind with those specially enumerated, and occasioned by similar causes."

[KEATING, J., referred to *Ionides v. Universal Marine Insurance Co.*, 14 C. B. (N. S.) 259; 32 L. J. (C. P.) 170.]

Sir G. *Honyman*, Q. C., *contra*. Underwriters do not insure against mere delay of the voyage caused by change of wind or the prudence of the captain in avoiding foul weather. *Everth v. Smith*, 2 M. & S. 278; *Philpott v. Swann*, 11 C. B. (N. S.) 270, 30 L. J. (C. P.) 358.

KEATING, J. Mr. Beasley has referred us to every authority which could at all favor the view he wished to present; but they do not, in my opinion, go far enough to sustain his argument. The facts stated in the case show beyond a doubt that the proximate cause of the loss of the meat was the delay in the prosecution of the voyage. That delay was occasioned by tempestuous weather; but no case that I am aware of has held that a loss by the unexpected duration of the voyage, though that be caused by perils of the sea, entitles the assured to recover upon a policy like this. I think we should be establishing a dangerous precedent if we were to give effect to Mr. Beasley's argument, seeing that there are so many cargoes which are necessarily affected by the voyage being delayed. I am not disposed to create such a precedent. I think our judgment ought to be for the defendant.

MONTAGUE SMITH, J. I am of the same opinion. The loss here has arisen in consequence of the putrefaction of the meat from the voyage having been unusually protracted. That is a loss which does not fall within any of the perils enumerated in this policy. To render the underwriters liable, it must be shown that the loss is proximately due to one of the known perils. Retardation or delay of the voyage is not one of them. The case states that the meat was not affected by the sea or by the storm. It was not, therefore, as Mr. Beasley wished us to assume, damaged by knocking about. If it had been, the case might have been brought within the principle of *Lawrence v. Aberdeen*, 5 B. & A. 107, and *Gabay v. Lloyd*, 3 B. & C. 793. But the statement in the case precludes us from drawing any such inference. If we were to hold that a loss by delay, caused by bad weather or the prudence of the captain in anchoring to avoid it, was a loss by perils of the sea, we should be opening a door to claims for losses which never were intended to be covered by insurance, not only in the case of perishable goods, but in the case of goods of all other descriptions. By the com-

mon understanding both of assured and assurers, delay in the voyage has never been considered as covered by a policy like this. I therefore agree that our judgment should be for the defendant.

BRETT, J. I am also of opinion that damage to goods caused by delay of the voyage, through the consequence of stormy and tempestuous weather, is not one of the perils covered by an ordinary policy. Such damage must have occurred many times, and yet no trace is to be found of such a claim being maintained. If it be desired, a clause may easily be inserted in the policy to meet the case.

*Judgment for the defendant.*¹

PROVIDENCE WASHINGTON INS. CO. v. ADLER AND OTHERS.

COURT OF APPEALS OF MARYLAND, 1886. 65 Md. 162.

APPEAL from the Superior Court of Baltimore City.² . . . The case is stated in the opinion. . . .

The plaintiffs asked . . . instructions: . . . 4. That the defendant in taking a risk like the present, upon oil-cloth clothing, is presumed to know, and to have contemplated all the casualties and incidents to which the subject insured might be liable, and that the plaintiffs are entitled to recover . . . even should the jury find that the loss proceeded from spontaneous combustion, should the jury further find that spontaneous combustion is one of the casualties and incidents to which the subject insured is liable.

The defendant then submitted . . . instructions: . . . 1. That the plaintiffs . . . cannot recover, if . . . the oil-cloth coats . . . were damaged or destroyed from spontaneous combustion caused by their inherent infirmity. . . .

The court (FISHER, J.) granted the prayers of the plaintiffs, . . . but rejected the defendant's first prayer. The defendant excepted. The verdict and judgment were for the plaintiffs, and the defendant appealed.

John R. Kenly, for the appellant.

Frank P. Clark, for the appellees.

STONE, J. The plaintiffs shipped by a line of steamers, running from New York to the South, a quantity of oil-cloth clothing to Louisiana and Texas. They insured this clothing before shipment in the office of the defendant company. The clothing was packed in boxes, and on its arrival at its destination it was found injured and comparatively worthless, either by spontaneous combustion or by some chemical action

¹ See *Goold v. Shaw*, 1 Johns. Cas. 293 (1800); *Baker v. Manufacturers' Ins. Co.*, 12 Gray, 603 (1851); *Perry v. Cobb*, 88 Me. 435 (1896). — ED.

² The statement has been abridged. — ED.

arising from the material in the goods themselves. They all presented the appearance of having been burned or charred within the boxes. The clothing was not injured by any external force or accident, but whatever the injury was, it was the result of the inherent infirmity of the goods themselves. Neither the plaintiffs nor the defendants knew at the time the insurance was effected that the goods were liable to spontaneous combustion, or to be injured by any inherent defect in the goods. No extra premium to cover such risk was paid.

Under these circumstances, the defendants claim that by the general principles of insurance law, they are not liable for a loss by spontaneous combustion, caused by the inherent infirmity of the goods themselves.

This was a marine policy, and one of the dangers insured against, by the terms of the policy, was fire. But while this is undoubtedly so, the question remains, and is still undecided in this State, whether the term "fire" used in the ordinary marine policy will, upon general principles, cover the case of spontaneous combustion, caused by an inherent infirmity in the article insured, and not the result of accident or peril of the sea. There is no doubt of the liability of the defendant company, under its policy, had the ship taken fire, and the goods been consumed; or had the fire originated from any of the perils insured against; but the question is a very different one when, as in this case, the goods are in good faith insured, and believed, both by plaintiffs and defendant, not to be liable to spontaneous combustion by reason of their inherent infirmity, but which in fact were so liable, and were so injured.

The authorities are few upon this subject, and neither full nor satisfactory. One of the oldest to which we have access is Emerigon, who says, page 290 :

"Art. 12 of another title establishes, as a general rule, that everything which happens through the *inherent vice of the thing*, or by the act of the owners, master, or merchant shipper, shall not be reputed a peril, if not otherwise borne on the policy."

It is then certain that the insurers never answer for damages and losses which happen directly through the act or fault of the assured himself. It would be in fact intolerable that the assured should be indemnified by others for a loss of which he is the author. This rule is grounded on first principles. It is a general rule, from which it is not permitted to derogate by a contrary agreement. As Pothier remarks, "it is evident that I cannot validly agree with any one that he shall charge himself with the faults that I shall commit."

We do not understand this learned author to mean that an article may not be insured that is inherently liable to spontaneous combustion, or decay, *provided it is so expressed in the policy*, but not otherwise. But if the loss happens through *the fault of the assured*, then the insurers are not liable, whatever may be the terms of the policy. For example, if an article is insured, which *when dry* is not liable to spon-

taneous combustion, but when he puts it on board, *it is wet*, in such case no recovery can be had. Such we understand to be the views of this author.

The next case to which we are referred is the case of *Boyd v. Dubois*, 3 Campbell. In that case Lord Ellenborough said: "If the hemp was put on board in a state liable to effervesce, and it did effervesce, and generate the fire which consumed it, upon the common principles of insurance law, the assured cannot recover for a loss which he himself has occasioned."

The defendant in that case attempted to prove that the hemp, which was insured, was put aboard ship in a *damaged* condition; and for that reason was apt to ferment and take fire.

This case is in accord with Emerigon.

The next authority is Parsons on Contracts, vol. ii. p. 374, 6th ed. The author therein says:

"It is another rule that insurers are not liable for property destroyed by the effect of its own *inherent deficiencies or tendencies*, unless these tendencies are made active and destructive by a peril insured against. Thus, if hemp, which was dry when laden, be afterwards wet by a peril of the sea, and by reason of such wet ferments, or rots, or burns, the insurers would be liable." And that very learned author refers to both Emerigon and the case of *Boyd and Dubois* as his authorities.

Chancellor Kent also takes a similar view in his Commentaries, vol. iii. c. 48.

Phillips on Insurance, c. 13, marginal page, says:

"It is a general rule that insurers are not, under the common form of the policy, liable to any damage or loss arising from the qualities or defects of the subject insured, since these are not among the perils assumed by the underwriter."

Parsons on the Law of Marine Insurance, vol. ii. p. 216, holds the same view. He says:

"It is also a rule that the insurers are liable for no subject-matter of insurance which is destroyed by reason of its own inherent defects or tendencies. But this rule does not apply to tendencies which are called into activity only by a peril insured against. Thus, if hemp insured, burns up, or rots, from spontaneous ignition or fermentation, it being known that this may happen, if the hemp be damp, but not if it be dry, the question would be, whether it was damp or dry when it was put on board. But if the hemp were dry when laden, and was afterwards wet by reason of the straining of the ship in a storm, or by the shipping of a sea, or any like peril, then the insurers, whether on ship or cargo, would be liable."

All these authorities refer to Emerigon and the case in 3 Campbell, and are all upon marine insurance.

On the other hand, we have been referred to the case of *The British American Insurance Co. v. Joseph*,¹ decided in the Court of Appeals

¹ 9 Lower Canada, 448 (1857). — Ed.

for Lower Canada, which has been supposed to decide that a fire insurance (not marine) covers the risk of spontaneous combustion; and citing that case only, Mr. May, in his Work on Fire Insurance, comes to the same conclusion.

The Lower Canada case is certainly very imperfectly reported. The report is in French, and the court gave no opinion; the terms of the policy are not set out, and but a very few of the facts in the case. It is by no means clear, from the few facts that are stated, that the spontaneous combustion did not originate in a heap of *uninsured* coal, and extend from that to the insured coal.

But suppose the case has all the effect claimed for it by the appellees, and does decide that in a purely fire insurance the risk of spontaneous combustion is covered, we could not agree that it should overrule the long list of high authorities to the contrary in marine policies. More especially since the reasons to the contrary, we think, are satisfactory.

No well managed insurance company would take a marine risk on an article inherently liable to spontaneous combustion; nor would any prudent shipmaster or owner receive such on his vessel, as not merely the property so insured, but the property of others, and the safety of the ship, and the lives of the crew, would be endangered by so doing. It would, as Emerigon says, be intolerable that the owner should receive pay for goods that destroyed themselves. The object of a marine policy is to insure against the perils of the sea, and not against the perils incident to the goods themselves.

In this case it is very clear that the goods were injured by their own inherent infirmity, and that such inherent infirmity was not called into activity by any peril insured against. We think such loss was not within the contemplation of either party to the contract of insurance. That the term "fire," used in the policy, included fire from accident, or brought about by a peril of the sea, and not spontaneous combustion.

Entertaining these views, we think the court below was in error in granting the fourth prayer of the plaintiffs, and in refusing the first prayer of the defendant, and the judgment must be reversed. But inasmuch as the evidence is full and explicit that the injury was caused by the inherent infirmity of the goods, a new trial will not be awarded.¹

*Judgment reversed.*²

¹ On application for a rehearing, a new trial was awarded to permit the appellees to furnish new evidence to the effect that the injury was not in fact caused by the inherent infirmity of the goods. — Ed.

² On the perils insured against, see also : —

Tierney v. Etherington, 1 Burr. at 348 (1743);
 Pelly v. Royal Exchange Assur. Co., 1 Burr. 341 (1757);
 Hodgson v. Malcolm, 2 B. & P. N. R. 336 (1806);
 Butler v. Wildman, 3 B. & Ald. 398 (1820);
 Ellery v. New England Ins. Co., 8 Pick. 14 (1829);
 Wilson v. Jones, L. R. 2 Ex. 139, 148 (Ex. Ch. 1867);
 Moores v. Louisville Underwriters, 14 Fed. Rep. 226 (C. C., W. D. Tenn., 1882);
 Snowden v. Guion, 101 N. Y. 458 (1886). — Ed.

SECTION I. (*continued*).

(B) THE CONNECTION BETWEEN PERIL AND LOSS.

BONDRETT v. HENTIGG.

NISI PRIUS, COMMON PLEAS, 1816. Holt, N. P. 149.

POLICY of insurance on goods from London to the Isle of France, &c. Loss averred by perils of the sea. The plaintiff claimed a total loss. The ship had been wrecked; but some of her cargo was saved and got on shore. It fell, however, into the hands of the natives of the Isle of France, who destroyed part and plundered the rest.

Bosanquet, serjeant, for the defendant. This is not a loss by perils of the sea, and the plaintiff has not abandoned. To make it a total loss under these circumstances there must be an abandonment.

GIBBS, C. J. An abandonment is not necessary to make it a total loss; the cause of the loss was the perils of the seas; and the portion of the goods which was saved from the wreck, though got on shore, never came again into the hands of the owners. It is therefore a total loss to them from the perils stated in the declaration.

Vaughan, serjeant, and *Barnewell*, for plaintiff.

Bosanquet, serjeant, for defendant.

PETERS AND ANOTHER v. WARREN INSURANCE COMPANY.

SUPREME COURT OF THE UNITED STATES, 1840. 14 Pet. 99.¹

THE case is stated in the opinion.

Mr. *Webster*, for the plaintiffs.

Mr. *Parsons*, for the defendant.

Mr. Justice STORY delivered the opinion of the court.

This is the case of a division of opinion, certified to this court by the judges of the Circuit Court for the District of Massachusetts.

The defendant, by a policy of insurance, dated the 1st of April, 1836, insured the plaintiffs, for whom it may concern, payable to them, eight thousand dollars, on the ship "Paragon," for the term of one year, commencing the risk on the 13th of March, 1836, at noon, at five per cent. The policy contained the usual risks, and among others, that of perils of the sea. The declaration alleged a loss, by collision with another vessel, without any fault of the master or crew of the "Paragon;" and also insisted on a general average

¹ The reporter's statement has been omitted. — ED.

and contribution. The parties at the trial agreed upon a statement of facts; by which it appeared that the "Paragon" was owned by the plaintiffs, and was in part insured by the defendants, by the policy above mentioned. On the 10th of November, 1836, the "Paragon" sailed from Hamburg, in ballast, for Gottenburg, to procure a cargo of iron for the United States. While proceeding down the Elbe, with a pilot on board, she came in contact with a galliot, called the "Frau Anna," and sunk her. By this accident, the "Paragon" lost her bowsprit, jibboom, and anchor, and sustained other damage, which obliged her to put into Cuxhaven, a port at the mouth of the Elbe, and subject to the jurisdiction of Hamburg, for repairs. Whilst lying there, the captain of the galliot libelled the "Paragon" in the Marine Court, alleging that the loss of the vessel was caused by the carelessness or fault of those on board of the "Paragon." The ship was arrested, but was subsequently released on security being given by the agents of the owners, to respond to such damages as should be awarded by the court. Upon hearing of the cause, the court decided that the collision was not the result of fault or carelessness on either side, and that therefore, according to the marine law of Hamburg, the loss was a general average loss, and to be borne equally by each party; that is to say, that the "Paragon" was to bear one-half of the expense of her own repairs, and to pay one-half of the value of the galliot; and that the galliot was to bear the loss of one-half of her own value, and to pay one-half of the repairs of the "Paragon:" the result of which was, that the "Paragon" was to pay the sum of two thousand six hundred dollars, being one-half of the value of the galliot (three thousand dollars), after deducting one-half of her own repairs (four hundred dollars). The owners of the "Paragon" having no funds at Hamburg the captain was obliged to raise the money on bottomry. There being no cargo on board of the "Paragon," and no freight earned, the "Paragon" was obliged to bear the whole loss.

Upon this state of facts the question arose, whether in this case the contributory amount paid by the "Paragon" on account of the collision, was a direct, positive, and proximate effect from the accident, in such sense as to render the defendants liable therefor. Upon this question the judges were opposed in opinion; and it has accordingly been certified to this court for a final decision.

That a loss by collision, without any fault on either side, is a loss by the perils of the sea, within the protection of the policy of insurance, is not doubted. So far as the injury and repairs done to the "Paragon" itself extend, it is admitted that the underwriters are liable for all the damages. The only point is, whether the underwriters are liable for the contribution actually paid on account of the loss of the galliot.

This point does not appear ever to have been decided in any of the American courts. It is proper, therefore, to examine it upon principle, and to ascertain what is the true bearing of the foreign authorities upon it.

And first upon principle: That the owners of the "Paragon" have been compelled to pay this contribution without any fault on their side, is admitted; that it constituted a proper subject of cognizance by the Marine Court of Hamburg, the collision having occurred within the territorial jurisdiction of that city, is also admitted; and that the claim constituted a charge or lien upon the "Paragon," according to the local law, capable of being enforced by a proceeding *in rem*, is equally clear. Why, then, should not the loss be borne by the underwriters, since it was an unavoidable incident or consequence resulting from the collision?

The argument is, that in the law of insurance, which governs the present contract, it is a settled rule that underwriters are liable only for losses arising from the proximate cause of the loss, and not for losses arising from a remote cause, not immediately connected with the peril. *Causa proxima non remota spectatur*. The rule is correct, when it is understood and applied in the true sense; and, as such it has been repeatedly recognized in this court. But the question, in all cases of this sort, is, what, in a just sense, is the proximate cause of the loss?

The argument in the present case, on the part of the defendants, is, that the law of Hamburg is the immediate or proximate cause of the loss now claimed, and the collision is but the remote cause. But surely this is an over-refinement, and savors more of metaphysical than of legal reasoning. If the argument were to be followed out, it might be said, with more exactness, that the decree of the court was the proximate cause, and the law of Hamburg the remote cause of this loss. But law, as a practical science, does not indulge in such niceties. It seeks to administer justice according to the fair interpretation of the intention of the parties; and deems that to be a loss within the policy which is a natural or necessary consequence of the peril insured against. In a just view of the matter, the collision was the sole proximate cause of the loss; and the decree of the court did but ascertain and fix the amount chargeable upon the "Paragon," and attached thereto at the very moment of the collision. The contribution was a consequence of the collision, and not a cause. It was an incident inseparably connected, in contemplation of law, with the sinking of the galliot; and a damage immediate, direct, and positive, from the collision. In the common case of an action for damages for a tort done by the defendant, no one is accustomed to call the verdict of the jury, and the judgment of the court thereon, the cause of the loss to the defendant. It is properly attributed to the original tort, which gave the right to damages consequent thereon; which damages the verdict and judgment ascertained, but did not cause.

But let us see how the doctrine is applied in other analogous cases of insurance, to which, as much as to the present case, the same maxim ought to apply, if there is any just foundation for it here. If there be any commercial contract which, more than any other, requires the application of sound common sense and practical reasoning in the

exposition of it, and in the uniformity of the application of rules to it, it is certainly a policy of insurance; for it deals with the business and interests of common men, who are unused to deal with abstractions and refined distinctions. Take the case of a jettison at sea, to avoid a peril insured against. It is a voluntary sacrifice, and may be caused by the perils of the sea; but it is ascertained long afterwards, and that ascertainment, whether made by a court of justice, or by an agreement of the parties, would, in the sense of the maxim contended for in the argument, be the immediate cause of the contribution, and the jettison but a remote cause; and the violence of the winds and waves a still more remote cause of the jettison. Yet all such niceties are disregarded, and the underwriters are held liable for the loss thus sustained by the jettison, as a general average. It is no answer to say, that this is now the admitted doctrine of the law, and therefore it is treated as a loss within the policy. The true question to be asked is, Why is it so treated? General average, as such, is not, *eo nomine*, insured against in our policies. It is only payable when it is a consequence, or result, or incident (call it what we may) of some peril positively insured against; as, for example, of the perils of the sea. The case of a ransom after capture stands upon similar grounds. The ransom is, in a strict metaphysical sense, no natural consequence of the capture. It may be agreed upon long afterwards; and if we were to look to the immediate cause, it might be said that the voluntary act of the party in the payment was the cause of the loss. But the law treats it as far otherwise, and deems the ransom a necessary means of deliverance from a peril insured against, and acting directly upon the property. The expenses consequent upon a capture, where restitution is decreed by a Court of Admiralty upon the payment of all the costs and expenses of the captors, fall under a similar consideration. In such cases, the decree of the court allowing the costs and expenses may be truly said to be the immediate cause of the loss; but courts of justice treat it also as the natural consequence of the capture.

A still more striking illustration will be found in the case of salvage decreed by a Court of Admiralty for services rendered to a vessel in distress. The vessel may have been long before dismasted or otherwise injured, or abandoned by her crew in consequence of the perils of the winds and waves; and the salvage decreed in such a case would seem, at the first view, far removed from the original peril, and disconnected from it: and yet, in the law of insurance, it is constantly attributed to the original peril, as the direct and proximate cause; and the underwriters are held responsible therefor, although salvage is not specifically, and in terms, insured against.

These are by no means the only illustrations of the danger of introducing such an application of the maxim into the law of insurance as is now contended for. Suppose a perishable cargo is greatly damaged by the perils of the sea, and it should, in consequence thereof, long afterwards, and before arrival at the port of destination, become

gradually so putrescent as to be required to be thrown overboard for the safety of the crew: the immediate cause of the loss would be the act of the master and crew; but there is no doubt that the underwriters would be liable for a total loss, upon the ground that the operative cause was the perils of the sea. Suppose a vessel which is insured against fire only, is struck by lightning, and takes fire; and in order to save her from utter destruction, she is scuttled and sunk in shoal water, and she cannot afterwards be raised; it might be said that the immediate cause of the loss was the scuttling: but in a juridical sense it would be attributed to the fire; and the underwriters would be held liable therefor. Suppose another case, that of a vessel insured against all perils but fire, and she is shipwrecked by a storm on a barbarous coast, and is there burnt by the natives; it might be said that the proximate cause of the loss was the fire; and yet there is no doubt that the underwriters would be held liable on the policy, upon the ground that the vessel had never been delivered from the original peril of shipwreck.

Illustrations of this sort might be pursued much farther, but it seems unnecessary. Those which have been already suggested sufficiently establish that the maxim, *Causa proxima non remota spectatur*, is not without limitations, and has never been applied in matters of insurance to the extent contended for; but that it has been constantly qualified, and constantly applied only in a modified practical sense, to the perils insured against. In truth, in the present case, the loss occasioned by the contribution is (as has been already suggested) properly a consequence of the collision, and in no just sense a substantive independent loss.

In the next place, how stand the authorities on this subject? The only authority which has been cited by the counsel for the defendants, to sustain their argument, is the case of *De Vaux v. Salvador*, 4 Adolphus and Ellis's Rep. 420. That case is certainly direct to the very point now in judgment. It was a case of collision, where the assured had been compelled to pay for an injury done to another vessel by the mutual fault of both vessels, according to the rule of the English Court of Admiralty, which, in a case of mutual fault, apportions the loss between them. Lord Denman, in delivering the opinion of the court, admitted that the point was entirely new; and after referring to the above maxim, said: "It turns out that the ship (insured) has done more damage than she has received, and is obliged to pay the owners of the other ship to some amount, under the rule of the Court of Admiralty. But this is neither a necessary nor a proximate effect of the perils of the sea. It grows out of an arbitrary provision in the law of nations; from views of general expediency, not as dictated by natural justice, nor (possibly) quite consistent with it: and can no more be charged on the underwriters than a penalty incurred by contravention of the revenue laws of any particular State, which was rendered inevitable by perils insured against." This is the whole reasoning of

the learned judge upon the point ; and with great respect, if the views already suggested are well founded, it is not supported by the analogies of the law, or by the principles generally applied to policies of insurance. The case of a penalty, put by the learned judge, does not strike us with the same force as it does his lordship. If any nation should be so regardless of the principles of natural justice as to declare that a vessel driven on shore by a storm should be forfeited because its revenue laws were thereby violated, it would then deserve consideration whether the underwriters would not be liable for the loss, as an inevitable incident to the shipwreck. At all events, the point is too doubtful in itself to justify us in adopting it as the basis of any reasoning in the present case.

The case before the King's Bench was confessedly new, and does not appear upon this point to have been much argued at the bar. It seems to have been decided, principally, upon the ground of the absence of any authority in favor of the assured, and as it appears to us, in opposition to the analogies furnished by other acknowledged doctrines in the law of insurance.

The same question, however, has undergone the deliberate consideration of some of the greatest maritime jurists of continental Europe ; and the result at which they have arrived is directly opposite to that of the King's Bench. Pothier lays it down as, in his opinion, the clear result of the contract of insurance, that the underwriters are bound to pay not only the direct loss occasioned by any peril insured against, but all the expenses which follow as a consequence therefrom. Pothier, *Traité d'Assurance*, n. 49. Estrangin, a very excellent modern commentator upon Pothier (Estrangin's note), asserts that there is not the slightest doubt on the subject. Emerigon, whose reputation as a writer on the law of insurance is second to no one, unequivocally adopts the same opinion. Emerig. *Assur.*, ch. 12 § 14, p. 414-417. In short, all those learned foreigners hold the doctrine that whenever the thing insured becomes by law directly chargeable with any expense, contribution, or loss, in consequence of a particular peril, the law treats that peril, for all practical purposes, as the proximate cause of such expense, contribution, or loss. And this they hold, not upon any peculiar provisions of the French ordinance, but upon the general principles of law applicable to the contract of insurance. In our opinion this is the just sense and true interpretation of the contract.

It has been suggested that there is a difference between our policies and the French policies ; the latter containing an express enumeration of fortuitous collision, or running foul (*abordage fortuit*), as a peril insured against ; while in our policies it falls only under the more general head of "perils of the sea." But this furnishes no just ground for any distinction in principle. The reasoning, if any, to be derived from this circumstance, would seem rather to apply with more force in favor of the plaintiff, since, even when the risk of collision is specifically enumerated, the expenses and contribution attendant upon it are treated

as inseparable from the direct damage to the vessel itself, as a part of the loss. In short, whether a particular risk is specified in terms, or is comprehended in the general words of the policy, the same result must arise, viz., that the underwriters are to bear all losses properly attributable to that peril, and no other losses.

It may be proper to remark, that the rule which we here adopt is just as likely, in actual practice, to operate favorably as unfavorably to the underwriters. If by the collision the "Paragon" had been sunk, and the galliot saved, the underwriters would have had the entire benefit of the reciprocity of the rule. It would sound odd that in such a case the underwriters should be entitled to receive the full benefit of the Hamburg law for their own indemnity; and yet in the opposite case, that they should escape from the burden imposed by that law.

In all foreign voyages, the underwriters necessarily have it in contemplation that the vessel insured must, or at least may be, subjected to the operation of the laws of the foreign ports which are visited. Those very laws may in some cases impose burdens, and in some cases give benefits, different from our laws; and yet there are cases under policies of insurance, where it is admitted that the foreign law will govern the rights of the parties, and not the domestic law. Such is the known case of a general average, settled in a foreign port according to the local law, although it may differ from our own. *Simonds v. White*, 2 Barn. and Cresw. 805. In the present case, the policy was on time, and the vessel had, as it were, a roving commission to visit any foreign port; and of course might well be presumed at different periods to come under the dominion of various codes of laws, which might subject her to various expenditures and burdens. The underwriters have no right to complain, that when those expenditures and burdens arise from a peril insured against, they are compelled to pay them; for they were bound to have foreseen the ordinary incidents of the voyage. Suppose a vessel injured by the perils of the sea puts into a foreign port to repair, and the license to repair, or the repairs themselves, are burdened with a heavy revenue duty; no one will doubt that the charge must be borne by the underwriters, as an expense incident to the repair; and yet it might truly be said not to be the natural result of the peril, but only a charge imposed by law, consequent thereon.

Upon the whole, we are of opinion that it be certified to the Circuit Court, that in this case the contributory amount paid by the "Paragon," on account of the collision, was a direct, positive, and proximate effect from the accident, in such sense as to render the defendants liable therefor upon this policy.

MONTTOYA AND OTHERS v. LONDON ASSURANCE CO.

EXCHEQUER, 1851. 6 Exch. 451.

COVENANT on two sea policies of insurance on produce or goods. The declaration stated an average loss on tobacco by perils of the seas. The defendants pleaded (by statute) that they had not broken their covenants; and issue having been joined thereon, by the consent of the parties, and by a judge's order, the following case (in substance) was stated for the opinion of this court:

The plaintiffs, who are merchants carrying on business in London, on the 9th of January, 1849, effected the first of the policies in the declaration mentioned with the defendants, on tobacco and hides (*inter alia*) from New Granada to ports of discharge in the United Kingdom, the plaintiffs engaging to pay averages on tobacco. On the 19th of February, 1849, the plaintiffs effected a similar policy, the second policy in the declaration mentioned, with the defendants, on tobacco and hides. The produce as declared was duly shipped on board the vessel, which sailed with her cargo from St. Martha in New Granada on her voyage towards her port of discharge; and whilst proceeding on her voyage encountered much bad weather, and was struck by heavy seas, and shipped large quantities of water, by reason whereof the produce so shipped sustained damage as hereafter mentioned. In April, 1849, the vessel arrived at her port of discharge; and it was then discovered that some part of the cargo was considerably damaged from the causes above mentioned, and on the opening of the hold a suffocating stench and vapor or gas issued from it. The cargo had consisted principally of sugar, hides, and tobacco. The tobacco had been shipped according to the usual course adopted in exporting tobacco from ports in New Granada, in serons — a Spanish term signifying dry hide packages. A very large part of the cargo of hides was in an absolute state of rottenness and putridity from sea damage, and a great number of the serons in which the tobacco was packed were also rotten, and greatly damaged by sea-water. A large portion of the cargo of tobacco was rendered totally worthless. The rest was greatly deteriorated in consequence of a part of the cargo having been excessively damaged by sea-water, which caused fermentation, and strongly impregnated more or less the whole of the cargo with a fetid flavor.

The plaintiffs claimed in this action in respect only of the damage sustained by the tobacco part of the cargo insured, which was not, nor were the serons, immediately in contact with nor directly damaged by sea-water, but which was damaged and deteriorated in the manner described, that is to say, was damaged and deteriorated in flavor only, and not otherwise, by the fetid odor caused by and proceeding from the fermentation and putridity of that part of the cargo which had been directly damaged and putrified by the sea-water.

The court were to be at liberty to draw any such inference from the facts as a jury would be at liberty to draw.

The question for the opinion of the court was, whether the defendants were liable for the damage aforesaid; and if the court should be of opinion that they were, judgment was to be entered for the plaintiffs for £630; but if the court should be of opinion that the defendants were not liable, judgment of *nolle prosequi*, or such judgment as the court might think fit, was to be entered.

Sir F. Thesiger (*Tomlinson* with him), for the plaintiffs.

*Peacock, contra.*¹

POLLOCK, C. B. We think it unnecessary to hear any further argument on the part of the plaintiffs. The question for the court is, whether, under the particular circumstances of this case, the plaintiffs are entitled to recover from the underwriters for the damage occasioned to the tobacco, as a loss within the meaning of the policy; and we are all clearly of opinion that our judgment ought to be for the plaintiffs. Mr. Peacock has argued the case with much ingenuity, and the effect of his argument has been to cause some doubt where the precise limits of the responsibility of underwriters are to be fixed. Many ingenious cases might be suggested, in which the court would have much difficulty in deciding whether they would fall within such limits. But it appears to me that no such doubt or difficulty exists in the present case, and I think, as fell from one of the members of the court in the course of the argument, that, if the underwriters here would have been responsible for damage done to a cargo consisting entirely of corn, the lower part of which had been spoilt by direct contact with the sea-water, and the upper by the fermentation of the lower part, the underwriters must equally be liable in the present case: for, in truth, there is no distinction between the two cases. It is a matter of no difference whether the whole of the cargo belongs to one person, and consists of one entire package of corn, or whether the cargo consists partly of corn and partly of hides, and is the property of several owners. In both cases the loss arises from perils of the seas; and it is difficult to see how the loss can be said not to be the immediate result of such perils. Several of the cases put to us on the part of the defendants are, in my opinion, cases of the direct and immediate consequence of perils of the seas, in which the sea-water is the immediate cause of the loss. And I think it

¹ This argument was interrupted by PARKE, B., thus: "Suppose, in the present case, that instead of the cargo consisting of a layer of hides, the whole cargo had consisted of several quarters of corn, and that the lower portion had become damaged by the action of salt water, and had undergone the process of fermentation, and had, by the evolution of gas, totally destroyed the upper portion of the cargo, would not such a damage have fallen within the terms of this policy?"

And the argument was interrupted by PLATT, B., thus: "Even admitting that this damage might have been prevented if the captain of the vessel had landed the cargo at some intermediate port and had caused the hides to be dried, does not the loss equally arise from the perils of the seas, when, instead of adopting that course, the captain proceeds on his voyage?" — ED.

may be laid down as a general rule, that where mischief arises from perils of the seas, and the natural and almost inevitable consequence of that mischief is to create further mischievous results, the underwriters, in such case, are responsible for the further mischief so occasioned.

PARKE, B. I am also of opinion that our judgment ought to be for the plaintiffs. There is no doubt that the maxim of Lord Bacon, which was cited at the commencement of the case, and has been relied upon by Mr. Peacock, is perfectly correct, and applies not only to the present case but to all cases of this description; and the question in each case is, what is *causa proxima*, and what *causa remota*? There is very great difficulty, as my Lord Chief Baron has observed, in saying where the precise line is to be drawn; and it is often no easy matter to decide whether a particular case falls within it or not. But I do not see that there is any difficulty in saying that the present case does fall within the line. If the owner of this tobacco which has been injured, could recover compensation for his loss occasioned by that injury from the master or owner of the vessel, there is no good reason why he should not be entitled also to recover against the underwriter for a loss occasioned by perils of the seas. If the cargo had consisted wholly of hides, and the upper part had been injured by vapors arising from the decomposition of the lower hides, occasioned by the action of sea-water, the owner of the hides would have been entitled to recover from the underwriter for the injury so occasioned to the upper layers. It is a matter of no difference whatever that the cargo consists partly of corn and partly of hides. The loss in either case is immediately and directly caused by perils of the seas, and would therefore fall within the terms of this policy. It is therefore not necessary to give any opinion upon the cases which have been put on the part of the defendants. Some of them may fall within the line, and others without it. It seems to me to be impossible to distinguish this case from that which I put, where the cargo is supposed to consist entirely of hides or corn, and the upper part is injured by noxious gases arising from the decomposition of the lower portions, or by the water being raised by capillary attraction. The assured are therefore entitled to recover in this action.

PLATT, B. I am of the same opinion. I do not feel that I was answered by the difficulty which Mr. Peacock suggested in reply to the case I put to him during the course of his argument. The learned counsel asked at what time the loss occurred. I do not think that is a matter of the least moment or consequence whatever. The sea-water having caused the hides to ferment, and thereby the tobacco to be spoilt, it is merely playing with terms to say that the injury is not occasioned by the sea-water. The action of the sea-water which has been shipped in consequence of bad weather occasions the fermentation, and is the proximate cause. It appears to me, therefore, that whatever mischief is occasioned to the cargo by the shipping of sea-water, is a loss occasioned by the perils of the seas, and that the insurers are liable to make the loss good.

MARTIN, B. I am clearly of opinion that the injury to the tobacco is a loss arising from perils of the seas. The case finds that the putrefaction of the hides was caused by the sea-water, which had found its way into the hold of the vessel, and that the putrefaction of the hides so occasioned had caused the destruction of the tobacco. I do not think it to be by any means necessary that the sea-water should be in absolute contact with the injured article. The result of the injury to the hides by the sea-water is the damage to the tobacco. It is, no doubt, difficult to say where the line is to be drawn in all cases. But in the present the loss clearly falls within the terms of the policy, as arising from perils of the seas.

*Judgment for the plaintiffs.*¹

GENERAL MUTUAL INS. CO., PLAINTIFFS IN ERROR,
v. SHERWOOD, DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES, 1852. 14 How. 351.²

THE case is stated in the opinion.

Mr. *A. Hamilton, Jr.*, for the plaintiffs in error.

Mr. *Butler*, with whom was Mr. *Cutting*, for the defendant in error.

Mr. Justice CURTIS delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the Southern District of New York.

The action was assumpsit on a time policy of insurance, subscribed by the plaintiffs in error, upon the brig "Emily," during one year from the seventeenth day of October, 1843, for the sum of eight thousand dollars, the vessel being valued at the sum of sixteen thousand dollars. The policy, described in the declaration, assumed to insure against the usual sea perils, among which is barratry of the master and mariners. The declaration avers, that during the prosecution of a voyage, within the policy, while on the high seas, and near the entrance of the harbor of the city of New York, by and through the want of a proper look-out, by the mate of the said brig, and, by and through the erroneous order of the chief mate, who was stationed on the top-gallant fore-castle of the said brig, who saw the schooner, hereinafter named, and cried out to the man at the wheel, "helm hard down — luff" — whereas, he ought not to have given the said order; and, by and through the negligence and fault of the said brig "Emily," the said brig ran into a schooner called the "Virginian," and so injured her that she sank, whereby the said brig "Emily"

¹ See *Cory v. Boylston F. & M. Ins. Co.*, 107 Mass. 140 (1871).

Compare *Cator v. Great Western Ins. Co.*, L. R. 8 C. P. 552 (1873) — Ed.

² The reporter's statement has been omitted. — Ed.

became liable to the owners of the said schooner and her cargo, to make good their damages; which liability was a charge and encumbrance on the said brig. The declaration then proceeds to aver, that the brig was libelled, by the owners of the schooner and her cargo, in the District Court of the United States; that a decree was there made, whereby it was adjudged, "That the collision in the pleadings mentioned, and the damages and loss incurred by the libellants, in consequence thereof, occurred by the negligence or fault of the said brig, and that the libellants were entitled to recover their damages by them sustained thereby;" that the same having been assessed, a decree therefor was made by the District Court, which, on appeal, was affirmed by the Circuit Court, which found, "That the hands, on board the 'Emily,' failed to keep a proper look-out, and, that the said brig might have avoided the collision, by the use of proper caution, skill, and vigilance." The declaration further avers, that the plaintiff has paid divers sums of money, to satisfy this decree and the expenses of making the defence, amounting to the sum of eight thousand dollars.

This statement of the substance of the declaration presents the question which has been here argued, and sufficiently shows how it arose; for, although there was a demurrer to the first two counts in the declaration, and a trial upon the general issue pleaded to the other counts, and a bill of exceptions taken to the ruling at the trial, yet the same question is presented by each mode of trial, and that question is, whether, under a policy insuring against the usual perils, including barratry, the underwriters are liable to repay to the insured, damages paid by him to the owners of another vessel and cargo, suffered in a collision occasioned by the negligence of the master or mariners of the vessel insured.

The great and increasing internal navigation of the United States, carried on over long distances, through the channels of rivers and other comparatively narrow waters, where the danger of collisions, and the frequency of their occurrence, are much greater than on maritime voyages, renders the respective rights of underwriters and insured, growing out of such occurrences, of more moment in this than in any other civilized country; and the court has considered the inquiry presented by this case, with the care which its difficulty and its importance demand.

In examining, for the first time, any question under a policy of insurance, it is necessary to ascertain whether the contract has received a practical construction, by merchants and underwriters; not through any partial or local usages, but by the general consent of the mercantile world. Such a practical construction, when clearly apparent, is of great weight, not only because the parties to the policy may be presumed to have contracted in reference to it, but because such a practice is very high evidence of the general convenience and substantial equity of it, as a rule. This is true of most commercial con-

tracts ; but it is especially true of a policy of insurance, which has been often declared to be an "obscure, incoherent, and very strange instrument," and, "generally more informal than any other brought into a court of justice" (Per Buller, J., 4 T. R. 210 ; Mansfield, C. J., 4 Taunt. 380 ; Marshal, C. J., 6 Cr. 45 ; Lord Mansfield, 1 Bur. 347) ; but which, notwithstanding the number and variety of the interests which it embraces, and of the events by which it is affected, has been reduced to much certainty, by the long practice of acute and well-informed men in commercial countries ; by the decisions of courts in America and in England, and by able writers on the subject, in this and other countries.

And it should not be forgotten, that, not only in the introduction of this branch of law into England, by Lord Mansfield, but in its progress since, both there and here, a constant reference has been had to the usage of merchants, and the science of insurance law has been made and kept a practical and convenient system, by avoiding subtle and refined reasoning, however logical it may seem to be, and looking for safe practical rules.

Now, although cases like the present must have very frequently occurred, we are not aware of any evidence that underwriters have paid such claims, or that, down to the time when one somewhat resembling it was rejected by the Court of King's Bench, in *De Vaux v. Salvador*, 5 Ad. and Ellis, decided in 1836, such a claim was ever made. And we believe that, if skilful merchants, or underwriters, or lawyers, accustomed to the practice of the commercial law, had been asked whether the insurers on one vessel were liable for damage done to another vessel, not insured by the policy, by a collision occasioned by the negligence of those on board the vessel insured, they would, down to a very recent period, have answered, unhesitatingly, in the negative.

As we shall presently show, such, for a long time, was the opinion of the writers on insurance, on the continent of Europe, and in England and America. And this, alone, would be strong proof of the general understanding and practice of those connected with this subject.

But, although this practical interpretation of the contract is entitled to much weight, we do not consider it perfectly decisive. It may be, that, by applying to the case the settled principles of the law of insurance, the loss is within the policy ; and, that it has not heretofore been found to be so, because an exact attention has not been given to the precise question. Or, it may be, that the weight of recent authority, and the propriety of rendering the commercial law as uniform as its necessities, should constrain us to adopt the rule contended for by the defendant in error. And, therefore, we proceed to examine the principles and authorities, bearing on this question.

Upon principle, the true inquiries are, what was the loss, and what was its cause ?

The loss was the existence of a lien on the vessel insured, securing

a valid claim for damages, and the consequent diminution of the value of that vessel. In other words, by operation of law, the owners of the "Virginian" obtained a lien on the vessel insured, as security for the payment of damages, due to them for a marine tort, whereby their property was injured.

What was the cause of this loss? We think it is correctly stated by this court, in the case of the *Paragon*, 14 Peters, 109. In that case, it was said: "In the common case of an action for damages for a tort done by the defendant, no one is accustomed to call the verdict of the jury and the judgment of the court thereon, the cause of the loss to the defendant. It is properly attributable to the original tort, which gave the right to damages consequent thereon." The cases there spoken of were claims *in personam*. But the language was used to illustrate the inquiry, what should be deemed the cause of a loss by a claim *in rem*, and is strictly applicable to such a claim. Whether the owners of the "Virginian" would proceed *in rem* or *in personam*, was at their election. It affected only their remedy. Their right, and the grounds on which it rested, and the extent of the defendant's liability, and its causes, were the same in both modes of proceeding. And, in both, the cause of the loss of the defendant would be the negligence of his servants, amounting to a tort. The loss consisting in a valid claim on the vessel insured, we must look for the cause of the loss in the cause of the claim, and this is expressly averred by the declaration to have been the negligence of the servants of the assured. From the nature of the case, it was absolutely necessary to make such an averment. If the declaration had stated simply a collision, and that the plaintiff had paid the damages suffered by the "Virginian" and her cargo, it would clearly have been bad on demurrer; because, although it would show a loss, it would state no cause of that loss. It is only by adding the fact, that the damage done to the "Virginian" was caused by negligence, that is, by stating the cause of damage, that the cause of payment appears, and, when it appears, it is seen to be the negligence of the servants of the assured.

We know of no principle of insurance law which prevents us from looking for this sole operative cause, or requires us to stop short of it, in applying the maxim *causa proxima non remota spectatur*. The argument is, that collision, being a peril of the sea, the negligence which caused that peril to occur is not to be inquired into; it lies behind the peril, and is too remote. This is true when the loss was inflicted by collision, or was by law a necessary consequence of it. The underwriter cannot set up the negligence of the servants of the assured as a defence. But in this case he does not seek to go behind the cause of loss, and defend himself by showing this cause was produced by negligence. The insured himself goes behind the collision, and shows, as the sole reason why he has paid the money, that the negligence of his servants compelled him to pay it. It is true that an expense, attached by the law maritime to the subject insured, solely as

a consequence of a peril, may be considered as proximately caused by that peril. But where the expense is attached to the vessel insured, not solely in consequence of a peril, but in consequence of the misconduct of the servants of the assured, the peril *per se* is not the efficient cause of the loss, and cannot, in any just sense, be considered its proximate cause. In such a case the real cause is the negligence, and unless the policy can be so interpreted as to insure against all losses directly referable to the negligence of the master and mariners, such a loss is not covered by the policy. We are of opinion the policy cannot be so construed. When a peril of the sea is the proximate cause of a loss, the negligence which caused that peril is not inquired into; not because the underwriter has taken upon himself all risks arising from negligence, but because he has assumed to indemnify the insured against losses from particular perils, and the assured has not warranted that his servants will use due care to avoid them.

These views are sustained by many authorities. Mr. Arnould, in his valuable Treatise on Insurance (vol. 2, 775), lays down the correct rule: "Where the loss is not proximately caused by the perils of the sea, but is directly referable to the negligence or misconduct of the master or other agents of the assured, not amounting to barratry, there seems little doubt that the underwriters would be thereby discharged." To this rule must be referred that class of cases in which the misconduct of the master or marines has either aggravated the consequences of a peril insured against, or been of itself the efficient cause of the whole loss. Thus, if damage be done by a peril insured against, and the master neglects to repair that damage, and in consequence of the want of such repairs the vessel is lost, the neglect to make repairs, and not the sea damage, has been treated as the proximate cause of the loss. In the case of *Copeland v. The N. E. Marine Ins. Co.*, 2 Met. 432, Mr. Chief Justice Shaw reviews many of the cases, and states that "the actual cause of the loss is the want of repair, for which the assured are responsible, and not the sea damage which caused the want of repair, for which it is admitted the underwriters are responsible." And the same principles were applied by Mr. Justice Story, in the case of *Hazard v. N. E. Marine Ins. Co.*, 1 Sum. R. 218, where the loss was by worms, which got access to the vessel in consequence of her bottom being injured by stranding, which injury the master neglected to repair. So where a vessel has been lost or disabled, and the cargo saved, a loss caused by the neglect of the master to transship, or repair his vessel and carry the cargo, cannot be recovered. *Schieffelin v. N. Y. Ins. Co.*, 9 Johns. 21; *Bradhurst v. Col. Ins. Co.*, 9 Johns. 17; *Am. Ins. Co. v. Centre*, 4 Wend. 45; *S. C.* 7 Cow. 504; *McGaw v. Ocean Ins. Co.*, 23 Pick. 405. So where condemnation of a neutral vessel was caused by resistance of search: *Robinson v. Jones*, 8 Mass. 536; or a loss arose from the master's negligently leaving the ship's register on shore: *Cleveland v. Union Ins. Co.*, 8 Mass. 308. So where a vessel was burnt by the public

authorities of a place into which the master sailed with a false bill of health, having the plague on board, Emerigon (by Meredith), 348; in these and many other similar cases, the courts, having found the efficient cause of the loss to be some neglect of duty by the master, have held the underwriter discharged. Yet it is obvious that in all such cases, one of the perils insured against fell on the vessel. And they are to be reconciled with the other rule, that a loss caused by a peril of the sea is to be borne by the underwriter, though the master did not use due care to avoid the peril, by bearing in mind that in these cases it is negligence, and not simply a peril of the sea, which is the operative cause of the loss. It may sometimes be difficult to trace this distinction, and mistakes have doubtless been made in applying it, but it is one of no small importance in the law of insurance, and cannot be disregarded without producing confusion. The two rules are in themselves consistent. Indeed, they are both but applications, to different cases, of the maxim, *causa proxima non remota spectatur*. In applying this maxim, in looking for the proximate cause of the loss, if it is found to be a peril of the sea, we inquire no further; we do not look for the cause of that peril. But if the peril of the sea, which operated in a given case, was not of itself sufficient to occasion, and did not in and by itself occasion the loss claimed, if it depended upon the cause of that peril whether the loss claimed would follow it, and therefore a particular cause of the peril is essential to be shown by the assured, then we must look beyond the peril to its cause, to ascertain the efficient cause of the loss.

The case at bar presents an illustration of both rules. So far as the brig "Emily" was herself injured by the collision, the cause of the loss was the collision, which was a peril insured against, and the assured, showing that this vessel suffered damage from that cause, makes a case, and is entitled to recover. But he claims to recover not only for the damages done to his vessel, which was insured, but for damages done to the other vessel, not insured. To entitle himself to recover these, he must show not only that they were suffered by a peril of the sea, but that the underwriter is responsible for the consequences of that peril falling on a vessel not insured. It is this responsibility which is the sole basis of his claim, and to make out this responsibility he does not and cannot rest upon the occurrence of a collision; this affords no ground for this claim; he must show a particular cause for that collision; and aver that by reason of the existence of that cause, the loss was suffered by him, and so the underwriter became responsible for it.

This negligence is therefore the fact without which the loss would not have been suffered by the plaintiff, and by its operation the loss is suffered by him. In the strictest sense, it causes the loss to the plaintiff. The loss of the owners of the "Virginian" was occasioned by a peril of the sea, by which their vessel was injured. But nothing connects the plaintiff with that loss, or makes it his, except the

negligence of his servants. Of his loss this negligence is the only efficient cause, and in the sense of the law it is the proximate cause.

The ablest writers of the continent of Europe, on the subject of insurance law, have distinctly declared, that, in case of damage to another vessel solely through the fault of the master or mariners of the assured vessel, the damage must be repaired by him who occasioned it, and the insurer is not liable for it. Pothier *Traité d'Assurance*, No. 49, 50; Boucher, 1500, 1501, 1502; 4 Boulay Paty, *Droit Maritime* (ed. of 1823), 14, 16; Santayra's *Com.*, 7, 223; Emerigon (by Meredith), 337. If the law of England is to be considered settled by the case of *DeVaux v. Salvador*, 4 Ad. & El. 420, it is clear such a loss could not be recovered there. Mr. Marshall is evidently of opinion that unless the misconduct of the master and crew amounted to barratry, the loss could not be recovered. Marsh. on Ins., 495. And Mr. Phillips so states in terms. 1 Phil. on Ins., 636.

It has been urged that, in the case of the *Paragon* (*Peters v. Warren Ins. Co.*, 14 Pet. 99), this court adopted a rule which, if applied to the case at bar, would entitle the insured to recover. But we do not so consider it. It was there determined that a collision without fault was the proximate cause of that loss. Indeed, unless the operation of law, which fixed the lien, could be regarded as the cause of that loss, there was no cause but the collision, and that was a peril insured against.

We are aware that in the case of *Hall v. Washington Ins. Co.*, 2 Story, Mr. Justice Story took a different view of this question; and we are informed that the Supreme Court of Massachusetts has recently decided a case in conformity with his opinion, which is not yet in print, and which we have not been able to see.¹ But with great respect for that very eminent judge, and for that learned and able court, we think the rule we adopt is more in conformity with sound principle, as well as with the practical interpretation of the contract by underwriters and merchants, and that it is the safer and more expedient rule.

We cannot doubt that the knowledge by owners, masters, and seamen, that underwriters were responsible for all the damage done by collision with other vessels through their negligence, would tend to relax their vigilance and materially enhance the perils, both to life and property, arising from this case.

The judgment of the Circuit Court must be reversed, and the cause remanded, with directions to render a judgment for the defendants, on the demurrer to the first two counts, and award a *venire de novo* to try the general issue pleaded to the other counts.²

¹ The case alluded to is doubtless *Nelson v. Suffolk Ins. Co.*, 8 Cush. 477 (1851). — Ed.

² *Acc.*: *Mathews v. Howard Ins. Co.*, 11 N. Y. 9 (1854); *Street v. Augusta Ins. and Banking Co.*, 12 Rich. S. Car. Law, 13 (1859).

Contra: *Nelson v. Suffolk Ins. Co.*, 3 Cush. 477 (1851); *Walker v. Boston Ins. Co.*,

14 Gray, 288 (1859); *Blanchard v. Equitable Safety Ins. Co.*, 12 Allen, 386 (1866); *Thwing v. Great Western Ins. Co.*, 111 Mass. 93 (1872).

See *Thompson v. Reynolds*, 7 E. & B. 172 (1857); *Taylor v. Dewar*, 5 B. & S. 58 (1864); *Xenos v. Fox*, L. R. 4 C. P. 665 (Ex. Ch. 1869); *Whorf v. Equitable M. Ins. Co.*, 144 Mass. 68 (1887); *London S. O. Ins. Co. v. Grampian Steamship Co.*, 24 Q. B. D. 663 (C. A. 1890).

On proximate cause in marine cases, see also :—

- Jones v. Schmoll*, 1 T. R. 130, n. (N. P. 1785);
- Hodgson v. Malcolm*, 2 B. & P. N. R. 336, 340 (1806);
- Livie v. Janson*, 12 East, 648, 652 (1810);
- Bell v. Carstairs*, 14 East, 375 (1811);
- Powell v. Gudgeon*, 5 M. & S. 431 (1816);
- Lawrence v. Aberdein*, 5 B. & Ald. 107 (1821);
- Naylor v. Palmer*, 8 Exch. 739 (1853);
- Ionides v. Universal M. Ins. Co.*, 14 C. B. n. s. 259 (1863);
- Dyer v. Piscataqua F. & M. Ins. Co.*, 53 Me. 118 (1865);
- Dent v. Smith*, L. R. 4 Q. B. 414 (1869);
- Insurance Co. v. Transportation Co.*, 12 Wall. 194, 199 (1870);
- Brown v. St. Nicholas Ins. Co.*, 61 N. Y. 332 (1874);
- Dudgeon v. Pembroke*, 2 App. Cas. 284, 295-297 (H. L. 1877);
- Mercantile Steamship Co. v. Tyser*, 7 Q. B. D. 73 (1881);
- Inman Steamship Co. v. Bischoff*, 7 App. Cas. 670 (1882);
- Cory v. Burr*, 8 App. Cas. 393 (1883);
- The Alps*, '93, P. 109;
- The Bedouin*, '94, P. 1 (C. A. 1893).—ED.

SECTION II.

Fire Insurance.

(4) THE KIND OF PERIL INSURED AGAINST.

AUSTIN AND ANOTHER v. DREWE.

COMMON PLEAS, 1816. 6 Taunt. 436.¹

THIS was an action of covenant on a policy of insurance effected with the defendant "against all the damage which the plaintiffs should suffer by fire" on their "stock and utensils in their regular built sugar-house," and the plaintiffs averred that "their stock and utensils were very much damaged by fire in the sugar-house." The defendant pleaded that "the stock and utensils were by and through the carelessness, negligence, and improper conduct of the plaintiffs and their servants, in regulating and managing the fires usually employed in and about the sugar-house, damaged by the smoke arising from such fires, and not from any other cause, without this, that the stock and utensils were damaged by fire in the sugar-house within the meaning of the policy." The plaintiffs replied, that the stock and utensils were damaged by fire in the sugar-house, within the meaning of the policy, and the defendant joined issue on this traverse. Upon the trial of this cause at Guildhall, at the Sittings after Michaelmas Term, 1815, before GIBBS, C. J., the evidence was, that the building insured contained eight stories, and in each story sugar, in a certain state of preparation, was deposited for the purpose of being refined; in order for refining, a certain degree of heat was necessary, and a chimney running up through the whole building formed almost one side of each of the stories, and by means of this chimney heat was communicated to each of the stories. At the top of the chimney, above the eight stories, was a register, which the plaintiffs used to shut at night, in order to retain in the chimney and building all the heat they could. They shut it one night, and lighted the fires next day, and they soon afterwards found the building full of smoke and sparks; and on examination they found that the register, which always ought to be open whensoever the fire was burning, was continued shut down: sparks and smoke had got out into the rooms; the heat had slightly blistered the walls, and considerably discolored and damaged the sugars. There was much smoke, but the only injury done to the sugars proceeded from heat; the smoke would not have hurt them. There was no fire in the building that ought not to be there, nothing was on fire that ought not to be on

¹ s. c. 2 Marsh. 130; and at Nisi Prius, Holt N. P. 126 (1815), and, *sub. nom.* Austin v. Drew, 4 Camp. 360.—ED.

fire, the damage was occasioned by the sparks, heat, and smoke taking a wrong direction. GIBBS, C. J., directed the jury, that inasmuch as the damage was occasioned entirely by the increased heat, which was produced by keeping the register closed, it was not a loss by fire within the meaning of the policy, but was occasioned by the improper management of the register.¹ The jury found a verdict for the defendant.

Shepherd, Attorney-General, now moved for a new trial. The words of the policy are not "excess of fire," or "improper fire," but "damage by fire." The actual flame which proceeded from the grates below, and would, if the register had not been closed, have issued out of that chimney, being confined therein by the register, occasioned the mischief. If actual flame was the cause of the damage, it matters not whether the fire was properly or improperly lighted, but the question is, whether fire occasioned the damage. If any other criterion be taken, it would in many cases of policies against fire introduce nice

¹ According to the report in 2 Marsh. 130, GIBBS, C. J., "told the jury that, as the damage had been produced by the increase of heat, occasioned by keeping the register improperly closed, and as nothing had *taken fire* which ought not to have been on fire, it was not a loss within the policy, but was occasioned by the unskilful management of the plaintiffs' machinery."

According to the report in Holt N. P. 126, GIBBS, C. J., said: "I am of opinion that this is not a loss within the policy. No greater fire existed than was necessary for the purposes of the business. By omitting to open the register, heat and smoke have been forced into the rooms where the sugars were preparing; the heat produced the mischief; no sensible damage resulted from the smoke and sparks, and the occasion which produced the excess of heat was not a fire against which the defendant had undertaken to indemnify the plaintiffs. The servants had neglected to open the register. What is this but a bad management of their own machinery? The fire is where it ought to be; no more than it ought to be. But it received a false direction by the irregular and improvident conduct of the plaintiffs' servants. As no substance, therefore, was taken possession of by the fire, which was not intended to be fuel for it; as the sparks and smoke caused no mischief, but as the damage arose from an excess of heat in the rooms, occasioned by the register being shut, I am of opinion that the plaintiffs are not entitled to recover."

According to the report in 4 Camp. 360, GIBBS, C. J., said: "I am of opinion that this action is not maintainable. There was no more fire than always exists when the manufacture is going on. Nothing was consumed by fire. The plaintiffs' loss arose from the negligent management of their machinery. The sugars were chiefly damaged by the heat; and what produced that heat? Not any fire against which the company insures, but the fire for heating the pans, which continued all the time to burn without any excess. The servant forgot to open the register by which the smoke ought to have escaped, and the heat to have been tempered." Hereupon a juryman said: "If my servant by negligence sets my house afire, and it is burnt down, I expect, my Lord, to be paid by the insurance office." And GIBBS, C. J., answered: "And so you would, Sir; but then there would be a fire, whereas here there has been none. If there is a fire, it is no answer that it was occasioned by the negligence or misconduct of servants; but in this case there was no fire except in the stove and the flue, as there ought to have been, and the loss was occasioned by the confinement of heat. Had the fire been brought out of the flue, and anything had been burnt, the company would have been liable. But can this be said where the fire never was at all excessive, and was always confined within its proper limits? This is not a fire within the meaning of the policy, nor a loss for which the company undertake. They might as well be sued for the damage done to drawing-room furniture by a smoky chimney."—ED.

and intricate questions. It cannot be necessary that the fire, to produce a loss within the policy, should be only such fire as is communicated to some substance not contained in the intended and proper receptacle of fire. Heat may be so intense as to ignite combustibles without the actual contact of flame. Suppose the intensity of heat necessarily required for any process to be so great that the fire made in a chimney, though confined there, might ignite neighboring bodies, it might in that case as well be said that that was not a damage by fire, because the original fire was contained in its proper receptacle. In the common case of a house on fire, if goods are damaged by the removal, that is a loss by fire within the policy. Put the case of a chimney on fire, there is only the usual quantity of heat below, but the mischief is occasioned by an accumulation of soot in the chimney, yet the insurers would be bound to pay any loss thereby occasioned.

GIBBS, C. J. I think it is not necessary to determine any of those extreme questions. In the present case, I think no loss was sustained by any of the risks in the policy. The loss was occasioned by the extreme mismanagement by the plaintiffs of their register. I so directed the jury, and I have no reason to alter the opinion I then formed.¹

DALLAS, J. I am of the same opinion. The only cause of the damage appears to me to have been the unskilful management of the machinery by the plaintiff's own servants, and it is therefore not a loss within the meaning of the policy.² *Rule refused.*³

KENNISTON v. MERRIMACK COUNTY MUTUAL INS. CO.

SUPERIOR COURT OF NEW HAMPSHIRE, 1843. 14 N. H. 341.

ASSUMPSIT, on a policy of insurance duly executed. The act creating the defendant corporation (approved July 1, 1825), sect. 1, constitutes certain persons a body politic, "for the purpose of insuring their respective dwelling-houses, with their contents, against loss or damage

¹ In 2 Marsh. 130, this opinion is reported thus:—

"It is not necessary to determine any of the extreme questions put on the part of the plaintiff. It is sufficient to say that in this case no loss has been sustained which can be brought within the fair meaning of the words of this policy. The damage was occasioned by the unskilful management of the machinery, and not by any of those accidents from which the defendants intended to indemnify the plaintiffs."—Ed.

² In 2 Marsh. 130, this opinion is reported thus:—

"His Lordship's direction appears to have been perfectly right, and the jury have drawn a perfectly correct conclusion from it. There was nothing on fire which ought not to have been on fire; and the loss was occasioned by the carelessness of the plaintiffs themselves."

And the same report adds that PARK, J., concurred in the decision.—Ed.

³ See *Scripture v. Lowell Mut. F. Ins. Co.*, *post*, p. 732 (1852); *American Towing Co. v. German F. Ins. Co.*, 74 Md. 25 (1891).—Ed.

by fire, whether the same shall happen by accident, lightning, or by any other means," excepting in case of design, invasion, or insurrection.

The terms of the policy sued on were to pay, "within three months next after the said property shall be burnt, destroyed, or demolished by or by reason or by means of fire;" and farther, if any part rebuilt, repaired, &c., to the amount of the policy, "shall happen to be injured by means of fire, such damages shall be made good, according to the estimate thereof, or repaired and put in as good condition as the same was before the said fire happened."

The plaintiff claims an indemnity as for a partial loss on his dwelling-house and its contents.

To sustain his claim the plaintiff offered evidence tending to show that on a certain day his house was struck by lightning, and different parts of it materially injured, and also articles of crockery, glass, and tin ware broken or destroyed. His witnesses also testified that the boards and timber near one of the windows where the lightning struck, exhibited marks or traces of fire, being discolored and rendered of a dark brown color, as if affected by a blaze of fire. One witness testified that he saw on these boards and timbers where fire burned, and he had no doubt that the house would have been burned had not the water been admitted through the window which was broken out by the lightning.

The only question made by the defendant was, whether the loss was covered by the policy or act of incorporation; and the court being of the opinion that it was, a verdict was ordered to be taken for the plaintiff, subject to be affirmed or set aside and a verdict entered for the defendant, as the opinion of this court might be on the case stated.

PARKER, C. J. There must be a new trial. On the facts stated, the court cannot determine whether the loss is, or is not, within the risks of the policy.

If the damage was from lightning without any combustion, it is clearly not within the terms of the contract of insurance. The policy does not provide against every damage which may arise from the action of the electric fluid.

The charter of the insurance company indeed refers to lightning, but it is only to authorize the defendant to insure against losses by fire, which "shall happen by lightning." This is a very different thing from direct losses by lightning, both as regards their origin, nature, predisposing causes, development and effects, and in reference to the possible application of means to prevent and to limit the damage.

The terms of the policy, too, were to pay within a certain time after the destruction "by reason or by means of fire." Fire is the one loss insured against; and lightning, though not excepted from the sources of fire, is nowhere, either in the charter or policy itself, directly provided against.

It is true, that there was evidence tending to show that the building, insured in the policy now in question, was set on fire by the lightning;

and if such was the fact, this action is well brought. But this fact is not made certain by the evidence, and the question must be submitted to a jury.
*New trial ordered.*¹

JOHNSON v. BERKSHIRE MUTUAL FIRE INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1862. 4 Allen, 388.

CONTRACT upon a policy of insurance upon the plaintiff's barn and grain therein, issued by the defendants. A trial by jury was waived in the Superior Court, and the case was heard before AMES, J., who found the following facts:

In the afternoon of a hot day in a dry season in August, 1859, during the time covered by the policy, the plaintiff and his son were unloading hay from a wagon, and placing it in a shed adjoining the barn, and while so engaged were annoyed by bees whose nest was in a hollow place under the door at which they were pitching in the hay; and the plaintiff, finding that no hot water could readily be had, undertook to smoke them out by thrusting a wisp of straw into their hole and lighting it with a match. A fresh breeze was blowing at the time; the building was very old, and covered on the outside with white wood boards; the barn adjoining was full of hay, and some hay was stored in the loft of the shed. After withdrawing the wisp of straw, and while attempting to extinguish it, the fire spread with great rapidity on the outside of the shed, and destroyed the property. It was admitted that there was no fraudulent intent on the part of the plaintiff. Upon these facts, the judge found that there had been a want of ordinary care, judgment, and discretion on the part of the plaintiff; that this default was the immediate and proximate cause of the fire; and that, although he acted in good faith, and the negligence and default on his part did not amount to recklessness and wilful misconduct, yet under the circumstances he was not entitled to recover.

The plaintiff alleged exceptions; and it was agreed that if the exceptions should be sustained, judgment should be entered for the plaintiff, for the amount of the policy.

M. Wilcox, for the plaintiff.

J. A. Walker, for the defendants.

MERRICK, J. The defendants contend that the carelessness and negligence proved at the trial whereby the fire was caused, by which the barn and other property insured were destroyed, constitute a valid defence to this action. It is admitted that there was no fraudulent intent on the part of the plaintiff in the commission of the acts from which the fire immediately resulted. But it was found as a fact by the

¹ *Acc.*: *Babcock v. Montgomery County Mut. Ins. Co.*, 4 N. Y. 326 (1850); *Andrews v. Union Mut. F. Ins. Co.*, 37 Me. 256 (1854). — Ed.

court, the parties having waived a trial by jury, that there had been an omission to exercise ordinary care, discretion, and judgment on his part; and it was thereupon determined that, although he had acted in good faith, and his negligence and default did not amount to recklessness or wilful misconduct, he was not entitled to recover indemnity in this action for his loss.

This determination was erroneous. It is said to have been formerly doubted whether in marine insurances underwriters were liable for losses by fire occasioned by the negligence or mismanagement of the master or mariners at sea, but that now it is the better and established doctrine that they are liable where the acts are not of a barratrous character, and that this is applicable in all cases of such loss whether occurring on land or at sea. 1 Phil. Ins., §§ 1049, 1096. And in Angell on Ins., § 125, it is stated as an indisputable proposition, that as applied to policies against fire on land the doctrine has for a great length of time prevailed that losses occasioned by the mere fault of the insured or his servants, unaffected by fraud or design, are within the protection of the policies, and as such are recoverable from the underwriters. In *Shaw v. Robberds*, 6 Ad. & El. 75, it is said by the court that the object of insurance is to guard against the negligence of servants and others; and that there is no ground of distinction between the negligence of strangers and others and that of the assured himself; and that in the absence of all fraud the particular cause of the loss is only to be looked at. And in *Huckins v. People's Ins. Co.*, 11 Fost. (N. H.) 238, it was distinctly held that carelessness and negligence as such cannot be held to be a defence to an action upon a policy of insurance; that, in the absence of fraud, it is only the proximate cause of the loss that is to be considered.

The same doctrine was recognized by this court in the case of *Chandler v. Worcester Ins. Co.*, 3 Cush. 328. It is there said that the general rule unquestionably is, that in cases of insurance against fire the carelessness and negligence of the agents and servants of the assured constitute no defence. The defendants in that case offered to show not only that the plaintiff had been guilty of negligence but also of gross misconduct. And the court in examining the case, where the facts upon which the allegation of the gross misconduct imputed to the party were not reported, expressed an opinion that it might be of such character, though not amounting to a fraudulent intent to burn the building, as to deprive the assured of his right to recover; and this for the reason assigned, that the misconduct might be such as to manifest a willingness, differing little from a fraudulent and criminal purpose to commit such an injury. But the law makes a clear distinction between even gross negligence and fraud, and although the former may be evidence tending to show *mala fides*, it is not in fact the same thing. 1 Parsons on Con., 571; *Goodman v. Harvey*, 4 Ad. & El. 870. In the present case, there is nothing in the facts found to show either a fraudulent intent or any willingness on the part of the plaintiff

to set fire to the building. On the contrary, it is conceded that he acted in good faith. And although his conduct was very imprudent, it is obvious, as well from his purpose as from his efforts to prevent the conflagration when the fire began to kindle, that he was actuated by no improper motive. These facts show a case of mere negligence, and therefore are not sufficient to preclude him from his right to recover on the policy an indemnity for his loss. *Exceptions sustained.*¹

KANE v. HIBERNIA INSURANCE COMPANY.

COURT OF ERRORS OF NEW JERSEY, 1877. 39 N. J. L.
(10 Vroom) 697.

ON error to the Supreme Court.

Kane brought an action of assumpsit against the insurance company on two policies of insurance (not under seal), against loss by fire. The defence was that the building insured was burned by design, with the knowledge and procurement of the plaintiff.

The defendant's counsel asked the court to charge the jury that, as to the defence of burning by design, while the burden of proof was on the defendant to establish this defence, it was only necessary to do so by the fair weight or preponderance of the evidence. The court refused so to charge, and charged the jury that, in order to make out such defence, the defendant was bound to establish the same beyond a reasonable doubt, and by the same measure of testimony that would be necessary to convict the plaintiff if tried under an indictment charging that offence.

The question of the correctness of this instruction was reserved and heard before the Supreme Court. *Kane v. Hibernia Insurance Company*, 9 Vroom, 441. The decision of the Supreme Court being adverse to the defendants, the case was removed by them to this court, by writ of error, on exceptions sealed at the trial.

For the plaintiff in error, *Joseph Coult* and *H. C. Pitney*.

Contra, *F. Voorhees* and *J. C. Ten Eyck*.

The opinion of the court was delivered by

DEPUE, J. The writ of error brings up for review only the propriety of the judge's charge.

It is conceded that there is a difference between civil and criminal cases in respect to the degree or quantity of evidence necessary to determine the verdict of a jury. In civil cases, it is the duty of the jury

¹ *Acc.*: *Phenix Ins. Co. v. Sullivan*, 39 Kans. 449 (1888).

See *Catlin v. Springfield F. Ins. Co.*, 1 Sumner, 434, 444 (1833); *Shaw v. Robberds*, 6 Ad. & E. 75, 84 (1837); *Henderson v. Western M. & F. Ins. Co.*, 10 Rob. La. 164 (1845).

Compare *Fleisch v. Ins. Co. of North America*, 58 Mo. App. 596, 606-607 (1894). — Ed.

to find for the party in whose favor the evidence preponderates; but in criminal cases, the accused should not be convicted upon any preponderance of evidence, unless it generates full belief of the fact, to the exclusion of all reasonable doubt. 3 Greenl. Ev., § 29; Best on Ev., § 95. But it is contended that there is an exception to this general rule, where the issue in a civil case is one in which crime is imputed, and the guilt or innocence of a party is directly or incidentally involved. In such cases, it is said that the presumption of innocence is to have as great effect as in criminal trials, and that to justify a verdict against the party to whom crime is imputed, the evidence adduced must be such as would be sufficient to convict upon an indictment for the crime imputed. 2 Greenl. Ev., §§ 408, 426; 1 Taylor on Ev., 97 *a*.

This exception is most frequently invoked in actions of libel and slander, where a justification imputing crime is pleaded, and actions on fire policies, where the defence is that the property was wilfully burned by the insured.¹ . . .

In an action on a contract of insurance, a defence that the loss was caused by the wilful act of the assured, does not necessarily involve a criminal accusation. It rests upon the legal maxim that no man shall be permitted to derive advantage from his own wrong. "It is," says Lord Campbell, C. J., "a maxim of our insurance law, and of the insurance laws of all commercial nations, that the assured cannot seek indemnity for a loss produced by his own wrongful act." *Thompson v. Hopper*, 6 E. & B. 171, 196. In that case, which was an action on a marine policy, a plea that the plaintiffs knowingly, wilfully, and improperly sent the ship to sea at a time when it was dangerous for her to go to sea in the state and condition in which she then was, and wrongfully and improperly caused and permitted the ship to be and remain on the high seas, near to the shore, in the state and condition aforesaid, without a master and without a proper crew to manage and navigate her, etc., and that the ship, by reason of the premises, was wrecked, was held to disclose a good defence. In delivering the judgment of the court, Lord Campbell said, "According to the statement in this plea, the plaintiffs' loss was caused by their wrongful act, and, if so, I think there was no necessity to characterize it as being either felonious or fraudulent." Knowledge and wilfulness and a loss resulting directly and immediately from such wrongful act, are the essential elements of such a defence. *Dudgeon v. Pembroke*, L. R. 9 Q. B. 581; 1 Q. B. Div. 96; 2 App. Cas. 284; *Thompson v. Hopper*, E., B & E. 1038.

Under a fire policy, the assured may recover for a loss occasioned by mere carelessness, without fraud or wilful misconduct. But to make defence to the action, the defendants need not prove that the plaintiff had committed an indictable offence. It is sufficient if it be shown that the plaintiff purposely and wantonly set fire to the property in-

¹ Here and elsewhere in the opinion passages not dealing directly with Insurance have been omitted. — Ed.

sured. *Schmidt v. N. Y. U. M. F. Ins. Co.*, 1 Gray, 529. At common law, and independently of the act of 1859 (Rev., p. 242), a man might burn his own house without incurring liability to indictment, unless it was so situated with respect to the houses of others as to endanger their safety. 2 East Pl. 1027, § 7; 1034, § 11; *State v. Fish*, 3 Dutcher, 323. After the act of 1859 became a law, a man might still, without criminal responsibility, burn his own house, if it was done without intent to prejudice the insurance thereon. Indeed, cases may arise where the assured may procure the destruction by fire of his property, with intent to defraud the insurer, and not be liable to indictment under the statute. Criminal laws are essentially local in their operation, and the incitement in a foreign jurisdiction to the commission of a crime in this State, is not indictable under our laws. Therefore, one who, in another State, procures another to enter this State and commit a crime, is not guilty of any offence punishable by the laws of this State. *State v. Wyckoff*, 2 Vroom, 65. And yet it cannot be doubted that, before the act of 1859, an insurance company might successfully defend on the ground that the assured wilfully caused the destruction of the property insured, and that such defence may be made where the assured is so circumstanced as not to be indictable under the statute. A contract for indemnity in such case would be absurd, and, so far as it related to a voluntary and intended loss, would be void in law. 1 Phillips' Ins. § 1046.

The doctrine that, in an action on a policy, the defence that the plaintiff had wilfully set fire to the premises must be as fully and satisfactorily proved as if the plaintiff were on trial on indictment, originated in the case of *Thurtell v. Beaumont*, 8 J. B. Moore, 612; 1 Bing. 339. This ruling is adopted by Mr. Greenleaf and Mr. Taylor, and is strongly approved by the latter writer. 2 Greenl. Ev., § 418; 1 Taylor's Ev. (5th ed.) 97 *a*. It is disapproved by Mr. Wharton, and is vigorously assailed by Mr. May, the author of *May on Insurance*, in an article in the *American Law Review*. 2 Whart. Ev., § 1246; 10 Am. Law Rev. 642.

The decision on this point, in *Thurtell v. Beaumont*, was made on an application for a rule, and without much consideration. It has never received approval in the English courts, although, as a rule of evidence, occasions have repeatedly arisen for its adoption and application. . . .

It may safely be said that *Thurtell v. Beaumont*, in principle, stands alone and unsupported in the English courts, except in actions of libel and slander, which are to be regarded as exceptional, and resting upon considerations peculiar to the nature of the actions and of the injuries for which they are brought.

In the courts of this country, the principle adjudged in *Thurtell v. Beaumont* has received but slender support, except in libel and slander cases. The weight of authority is decidedly against the soundness of the rule there propounded, in its application to actions on policies of insurance, as well as other civil actions, where the issue is such that,

for its support, a case must be made such as would afford ground for an indictment. . . .

The decisions in actions on policies of insurance against loss by fire are mainly to the same effect. In *Schmidt v. N. Y. U. M. Fire Ins. Co.*, 1 Gray, 529, the defence was, that the plaintiff had purposely set fire to the property insured, and burned it; and it was held that the judge properly refused to instruct the jury that they must be satisfied, beyond a reasonable doubt, of the truth of this defence. The criticism on this case, in the court below, that the instruction actually given was, in substance, equivalent to an instruction that the defence must be established beyond a reasonable doubt, and that the case, if it does not inferentially recognize the rule in *Thurtell v. Beaumont*, is of no value as an authority against it, though warranted by some expressions of the judge, in his opinion, is shown to be untrue, in fact, by the opinion of the same judge, in *Gordon v. Parmelee*, 15 Gray, 413. In the latter case, he adverts to the case in 1 Gray, and declares it was not the purpose of the court to sanction any exception to the rule, or to say that, in any civil action, the jury were not to decide by the preponderance of the proof or the weight of the evidence; and he closes his opinion by saying that, "in the opinion of the court, it is better that the rule be uniform, leaving the instruction that the jury must be satisfied of the guilt of the party beyond a reasonable doubt, to apply solely to criminal cases." In the following cases, also, in actions on fire policies, where the defence was a wilful destruction, by the assured, of the property insured, the rule of evidence adopted in *Thurtell v. Beaumont* was repudiated, and the correct rule declared to be that, in civil cases, the verdict should be determined by the preponderance of the evidence, without regard to the fact that in the defence was involved a charge which might be made the ground of a criminal prosecution. *Scott v. Home Ins. Co.*, 1 Dillon C. C. 105; *Huchberger v. Merchants' Fire Ins. Co.*, 4 Bissell C. C. 265; *Washington Ins. Co. v. Wilson*, 7 Wis. 169; *Blaeser v. M. M. M. Ins. Co.*, 37 Wis. 31; *Rothschild v. Amer. Cent. Ins. Co.*, 62 Mo. 356; *Ætna Ins. Co. v. Johnson*, 11 Bush. 587; *Hoffman v. W. M. & F. Ins. Co.*, 1 La. An. 216; *Wightman v. Same*, 8 Rob. 442.

I fully concur in these decisions, and the reasoning on which they are founded.

In actions where usury was pleaded, it has been said that the defence must be established beyond a reasonable doubt. *Conover v. Van Mater*, 3 C. E. Green, 481; *Taylor v. Morris*, 7 id. 606. This language was used, perhaps inconsiderately, to express the quantity of evidence that, under the circumstances, should be required to defeat the plaintiff's security, without intending to assert that, as a rule of law, the same measure of proof should be required in civil as in criminal cases. So also in suits on fire policies, on a defence like that in the present case, judges, in their instructions to juries, have commented on the gravity of the charge contained in such a defence, and have put

the presumption of innocence in the scales as an element to weigh in favor of the plaintiff and decide the issue, if the evidence was not entirely satisfactory. The charge of Judge Davis, in *Huchberger v. Merchants' Fire Insurance Company*, and of Judge Dillon, in *Scott v. Home Insurance Company*, and of Chief Justice Whelpley, in *Powers v. Market Fire Insurance Company*, in the Morris Circuit, are examples of this mode of dealing with the subject in the practical administration of the law. But in each of these cases the judge was careful to instruct the jury that the rule of law in criminal cases, with respect to the quantum of proof, was not to be applied.

A judge may make such comments on the evidence as he deems proper, and may advise and instruct the jury with respect to the degree of proof they should require to decide the issue under the circumstances of the particular case. But a charge that, as a question of law, proof beyond a reasonable doubt is required, is quite a different thing. While it is impracticable to frame a satisfactory definition of the expression "reasonable doubt," yet the effect of a charge, in this language, is a matter of almost every day's observation. Every one familiar with the administration of justice can recall instances in which defendants, under such an instruction, have been pronounced not guilty, when the evidence of guilt was quite convincing.

The importance of preserving the distinction between civil and criminal cases increases with the growth of the criminal law. Almost every tortious act is by statute made indictable, if done wilfully or maliciously, and the courts should be reluctant to adopt, in civil cases, the rules peculiar to criminal law, lest wrong-doers be enabled to avoid civil liability, as well as escape criminal responsibility, under cover of the rules of criminal prosecution, the object of which is punishment only.

The judgment should be reversed.¹

DIXON, J. Several of my brethren unite with me in desiring to exclude the inference that we assent to the intimation contained in the opinion just read, as to the exceptional character of actions of libel and slander. We prefer that the matter should remain open, to be decided when its decision is necessary.

KNAPP, REED, and DODD, JJ., concurred in the views of Justice DIXON.

For affirmance — None.

For reversal — THE CHANCELLOR, DALRIMPLE, DEFUE, DIXON, KNAPP, REED, CLEMENT, DODD, LATHROP, LILLY, WALES — 11.

¹ *Acc.*: *Continental Ins. Co. v. Jachnichen*, 110 Ind. 59 (1886).

See *Perry v. Mechanics' Mut. Ins. Co.*, 11 Fed. R. 485 (C. C., D. R. I., 1882); *Karow v. Continental Ins. Co.*, 57 Wis. 56 (1883). — ED.

WAY v. ABINGTON MUTUAL FIRE INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1896. 166 Mass. 67.¹

THIS was an action upon a fire insurance policy, of the Massachusetts standard form, for \$1,500. The property insured consisted of cigars manufactured and in process, tobacco, and supplies for cigars. About five o'clock in the afternoon the foreman emptied waste paper into a stove, and when the paper was consumed closed the drafts and shut the store for the night. About eight o'clock it was discovered that the premises were full of dense smoke. This came down the chimney. The soot in the chimney had been set on fire by the waste paper, and the smoke thus produced had been forced into the premises because the flue was choked with an accumulation of loose plaster and scales of soot. Thus resulted a damage by smoke alone to the goods insured. The damage was \$1,180.65. The loss occurred within the term of the policy. The case was referred to an auditor, who reported the foregoing facts, and ruled "that, although the fire was confined in places constructed or maintained for holding and conducting fire and the products of combustion under ordinary intended conditions, it was still not such a fire as the places and appliances were intended for, and neither the fire nor the damage was caused by any misuse or mismanagement of such appliances, but the fire was accidental and in a place where the plaintiff did not intend to maintain it, and that it was the proximate cause of the damage; that the chimney was not made or maintained for the purpose of maintaining fires therein, but for the purpose of conducting the products of combustion to the outside of the building, which in this case it failed to do by reason of the soot being so ignited and burnt, thereby causing the obstruction which forced the products of such fire into the rooms of the building and caused the damage." The auditor found for the plaintiff.

At the trial in the Superior Court the plaintiff introduced no evidence except the auditor's report, the policy, and the affidavit of loss.

The defendant's counsel in his opening to the jury contended that, within the common knowledge of the jury, when stoves are used, soot collects in the chimney and is liable to burn, and chimneys are constructed with the expectation of such occasional burning and with the intention of carrying off the products of such combustion, so that stoves and chimneys are intended and maintained as receptacles for fire, and fire, while confined therein, is not such fire as is insured against. Thereupon he called as a witness an experienced builder, by whom it was testified that the flue was of ordinary construction. To this witness the defendant's counsel put questions whether soot ordinarily collects in such a flue and occasionally burns out, and whether such a

¹ The statement has been rewritten. — ED.

flue is intended to meet that result and to carry off the consequences of such ignition; but upon the plaintiff's objection, MASON, C. J., excluded this evidence. The defendant requested instructions to the effect that the defendant was not liable so long as the fire was confined within the appliances intended to hold it and carry off its effects, and that the defendant was not liable if the ordinary effect of maintaining fire in a stove is to create soot in the chimney, with the consequence that the lighting of a fire in the common way occasionally sets fire to the accumulation; and that the defendant was not liable if the smoke escaped into the premises by reason of an obstruction, and if the fire did not escape from the chimney. The judge did not give these instructions, but gave a peremptory charge for the plaintiff. To all the rulings of the court the defendant excepted.

L. S. Dabney, for the defendant.

A. Hemenway (*W. H. Preble* with him), for the plaintiff.

KNOWLTON, J. It is conceded by the defendant that it is liable for damage caused by smoke to the same extent as if damage had been caused directly by the fire which produced the smoke. The question before us is whether the fire in the chimney was within the contract of insurance made by the defendant. The policy purports to cover all loss or damage by fire, but the defendant contends that in all such contracts there is an implied exception of such fires as this from which the plaintiff suffered loss.

The facts are not in dispute, and if the defendant's witness had been permitted to testify as an expert, or if the jury had used their common experience and common knowledge to find the facts as the defendant's counsel in his opening contended that they should be found, there would have been no substantial conflict between the statement of the auditor and the facts relied upon by the defendant.

A chimney is not intended to be used as a place in which to kindle fires, or to have fires for use or employment in connection with the occupation of a building. It is intended to carry off the products of combustion. One of the products of combustion in a stove or fireplace connected with a chimney is soot, which will accumulate more or less in the chimney, and will sometimes take fire from the flame in the stove or fireplace. Chimneys are constructed with a view to guard against accidents when such fires occur. Occasional fires in a chimney from the ignition of soot are to be expected. Such fires are not desired. They are not maintained for any useful purpose. In a sense they are accidental, for they are not lighted intentionally, but they start from time to time without human agency when a large quantity of soot has accumulated and the circumstances chance to be favorable to ignition from the fire which is maintained in the place intended for it.

The defendant's counsel contends that the policy was not intended to apply to a fire which is lighted and maintained for the ordinary purposes for which fires are used in buildings, and which is confined within the place that is fitted for such fires. He argues that, if a stove should

be cracked and spoiled by a fire kindled in it to warm the house, or if a fire in a fireplace should crack the mantel, or scorch valuable furniture left too near it, or injure property by its smoke which the chimney failed to carry off, or if a lamp should throw off soot or smoke in such quantities as to cause damage to property, in every such case, if the fire burned nothing but that which was intended to be burned for a useful purpose in connection with the occupation of the house, and if it did not pass beyond the limits assigned for it, the insurance company would not be liable. See *Austin v. Drew*, 4 Camp. 360; s. c. *Holt* N. P. 126; 6 Taunt. 436, 438; *American Towing Co. v. German Ins. Co.*, 74 Md. 25; *Scripture v. Lowell Ins. Co.*, 10 Cush. 356. We are not disposed to question the soundness of the general principle on which this contention is founded, and we find it by no means easy to determine whether the principle should be extended far enough to cover an occasional fire in a chimney incidental to the ordinary use of a stove, or whether such a fire should be held to be one for whose unexpected injurious consequences an insurance company should be liable. We are inclined to the opinion that a distinction should be made between a fire intentionally lighted and maintained for a useful purpose in connection with the occupation of a building and a fire which starts from such a fire without human agency in a place where fires are never lighted nor maintained, although such ignition may naturally be expected to occur occasionally as an incident to the maintenance of necessary fires, and although the place where it occurs is constructed with a view to prevent damage from such ignition. A fire in a chimney should be considered rather a hostile fire than a friendly fire, and as such, if it causes damage, it is within the provisions of ordinary contracts of fire insurance.

It is doubtless true that in former years in some parts of the country straw and other combustible materials have sometimes been put in chimneys and set on fire to burn out the soot. But neither at the trial of this case before the jury nor in the argument before us was there any suggestion that such a practice prevails or has ever prevailed in Boston, or that this chimney was constructed with a view to kindling fires in it for such a purpose. What our decision would be if damage was done by smoke from a fire in a chimney intentionally kindled to burn out the soot, it is unnecessary now to determine.

It is also to be noted that there was an accidental obstruction of the flue by the falling of the plaster lining of the chimney, which in some aspects of the case might be deemed an important fact in favor of the plaintiff's claim.

Exceptions overruled.

SECTION II. (*continued*).

(B) THE CONNECTION BETWEEN PERIL AND LOSS.

CITY FIRE INS. CO. v. J. & H. P. CORLIES.

SUPREME COURT OF NEW YORK, 1839. 21 Wend. 367.

ERROR from the Superior Court of the city of New York. The plaintiffs in error were defendants below. The action was on a policy of insurance, dated December 9, 1835, by which the company insured the plaintiffs for the period of four months and twenty-two days against loss or damage by fire, to the amount of \$3,000, on earthen-ware in crates, contained in the brick, slated store No. 75 Pearl Street, New York. In the declaration the loss was alleged to have happened by and through the explosion of large quantities of gunpowder and by fire. On the trial it appeared that in the great fire, on the morning of the 17th of December, 1835, the store No. 75 Pearl Street was blown up with gunpowder, and the goods insured totally destroyed. The explosion was ordered by the mayor of the city, to arrest the progress of a fire then raging to the east of this store. The building next to the store, but not the store itself, was on fire at the time of the explosion. The buildings all around this store, in every direction, took fire, and were more or less burnt or totally destroyed by the course of the flames; and according to every probability the fire would have destroyed the store in question, with its contents, had it not been blown up. The crates, after they fell, were consumed by the fire. The defendants moved for a nonsuit on the following grounds:

1. The loss alleged did not arise from a cause contemplated by the policy, but was a remote consequence of the fire not necessarily arising from it.

2. The mere fact of bringing gunpowder upon the premises suspended the policy, although deposited without the knowledge of the plaintiff.

3. A loss by explosion of gunpowder cannot be said to be a loss by fire, and those cases in which a recovery can be had where the goods have been destroyed not by fire, but by water or by breakage or the consequences of the fire, are cases where the injury arose in the attempt to save the goods insured; here the goods insured were intentionally destroyed to save the property of others.

4. The act was done by the mayor by virtue of his office for the benefit of the citizens at large, and the corporation of the city are liable for his acts, even at common law independently of the statute; if he had no authority, then his own was an usurped power, which is expressly excepted by the policy.

5. This fire was a general calamity, and property destroyed to put an end to it should be a general tax on the citizens, and not a partial one on this insurance company; and in a doubtful case the policy should be so construed as to lay a general rather than a partial contribution.

The chief justice, before whom the case was tried, denied the motion for a nonsuit, and charged the jury that the plaintiffs were entitled to a verdict. The defendants excepted, and the verdict and judgment having passed against them, they now bring error.

J. W. Gerard, for plaintiffs in error.

D. Lord, Jr., for defendants in error.

By the Court, BRONSON, J. I. There has, I think, been a loss by the peril insured against, within the meaning of the policy. In *Grim v. The Phoenix Ins. Co.*, 13 Johns. R. 451, no doubt seems to have been entertained, either by the court or counsel, that a loss by the explosion of gunpowder was a loss by fire. And in *Waters v. The Merchants' L. Ins. Co.*, 11 Pet. 213, the point was so adjudged. The court was of opinion that fire was the proximate cause of the loss.

II. According to the terms of the policy, if the building was used for the purpose of storing gunpowder, the contract was, for the time, suspended. And see *Duncan v. The Sun Fire Ins. Co.*, 6 Wend. 488. But placing gunpowder with a lighted match in the building, for the express purpose of producing an explosion, which immediately followed, was a very different thing from what the parties contemplated when they inserted this provision in the contract. Whether the insurers are liable for this voluntary destruction of the property is a question yet to be considered. But I think it quite clear that they have not established the allegation that the building was used for the storing of gunpowder.

III. The building containing the goods was destroyed by order of the mayor of the city, for the purpose of arresting the progress of a conflagration. Are the insurers answerable for this voluntary destruction of the property? This question has been presented in a double form,—the one supposing that the mayor acted with, and the other that he acted without, authority.

1. Let us first assume that the mayor acted illegally. If the fire had been kindled by an incendiary, it is not denied that the insurers would be answerable. Why are they not then answerable if the mayor acted without authority? The act, though not done for a wicked purpose, was as illegal as though it had been the work of a felon. The answer attempted is that, although the mayor had no authority, yet as he acted *colore officii*, this is a case of loss happening by means of usurped power, which is expressly excepted by the policy.

It is impossible to maintain that a mere excess of jurisdiction by a lawful magistrate is the exercise of an usurped power, within the meaning of this contract. That is not what the insurers had in mind when they made the exception. It was an usurpation of the power of gov-

ernment, against which they intended to protect themselves. Such was the interpretation given to the same words in a policy as early as the year 1767. *Drinkwater v. The London Assurance*, 2 Wils. 363. The property insured was destroyed by a mob, which arose on account of the high price of provisions; and the insurers were held liable, notwithstanding a proviso in the policy that they would not answer for a destruction by "usurped power." BATHURST, J., said, those words, according to the true import thereof and the meaning of the parties, could only mean an invasion of the kingdom by foreign enemies to give laws and usurp the government, or an internal armed force in rebellion, assuming the power of government, by making laws, and punishing for not obeying those laws. WILMOT, C. J., said, the words meant an invasion from abroad, or an internal rebellion, when armies are employed to support it; when the laws are dormant and silent, and firing of towns is unavoidable. In *Langdale v. Mason*, 2 Marsh. Ins. 791, it was said by Lord Mansfield that these words were ambiguous, but they had been the subject of judicial determination; that they must mean rebellion conducted by authority, — determined rebellion, with generals who could give orders. And he added: "Usurped power takes in rebellion, acting under usurped authority." Whatever doubt there may have been originally about the meaning of the words "usurped power," in a policy, their legal import had been settled long before this contract was made; and we cannot assume that these parties used the words in any other than their legal sense.

2. But the mayor acted under lawful authority; there was no usurpation of any kind. Whether he had the concurrence of two aldermen, as the statute provides, or not, there can be no doubt of his common-law power, as the chief magistrate of the city, to destroy buildings, in a case of necessity, to prevent the spreading of a fire. Indeed, the same thing may be done by any magistrate, or even by a citizen, without official authority. *The Mayor of N. Y. v. Lord*, 17 Wend. 285.

IV. If the mayor acted by lawful authority, it is then said that the property was destroyed for the benefit of the city, and that the corporation (not the insurers) must bear the loss. This case does not fall within the statute charging certain losses on the city, because it does not appear that the mayor had "the consent and concurrence of any two aldermen," 2 R. L. 368, § 81; and for the further reason, that the property would have been consumed by fire if its destruction had not been ordered by the magistrate. *The Mayor of N. Y. v. Lord*, 17 Wend. 285. It is said that the corporation is liable at the common law for the acts of the mayor; but no authority was cited in support of the position, and I am not prepared to say that, in a case like this, the doctrine can be maintained. The inclination of my mind is strongly the other way.

But suppose the city is liable, I do not see how that fact can affect this contract. If the insurers pay the loss, they may, perhaps, have an action against the corporation of the city, in the name of the as-

sured, to recover back the money. *Mason v. Sainsbury*, 2 Mash. Ins. 794; 3 Doug. 61, S. C. But however that may be, the fact that the assured may have a remedy against the city, cannot change or qualify the undertaking of the insurers.

This leads me to notice a little more particularly the extent of the contract. The company agrees to make good unto the assured all such loss or damage to the property as shall happen by fire. Thus far there is no limit or qualification of the undertaking. If the loss happen by fire, unless there was fraud on the part of the assured, which is not pretended in this case, it matters not how the flame was kindled. Whether it be the result of accident or design, — whether the torch be applied by the honest magistrate or the wicked incendiary; whether the purpose was to save a city, as at New York, or a country, as at Moscow, — the loss is equally within the terms of the contract. That the insurers intended the general undertaking should extend to every possible loss by fire is evident from the fact that they afterwards proceeded to specify particular losses by fire for which they will not be answerable. *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507. The exceptions are contained in the sixth condition of the proposals annexed to the policy. It is unnecessary to recite the clause, because it is not pretended that this case comes within any of the exceptions, save that relating to a loss happening by means of “usurped power,” and that point has already been considered.

There has then been a loss by fire. The case falls within the general undertaking of the insurers, and is not affected by any of the exceptions which they thought proper to make to the extent of their liability. We cannot add another exception. The insurers are bound by their contract. *Judgment affirmed.*

SCRIPTURE v. LOWELL MUTUAL FIRE INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1852. 10 Cush. 356.

ASSUMPSIT upon a policy of insurance on a dwelling-house, owned by the plaintiff, but in the occupation of one Elbridge Smith. The tenant's minor son carried a cask of gunpowder into the attic, without the plaintiff's knowledge, and fired it with a match, doing the damage stated in the opinion of the court. The case was submitted upon an agreed statement of facts to the Court of Common Pleas, PERKINS, J., who rendered judgment for the plaintiff for the whole amount of damage. The defendants appealed to this court.

I. S. Morse, for the defendants.

A. R. Brown, for the plaintiff.

CUSHING, J. The case finds that a burning match being applied, without fault of the plaintiff, to a cask of gunpowder in the attic of his house, the gunpowder took fire, exploded, set fire to a bed and

clothing, charred and stained some of the wood-work, and blew off the roof of the house; and the only question in the case is, whether the loss thus occasioned to the building is covered by the conditions of an ordinary policy against fire. The question may be generalized thus: By the ignition of gunpowder within a dwelling-house, damage is done to the house, that damage consisting in part of combustion, and in part of explosion. Is the whole damage covered by a policy insuring "against loss or damage by fire?"

The very anomalous case of *Austin v. Drewe* has been adduced in argument and greatly relied upon as having apparent analogy to this; but when that case is examined the analogy disappears.¹ . . . The conflicting and imperfect reports of this case have led to various and contradictory misapprehensions of its import. On the one hand it has been supposed that the decision in *Austin v. Drewe* is put on the ground of carelessness of servants (compare *Hughes on Ins.* 507-511), and is thus in apparent contradiction with the decision of *Dobson v. Sotheby, Mood. & Malk.* 90, in which Lord Tenterden says, that "one of the great objects of insuring is security against the negligence of servants and workmen," — which doctrine is now, in regard to fire policies, at least, the well-settled law both in Great Britain and the United States. 1 *Phillips on Ins.* c. 13, § 2, 1049.

Another authority supposes the point decided to have been, that "in order to recover upon a policy against loss or damage by fire, it is not sufficient to show that the property has been damaged by the heat of fires usually employed in manufacture, and incurred by the negligence of the insured, or his servants, beyond its usual intensity. *Ellis on Ins.* 25." This construction of the case of *Austin v. Drewe* is inexact; for it does not plainly indicate that the real question in controversy was of damage to the subject-matter of manufacture.

On the other hand, the decision in *Austin v. Drewe* has been assumed to establish that "to bring a loss within the risk insured against, it must appear to have been occasioned by actual ignition, and no damage occasioned by mere heat, however intense, will be within the policy." 2 *Marsh. on Ins.* (3d ed.) 790. This proposition is not the point of the case; and it cannot be sound law; for it may well happen that serious damage, within the scope of a fire policy, shall be done to a building, or to its contents, by the action of fire in scorching paint, cracking pictures, glass, furniture, mantelpieces, and other objects, or heating and thus actually destroying many objects of commerce, and yet all this without actual ignition, — that is, visible inflammation.

All these manifest errors, and the doubts they throw over the case of *Austin v. Drewe*, are dispelled at once by the report of it in *Holt* and in *Campbell*, as it was tried at *Nisi Prius*. There it appears that the claim was for damage to the sugars by over-heating only.² . . .

¹ Here was stated *Austin v. Drewe*, *ante*, p. 715 (1816). — *ED.*

² Here were quoted the *Nisi Prius* reports of *Austin v. Drewe*, *ante*, p. 716, n. (1815). — *ED.*

If, in *Austin v. Drewe*, the fire had been where it ought not to be, if, even with careless management, it had burned the building, and notwithstanding it was fire maintained only for the purpose of manufacture, then all the observations of the court go to show that, in this instance, as in that of the whaleship mentioned in *Emerigon* (1 Tr. de Ass. 436), the insurers would have been held to be liable for the loss. This, therefore, and this only, as correctly stated by Beaumont (Ins. 37), is decided by the case of *Austin v. Drewe*, namely, that where a chemist, artisan, or manufacturer employs fire as a chemical agent, or as an instrument of art or fabrication, and the article, which is thus purposely subjected to the action of fire, is damaged in the process by the unskilfulness of the operator, and his mismanagement of heat as an agent or instrument of manufacture, that is not a loss within a fire policy. This we apprehend is good sense and sound law. But it does not touch at all the present case.

It has been thought proper thus to analyze the case of *Austin v. Drewe*, because having been variously reported by four different reporters, and presenting itself prominently in several of the text-books, but in nearly all of them with more or less of misconception, it has become the starting-point, in legal construction, of conflicting lines of argument leading to sundry false conclusions, and, among others, that of a supposed application to the present question.

Some adjudications have also been cited of questions arising in the contingency of damage done by lightning.¹ . . .

The principle adjudged in the cases of this class will be readily seen by reversing the question. Suppose, not as fact but as mere supposition, a policy insuring against damage done through electricity generated by caloric. Obviously, this would not cover damage done by fire only, electricity not being evolved. So, in the actual case reported, of insurance against fire produced by lightning, if the effects be of lightning only, without exhibition of fire, it would not, according to the above decision, be within the policy. Or, suppose insurance on cattle against the risk of death by fire alone. In that assumption, if the cattle die, as they may, by a stroke of lightning, without a burn or any other action of fire on their bodies, it would not be the risk contemplated by the contract. Beaumont on Ins. 37.

The question of loss by lightning is very summarily disposed of in the older authorities, by treating electricity as fire from heaven. See 1 *Emerigon*, c. 12, § 17, no. 1, and the authors there cited. But the progress of knowledge has led to juster notions of the nature of lightning, and of course to different conclusions touching its legal relations, which are correctly summed up by a late writer as follows, namely, that fire includes lightning if there be any mark of fire, but not otherwise. Beaumont on Ins. 37.

¹ Here were summarized *Kenniston v. Merrimack County Mut. Ins. Co.*, ante, p. 717 (1843); and *Babcock v. Montgomery County Mut. Ins. Co.*, 6 Barb. 637 (1849). — Ed.

These cases of damage by lightning bear on the present question, therefore, if at all, only by very distant analogy. Neither of them covers it, or has any direct relation to it. To the contrary of this, in New York, at least, the same courts, which decide that loss by lightning merely is not covered by a fire policy, decide that loss by the explosion of gunpowder is. There is a series of cases precisely in point, which expressly decide, or by implication assume, that damage done by the explosion of gunpowder ignited within a building, as well as that done by its combustion, is within the risk of a fire policy. The case of *Grim v. Phoenix Insurance Company* was this: A vessel, insured against fire, was partly laden with gunpowder, which, being ignited by carelessness, the vessel was blown up and totally lost. It was argued by eminent counsel, and the opinion was given by Thompson, C. J.; and throughout the cause it seems to be assumed that the loss was, in respect to its cause, within the policy, and the decision was made to depend on other considerations. 13 Johns. 451. The same conclusion is also assumed in the case of *Duncan v. Sun Fire Insurance Company*, 6 Wend. 488. In the case of *City Fire Insurance Company v. Corlies*, the claim was on a fire policy for merchandise destroyed, not in burning, but through the blowing up of the building wherein it was stored, by means of gunpowder; and the court expressly adjudged this to be "a loss by the peril insured against, within the meaning of the policy." 21 Wend. 367. The same point has been ruled incidentally by the Supreme Court of the United States. *Waters v. Merchants' Louisville Insurance Company*, 11 Pet. 225. Perhaps it may add a little to the weight of these authorities to say, that the same thing as to loss by gunpowder — *sulphureo pulvere accenso* — seems to have been holden by the older commercial jurists in Europe. Straccha de Assec. gl. 18, § 2.

This court, to be sure, is not bound by the decisions or opinions cited, but they are entitled to great consideration; and there is not, so far as we know, any contrary adjudication or opinion. Uniformity of decision is in itself a desirable thing. The question, we admit, is a nice one. Upon careful reflection, however, we have come to the conclusion that the received opinions on the subject, and the adjudications referred to, are in accordance with reason and principle. It seems not to be denied that actual combustion, produced by the ignition of gunpowder, is within the present policy. If, then, a combustible substance, in the process of combustion, produces explosion also, it is not easy to perceive why, of the two diverse but concurrent results of the combustion, the one should be ascribed to fire any less than the other. The plain fact here is, the application of fire to a substance susceptible of ignition, the consequent ignition of that substance, and immediate damage to the premises thereby. It is no sufficient answer to say that some of the phenomena produced are in the form of explosion. All the effects, whatever they may be in form, are the natural results of the combustion of a combustible substance; and, as the combustion is

the action of fire, this must be held to be the proximate and legal cause of all the damage done to the premises of the plaintiff.

Our opinion excludes, of course, all damage by mere explosions, not involving ignition and combustion of the agent of explosion, such as the case of steam, or any other substance acting by expansion without combustion. See *Perrin's Administrator v. Protection Insurance Co.*, 11 Ohio, 146. It likewise excludes all damage occasioned but remotely or consequentially through the agency of gunpowder, such as injury done to a house by falling fragments in the blasting of rocks, or the shattering of a house by the stroke of a cannon-ball, in which examples the shock of a projectile, and not ignition or combustion, is the proximate cause of the damage done. We recognize and accept, in the full force of its application, the maxim: *In jure non remota causa sed proxima spectatur*. Bacon's Max. 1.

The legal relations of marine insurance have been copiously discussed in many express treaties of elaborate erudition, and are considered in a great number of judicial decisions, in which the whole subject has been explored with wonderful acuteness and comprehension of logic and of learning; while fire insurance, as a branch of legal knowledge, is, comparatively speaking, in its rudiments. The cases on marine insurance throw little if any light on the present question, except in so far as they attempt to prescribe a rule for distinguishing between what is remote and what is proximate cause. The conclusion reached in this discussion, as may be seen by the latest investigation of the point in Great Britain, *Montoya v. London Assurance Co.*, 6 Welsb. Hurlst. & Gord. 451, is that, while for most cases it is practicable to draw the line, and to formalize a rule between the two classes of causes, yet in other cases, according to the general law of nature, the two classes approach and run into one another until the distinction vanishes; and within the limits of this debatable land of differences, it is necessary to apply judicial discretion to the particular questions as they arise, just as it is in the not infrequent inquiry whether a thing, or the use or measure of it, be reasonable or not. In *Montoya v. London Assurance Co.*, it was determined that where the lower part of a cargo is damaged by sea-water, and, by the evolution of gases from the part thus damaged, or the propagation of heat arising from fermentation, the superior part of the cargo be damaged also, the loss on the latter is by the perils of the sea, the involvement of the secondary effect in the primary one being an example of *causa proxima*.

In the present case there is no room for question concerning a series of causes, as whether primary or secondary, proximate or remote; for the agent is one and the same throughout, namely, fire. The *causa* was burning powder; the *causa causans* was a burning match; at each stage of causation it was the action of fire. Nay, to be exact, the burning of the gunpowder, like the burning of the match, was a succession of several complex acts of burning. Yet fire is the agent at each of these distinct stages of causation. Suppose there was a

barrel of sulphur in the plaintiff's attic instead of gunpowder; and this being ignited with a match, afterwards the fire had passed from the burning sulphur to the substance of the house. This would be recognized at once as a case of fire. It does not change the legal relation of causes to substitute a barrel of burning gunpowder for a barrel of burning sulphur. The only difference in the elements of the question is, that the gunpowder, when ignited, consumes with more of rapidity than sulphur, and the combustion is accompanied or followed by explosion. Still, the agent is fire, though it acts in different ways upon the different successive subjects of its action, beginning with the match and terminating with the plaintiff's house.

On the other hand, cases are conceivable, other than by the use of gunpowder, of explosion without any combustion, which, nevertheless, being the result of the action of fire, are still, it would seem, within the range of the general principle. Various mineral substances exist, of value in commerce and the arts, which explode by the action of the fire, without either ignition or combustion. In general, any close vessel, of whatever material composed, when filled with an expansive fluid, is liable to explode by the action of heat, though it may be that the vessel and its contents are alike incombustible. The same thing happens, under certain conditions, to some forms of wood, which, although combustible, may by the action of fire explode without ignition; or which, as in the present case, of a house, by having compressed within it some burning substance, which is explosive as well as combustible, like gunpowder, may suffer the double injury of combustion in part and in part of explosion.

If, however, the question of consequential damage needed to be explored for the determination of the present case, it would serve to confirm the conclusion to which we have on other premises arrived. Thus, in Great Britain, damage, which occurs consequentially in the case of a fire, by reason of confusion of mind, as in throwing fragile objects out of the window, or by sudden terror from alarm, as in leaving open the tap of a barrel, and thus wasting the contents, is held to be loss by fire, according to the usages of insurance offices or established legal principle. Beaumont on Ins. 41. So it is in the case of a beam, cornice, or coving, removed to prevent the spread of conflagration. Ibid. We understand the same to be the rule in the case, for instance, of a fire in the upper story of a building, and the destruction or damage of goods in a lower story, not by fire, but by the water thrown into or upon the building, for the purpose of extinguishing the fire. All these are fit illustrations of the question of merely consequential damage. Its legal relations may likewise be followed in the familiar case of the squib falling on a party's premises, and by him hastily thrown off, and so falling upon the premises of another, and thus giving rise to the inquiry, whether the first throwing or the second throwing should be taken as the responsible cause. *Scott v. Shepherd*, 2 W. Black. (2d ed.) 892 and notes; 3 Wils. 403.

In the hypothesis that fire is to be regarded as *causa proxima* in the present case, we can see but one supposable defect, namely, the suggestion that, though it be conceded that the explosion of burning gunpowder, and its effects, are the action of fire, yet this particular effect on the building is not exhibited in the form of igneous action. The cases above supposed, of the shrivelling of some masterpiece of pictorial art, the cracking or discoloration of a rich vase or gem, the bursting of a cask of wine through the expansion of its contents, these, it may be said, are distinctly cases of damage, without ignition it is true, but by the direct and specific action of heat as such; while it is denied that such is the fact in the present case of the blowing up of a dwelling-house by the ignition of gunpowder. We do not think the premises of this argument are sustained by the physical facts which occurred. If they were so, then the nearest analogy would be of damage by smoke, that is, the moisture thrown off by burning wood, and carrying with it ashes, empyreumatic oil, and other constituent parts of the wood, either in their natural condition, or transformed by the process of combustion. Now, it is obvious that mere smoke, without any direct action of heat, may do great damage to many kinds of merchandise, such as delicate textile fabrics, esculent vegetables, articles of taste, and other numerous objects; and if a dwelling or a magazine take fire, and some parts of it only be consumed, but the contents of apartments, to which the actual fire does not extend, are nevertheless damaged by the smoke penetrating into and filling them, can it be doubted that the damage thus done is a loss within the ordinary conditions of a fire policy? *Semble*, per Gibbs, Chief Justice, *arguendo*, in *Austin v. Drewe*, Holt N. P. 127. Yet, incontestably, damage by smoke is an effect which is not in itself igneous action, though it be the result thereof; while, as we conceive, the explosion of gunpowder is igneous action.

In conclusion, we think the rule which we propose for the present case reconciles all the conditions involved in the question; is conformable to the nature of things; and constitutes a coherent and consistent doctrine, namely, that where the effects produced are the immediate results of the action of a burning substance in contact with a building, it is immaterial whether these results manifest themselves in the form of combustion, or of explosion, or of both combined. In either case, the damage occurring is by the action of fire, and covered by the ordinary terms of a policy against loss by fire.

*Judgment for the plaintiff.*¹

¹ See *Hayward v. Liverpool and London Ins. Co.*, 3 Keyes, 456 (1867), s. c. 2 Abb. N. Y. App. 349; *Briggs v. North American and Mercantile Ins. Co.*, 53 N. Y. 446 (1873); *Transatlantic F. Ins. Co. v. Dorsey*, 56 Md. 70 (1881); *Renshaw v. Missouri State Mut. F. & M. Ins. Co.*, 103 Mo. 595, 606-611 (1890).

In *Millaudon v. New Orleans Ins. Co.*, 4 La. Ann. 15 (1849), sugar and molasses in a sugar-house were destroyed by the explosion of a steam-boiler used in the manufacture of sugar, and it was held that the loss was not covered by insurance against fire. *EUSTIS, C. J.*, for the court, said:—

“The damage . . . is confined exclusively to that produced by the explosion, none

TILTON v. HAMILTON FIRE INS. CO.

SUPERIOR COURT OF THE CITY OF NEW YORK, 1857.

1 Bosworth, 367.

THIS action comes before the court at General Term, on a verdict taken, subject to the opinion of the court, for its decision of questions of law arising at the trial, and which were there ordered to be heard, in the first instance, at the General Term. The case made is as follows, viz.:—

“This action was brought upon a policy of insurance made by the having been done by fire. . . . There is a material difference between the risk of explosion of a steam-boiler and that of fire, and . . . this difference is established by the popular and ordinary meaning attached to each. . . . Steam has been for years the motive power in manufactories in England and parts of the United States, and accidents by explosion have often occurred. . . .

“It is remarkable that no case has been found in which a recovery has been had on a fire policy for a loss by explosion. It is but fair to infer that the risks are considered as different. . . .

“So far as relates to the insurance, we are unable to distinguish a loss occasioned by the explosion of the boiler from that caused by the breaking or derangement of any other part of the machinery.”

In *Heuer v. Northwestern National Ins. Co.*, 144 Ill. 393 (1893), goods and fixtures were covered by a fire insurance policy providing that “this company shall not be liable by virtue of this policy . . . for any loss or damage by fire caused by means of an earthquake; nor of an invasion, insurrection, riot, civil commotion, or military or usurped power; . . . nor for any loss caused by the explosion of gunpowder, nor any explosive substance, nor by lightning or explosion of any kind, unless fire ensues, and then for the loss or damage by fire only.” The property was not burned, but was damaged through an explosion of illuminating gas in the building, and the explosion was caused through the accidental ignition of the gas by the flame of a match. *MAGRUDER, J.*, for the court, said:—

“Is the loss to be attributed to the explosion, or to the lighting of the match, which preceded the explosion? If it is attributable to the explosion, the loss is not covered by the policy. . . .

“The exemption clause provides that ‘this company shall not be liable . . . for any loss caused by . . . explosion of any kind, unless fire ensues.’ The use of the expression, ‘explosion of any kind,’ contemplates the existence of more than one kind of explosion. Without undertaking to make an accurate classification, we deem it sufficient to say, that one kind of explosion is that which is produced by the ‘ignition and combustion of the agent of explosion,’ as where a lighted match is applied to a keg of gunpowder, and another kind of explosion is that which does not involve ‘ignition and combustion of the agent of explosion,’ as where steam, or any other substance, acts by expansion without combustion (*Scripture v. Lowell Mut. F. Ins. Co.*, 10 Cush. 356). The exemption clause is broad enough to embrace both kinds of explosion. As the present case, where it appears that a lighted match was applied to the illuminating gas confined in the basement of a building, furnishes an instance of the first kind of explosion above specified, it manifestly comes within the terms of the exemption. . . .

“There was no fire prior to the explosion, and . . . the lighted match was not a fire within the policy. . . .

“We think that the loss in this case resulted from the explosion, and not from any fire which preceded or followed the explosion, and that it comes within the terms of the exemption clause.” — *Ed.*

defendants, to recover from them their proportion of the loss and damage sustained by the plaintiff by the destruction or damage of the property insured, by a fire which occurred on the morning of the 5th of February, 1855.

“By the pleadings in the action, the making of the policy and the occurrence of the fire were admitted, and also that the goods of the plaintiff saved from the fire were damaged to the extent of nine hundred dollars. In addition to this, the plaintiff claimed that there was a total loss of goods to the amount of \$3,459.35, covered by the policy.

“The defendants denied the total loss of any goods, and claimed that the plaintiff, on presenting his claim to the defendants, had made false statements as to the amount of his loss, whereby, under the terms of the policy, he had forfeited his claim to the amount of damage admitted to have been suffered.

“The action came on to be tried before Mr. JUSTICE DUER, and a jury, on the 21st April, 1856.

“Upon the trial the plaintiff read in evidence the policy of insurance, bearing date June 1st, 1854, whereby the defendants insured the plaintiff against loss or damage by fire, to the amount of \$1,500, on his stock of ready-made clothing, contained in the building No. 140 Fulton Street, New York; also, \$400 additional on the store fixtures, furniture, &c., for the term of one year thereafter.

“The plaintiff then offered evidence tending to show that on Saturday, the third day of February, 1855, the store was closed at the usual hour in the evening, and that neither the plaintiff nor any of his clerks again entered it. That on Monday morning, the fifth of February, 1855, when the plaintiff and his clerks came to the store, they found the building entirely destroyed. That neither the plaintiff nor any of his clerks were present at the fire. That in the morning after the fire, the plaintiff was notified by the agents of the defendants, that they had removed his goods from the store, and that they were stored in the basement of the Sun Building, and soon afterwards, the plaintiff having hired the store No. 194 Fulton Street, the defendants delivered to him the goods saved, which were taken from the basement of the Sun Building to the store No. 194 Fulton Street, where an inventory was taken of the same. That by this inventory it appeared that the value of the goods saved amounted to \$9,488.66. Evidence was also offered by the plaintiff, tending to show that on the night previous to the fire, when the store was closed, there was a stock of goods on hand of the value of \$12,948.01. That many goods which were in the store on the evening previous to the fire were not among the goods delivered to the plaintiff after the fire. That the fixtures, &c., covered by the policy to the value of \$500, were, together with the building, totally destroyed by the fire in question.

“The defendants gave evidence tending to show that in making up the account of the goods saved from the fire, the plaintiff had fraudulently undervalued the goods, so as to increase the apparent amount of

his total loss. The plaintiff offered counter evidence on this point, tending to show that the accounts were in all respects just and true.

“The defendants then offered evidence tending to show that the fire in question was discovered about midnight, in the third story of the building No. 140 Fulton Street; that a few minutes thereafter the insurance watch arrived, broke open the doors, took possession of the store, and commenced moving the goods across the street; that the police formed lines across the street, about midway of the block above and below the fire, to prevent persons approaching the fire; that all the goods were removed from the store before the fire reached that portion of the building occupied by the plaintiff, and were taken across the street, and piled up on the sidewalk, extending from the curbstone back against the door of a hotel then open; that the goods were covered by oil-cloths, and policemen were stationed in charge to watch them; that after all the goods had been removed across the street, they were taken to the Sun Building, a hundred feet distant, and stored in the basement, which was locked up, and the key retained by one of the insurance agents until delivered to the plaintiff, the next morning; that all the goods stored in the Sun Building were delivered to the plaintiff the next morning.

“The plaintiff gave evidence tending to show that a large number of persons were admitted inside the lines formed by the police; that persons passed them freely; that there were several hundred persons assisting in removing the goods, including policemen, insurance watch, and others; that there was a great deal of confusion; and that goods might have been stolen and carried away without being noticed.

“The court thereupon charged the jury, amongst other matters, as follows:

“That if the witnesses on the part of the plaintiff are to be believed, the plaintiff had in his store, on the night of the fire, goods to the value of \$12,948.01, while the goods saved by the defendants and delivered to the plaintiff at the Sun Building, on the morning after the fire, only amounted to \$9,488.66, leaving a deficiency of \$3,459.35, which the plaintiff claims were lost or destroyed by the fire. In opposition to this we have the testimony on the part of the defendants, that all the plaintiff's goods were removed by them from the store before the fire reached that portion of the building. None of the witnesses, however, can testify that all the goods removed from the store were taken to the Sun Building, and these statements can only be reconciled upon the supposition that a portion of the goods were abstracted during the fire. Although it is a serious question, and in my judgment a very doubtful one, whether the insurers, insuring against fire alone, are bound to make good any loss resulting from stealing the goods by persons at the fire, yet, for the purposes of this trial, I shall charge you that it is immaterial whether the goods were actually burned, or were abstracted or stolen by persons at the fire. If you are satisfied that the plaintiff was not guilty of any fraud in making the statement as to the amount

of his loss, he is entitled to your verdict for the sum of \$400 insured upon the fixtures, and also for three-twenty-eighths of that portion (if any) of the goods in the store on the night of the fire, which were either burned or abstracted by persons at the fire. If you find for the plaintiff for the full amount claimed, your verdict will be for \$900.'

“ The counsel for the defendants thereupon excepted to that portion of the charge in which his honor charged the jury that the defendants were liable for goods stolen at the fire.

“ The jury thereupon returned a verdict for the plaintiff, for nine hundred dollars, which was directed by the court to be entered, subject to the opinion of the court upon the question as to the liability of the defendants for goods stolen; to be heard in the first instance at the General Term, on a case to be made, with leave to either party to turn the same into a bill of exceptions.”

It was first argued at the February General Term, 1857, before BOSWORTH and HOFFMAN, JJ. On April 11, 1857, they severally delivered written opinions, and, disagreeing in their conclusions, ordered a re-argument.¹

The cause was re-argued on June 6, 1857, before DUER, C. J., and BOSWORTH, HOFFMAN, SLOSSON, and WOODRUFF, JJ.

D. D. Field, for plaintiff.

E. J. Phelps and *E. W. Stoughton*, for defendants.

BY THE COURT. DUER, C. J. The judge, upon the trial, charged the jury, that, if they were satisfied that the plaintiff had sustained the loss that was claimed, he was entitled to recover, as well for the goods abstracted or stolen, as for those, if any, destroyed by fire. To this part of the charge, the counsel for the defendants excepted; and whether this exception is well taken is the single question that we are now required to determine. In words less technical: Whether, as fire is the only risk mentioned in the policy, the defendants are answerable for the loss of goods that, during the course of, or subsequent to, their removal from the building on fire, and before any part of them had been restored to the possession of the assured, had been abstracted or stolen?

The determination of this question evidently depends upon the true interpretation and just application of the established maxim, that, in determining the character of a loss for which an indemnity is claimed under a contract of insurance, its proximate cause is alone to be regarded; so that, when it appears that this proximate cause was a peril not covered by the policy, the insurers are discharged from all liability. The well-known maxim of Lord Bacon, *In jure causa proxima, non remota, spectatur*, it is admitted, furnishes, in all cases, the controlling rule. Strictly speaking, the proximate cause is that which immediately precedes and directly occasions a loss; and hence, if the maxim is to be understood in this limited sense, it is plain that the defendants are not answerable for the loss that is claimed, since its proximate cause, in this sense, was not fire, but theft,—a risk which the language of the

¹ These opinions have not been reprinted. — Ed.

policy does not embrace, and against which no indemnity in terms is promised.

It is not pretended, however, that the maxim, in its application to the contract of insurance, has ever been understood, or, without an entire disregard of prior decisions, can now be understood, in this strict and limited sense, — a sense that, if adopted, would confine the liability of insurers to losses produced solely by the direct agency of a peril insured against, upon the property insured. It is not denied that, in numerous cases, where the property has not been at all injured or affected by direct action of the peril, the insurers have been held responsible for a subsequent loss, even when its immediate cause has been an act or event not mentioned in the policy. Nor is it denied that, in all such cases, the law attributes the loss to the original peril, as its proximate cause. Thus, to select a frequent and familiar instance, where goods insured only against fire, and contained in a building actually on fire, are neither touched by the flames, nor affected by the heat, but are saturated by the water used to extinguish the fire, and are thereby damaged or rendered worthless, it has never been doubted that the insurers are bound by their contract to satisfy the loss; nor that it is recoverable as a loss occasioned by fire, although the voluntary application of water was, in reality, its sole immediate cause. And this single example is sufficient to prove that the maxim, *Causa proxima, non remota, spectatur*, is not to be strictly and literally construed, but, by its received interpretation, embraces consequential or incidental losses, as well as those which are direct and immediate. To enable us, therefore, to answer the novel question now before us, it will be necessary to define the consequential losses that the maxim by which we must be governed has been held to embrace, and carefully to distinguish them from those, the recovery of which it has been held to preclude. We must ascertain, if possible, the principle or grounds upon which each class of cases may justly be said to rest, that we may determine to which class that which is before us, by a parity of reasoning, ought to be referred; and this we shall now endeavor to do, by referring to a few of the cases belonging to each class.

There are some losses, not produced by any direct action of a peril insured against upon the property insured, and therefore strictly consequential, which it is admitted by all that the insurers are bound to make good. They are responsible for every loss which is, physically, a necessary consequence of the peril; that is, for every loss that, from the nature of the peril, and of the subject insured, when the peril occurs, must inevitably follow.¹ . . .

My observation upon the cases that have been cited, is: that it cannot be denied that in each of them the loss for which an indemnity was

¹ Here were discussed *Montoya v. London Assur. Co.*, ante, p. 704, (1851); *Livie v. Janson*, 12 East, 648 (1810); *Rice v. Homer*, 12 Mass. 230 (1815); *Patrick v. Commercial Ins. Co.*, 11 Johns. 14 (1814); *Hillier v. Allegheny County Mut. Ins. Co.*, 3 Pa. 470 (1846). — ED.

claimed, was, in one sense, a consequence of the peril insured against, since in each it was certain that but for the happening of the peril — the sea peril in the first case, the fire in the last — no loss, or a loss only partial, would have occurred; but as in each case the property insured would have been saved, in whole or in part, but for the happening of a subsequent event of risk, this subsequent risk, as it was the only efficient, was properly held to be the proximate cause of the loss, and as it was not covered by the terms of the policy, the insurers were, necessarily, discharged from its payment. In each case, the peril insured against was merely the occasion, and not in any legal sense the cause of loss.

From these, therefore, and many other cases in which the insurers have been exonerated from consequential losses, it may be safely deduced, as a general rule, that insurers, whether on a marine or fire policy, are never liable for consequential losses, other than such as are physically or legally necessary, unless it appears not only that the property insured was involved in a peril insured against, but that it must have perished from that cause, had the peril continued to operate. In fewer words, unless it appears that the loss, had it not been consequential, would have been immediate and total.

When this necessary condition of the liability of the insurers is proved to have existed, the consequential losses for which they have been held to be answerable may be divided into two classes; and if the loss now claimed can with propriety be referred to either of these classes, the plaintiff will be entitled to our judgment; otherwise, the verdict in his favor must be set aside and a new trial granted.

First: The insurer must satisfy every loss which is shown to have been, although not a necessary, a natural consequence of the peril insured against; and by natural is evidently meant a usual and probable consequence, and such, therefore, as it is reasonable to believe was in the contemplation of the parties when the insurance was effected. Hence, the insurers are bound to indemnify the assured against every loss that may be expected to follow from the means usually employed to avert or diminish the peril, and save the property insured from the destruction, in which it would otherwise be involved; and it can hardly be said that their liability for consequential losses that may with certainty be referred to this class, has ever been doubted or denied.

The examples that most readily occur, are, under a marine policy, jettison of goods, or the cutting away of a mast during a storm; and, under a fire, the damage to the goods from water, and the injuries which they suffer from haste and negligence in the course of their removal from a building actually on fire.

The second class of consequential losses for which the insurers are undoubtedly liable, as referable to the peril insured against as their proximate cause, embraces the cases in which the property insured is extricated from the peril that otherwise would have led to its destruction, by means that could not have been anticipated by the parties, but by which it is taken from and never again restored to the possession of

the assured, so that to him the loss is exactly the same that it would have been had the peril continued to operate.¹ . . .

I have already said that, although the loss now claimed is consequential, yet if it fall within either of the classes that have now been stated and explained, it is recoverable under the policy, as a loss by fire, and that it falls within both classes, is the conclusion to which we have all of us come, with the exception of my brother Hoffman. We think that this conclusion is fully justified by the decisions to which I have referred, and which we are not aware are contradicted or shaken by any other authorities.

It cannot be denied, that the facts which I have stated to be the necessary condition of the liability of insurers for consequential losses, other than such as are inevitable, were in this case proved to exist. The goods were removed from a building actually on fire, and which was destroyed by the fire; had they remained, their destruction was certain. Under these circumstances we think the loss as claimed was a natural consequence of the peril insured against. When the doors of a warehouse or store on fire are broken or thrown open, in order that the goods within, by their removal, may be saved from the peril, a loss of a portion of them by plunder we cannot but think is just as certainly a natural consequence of the attempt to preserve them as the damage which they suffer from the negligence or recklessness of those engaged in their removal. It is a consequence that from the frequency of its occurrence may be expected to follow, and which, it is therefore reasonable to believe, was in the contemplation of the parties when they made their contract. It is a public and notorious fact, which as such we may judicially notice, that in this city, and, indeed, in all crowded cities, losses from this cause constantly happen, and that from the temptation and facilities that a fire creates, it would be difficult and almost impossible to prevent them. And when we call to mind the hurry, confusion, and disorder that usually prevail, and the habits and character of those who form a large portion of the crowd that usually assemble at a fire, it would be a matter of great surprise if losses of this description were not as frequent as an experience almost daily attests they are.

It was admitted by one of the learned counsel of the defendants, that as petty losses by theft not unfrequently happen, it might not be unreasonable to hold that, for such the insurers are liable, as a natural consequence of the peril insured against; but he contended that, as a loss by theft of the magnitude of that which is now claimed very rarely occurs, it would be unjust to hold that the defendants ever meant to assume the risk, since it cannot be thought that such a loss was in the contemplation of the parties when they made the contract.

The argument is plausible, but it implies a distinction for which there is no warrant or precedent, and to which we cannot assent. The only question is, whether a loss by theft is from its nature a consequential

¹ Here were discussed *Bondrett v. Hentigg*, *ante*, p. 697 (1816); *Hahn v. Corbett*, 2 Bing. 205 (1824); *Dean v. Hornby*, 3 E. & B. 180 (1854). — Ed.

loss, for which the insurers are liable, and if this be admitted or proved, their obligation to satisfy the loss, when not exceeding the sum insured, cannot be varied by its amount.

If all the costly furniture of a dwelling-house were defaced and broken by a disorderly crowd volunteering their aid to rescue it from a fire, we cannot believe that the unusual amount of the loss would be held to exonerate the insurers from its payment. And we see no reason to doubt that a loss by theft, if covered by the policy at all, stands upon the same ground.

But were we prepared to say that, if the loss now claimed cannot be regarded as a natural consequence of the peril, and is not recoverable upon that ground, it is still certain that the goods upon which it is claimed, before their removal, were involved in a peril that must have led to their destruction, and that, although saved from this peril, they were never restored to the possession of the plaintiff.¹ . . .

Here, it is certain that the goods upon which the loss is claimed, had they remained in the store, must have been destroyed by the fire; and equally so, that, since their removal they have never been restored to the possession of the plaintiff, — the loss to him is exactly the same as if they had been consumed by the fire. So far as he is concerned, they were never rescued from the peril in which they were involved, and which may, therefore, be justly considered the proximate cause of the loss.

There is no ground for the allegation that the goods lost were in the possession of the plaintiff when the loss happened. They were taken from his possession by the persons who removed them, and those persons were in no sense his agents, or subject in any respect to his direction or control. Neither he nor any person acting by his authority was present at the fire. The case, moreover, expressly states that the goods saved were taken possession of by an agent of the insurers, who stored them in a building of which he kept the key; and that this key was not delivered to the plaintiff until the next morning. Until then the goods saved were not restored to his possession. Those that were stolen were at no time after their removal in his possession. The property remained in him, but the possession was gone. *Dean v. Hornby, supra.*

The result of this discussion is, that, in our opinion, the jury were rightly instructed upon the trial,² and that the plaintiff is entitled to judgment upon the verdict which they rendered, and such is our decision.³ . . .

HOFFMAN, J., dissenting.⁴ . . .

¹ A passage discussing the authorities already cited has been omitted. — ED.

² *Acc.*: *Whitehurst v. Fayetteville Mut. Ins. Co.*, 6 Jones, N. Car. 352 (1859); *Independent Mut. Ins. Co. v. Agnew*, 34 Pa. 96 (1859); *Newmark v. Liverpool and London F. & L. Ins. Co.*, 30 Mo. 160 (1860); *Witherell v. Maine Ins. Co.*, 49 Me. 200 (1861).

See *Webb v. Protection Ins. Co.*, 14 Mo. 3 (1850); *Leiber v. L. & G. Ins. Co.*, 6 Bush. 639 (1869). ED.

³ Here was discussed *Levy v. Baillie*, 7 Bing. 349 (1831). — ED.

⁴ This opinion has not been reprinted. — ED.

BRADY v. NORTHWESTERN INS. CO.

SUPREME COURT OF MICHIGAN, 1863. 11 Mich. 425.¹

ERROR to Oakland Circuit.

The action was upon a policy of fire insurance that covered a three-story wooden warehouse in Detroit. The policy was for \$2,000, and contained this provision: "In case of any loss or damage . . . it shall be optional with the company . . . to rebuild or repair the building . . . giving notice of their intention . . . within forty days after . . . proofs of loss . . . and where no such offer . . . is made, the loss due and ascertained shall be payable in sixty days after . . . proofs." The plaintiff introduced evidence that the roof of the building insured had been burned within the term of the policy, that the building was worth from \$4,000 to \$5,000 before the fire, and that the unconsumed portion was worth less than \$100. The plaintiff then proposed to introduce in evidence the city charter, the ordinances, and the proceedings of the common council, in order to show that the warehouse was within the fire limits, that it could not be rebuilt without the permission of the common council, and that such permission had been refused; but the defendant company objected to the introduction of this evidence on the ground that it had nothing to do with the rule of damages, and the court sustained the objection, whereupon the plaintiff excepted. The plaintiff admitted the receipt of \$866.50 from the defendant company on account, and conceded that another company was responsible for one half of the entire loss. The defendant company introduced evidence to show what sum would have been necessary in order to restore the building. The court charged the jury that the measure of recovery was such amount as would be sufficient to place the building in as good condition as it was in when the loss happened; and to this estimate the plaintiff excepted. The judgment having been for the defendant company, the plaintiff appealed.

G. V. N. Lothrop and *S. D. Miller*, for plaintiff in error.

D. B. Duffield, *H. K. Clarke*, and *S. T. Douglass*, for defendants in error.

MARTIN, C. J. The plaintiff in this case was insured by the defendants in the sum of \$2,000, upon his warehouse, on the first day of January, 1856, for one year. The policy of insurance contained, among others, this provision: "This insurance (the risk not being changed) may be continued for such further time as shall be agreed on; the premium therefor being paid and indorsed on this policy, or a receipt given for the same." The obligation of the defendants seems to have been renewed every succeeding year, under this stipulation; and upon

¹ The reporter's statement has not been reprinted. — ED.

such renewed obligation, dating from the first day of January, 1861, this action arises.

Between the years 1856 and 1861, certain ordinances were adopted by the common council of Detroit for preventing the restoration or reconstruction, within certain boundaries, of wood buildings which might be injured or destroyed by fire. After the passing of these ordinances, the policy was renewed on payment of the premium originally stipulated, and after being countersigned by the resident agent. The question now presented is, whether the liability of the defendant is under the promise of 1856 or that of 1861; in other words, was the undertaking of 1856 made a continuous undertaking, to be construed by the laws and ordinances as they existed in 1856 solely, or, by the renewal, were the parties bound by the laws and ordinances existing at the time of such renewal?

We have no doubt that each renewal of the policy was a new contract. Each was upon a new consideration, and was optional with both parties. At the expiration of the year over which the original policy extended, the obligation of the insurer was ended, and it was only by the concurrence of the will of both parties that the obligation could be continued. This concurrence is manifested by the payment of a consideration by the one party, and a renewed promise by the other; and an obligation revived or continued under such circumstances is an original obligation. It must be asked for by the one, and may be assumed or refused by the other; and the policy, which is its evidence, is therefore only continued by the positive act of both parties. This is according to the terms of the policy, and of the certificate of renewal; and the fact that the insurance company, by the very terms of the certificate of renewal, required payment therefor, and that such certificate should be countersigned by the resident agent before it should become operative, shows that the company regard the renewal as a new contract, made at their option, and dependent in some degree upon the judgment and knowledge of such agent. Thus, if the agent should find the property depreciated in value, or the risk increased from any cause, he could refuse to countersign the renewal receipt, and the promise by the company to renew the policy would be thereby terminated. Now, it is very clear that all such contracts must be mutual, and that where a right is reserved to a party to renew or dissolve an obligation, the determination of such party to renew an expired contract, if accepted by the other, makes an original contract.

This contract of insurance is one of indemnity against loss by fire; and the whole loss of which the fire is the *actual* cause, is within its terms to the extent of the indemnity promised. Much is said by judges of the proximate and remote cause of the loss; and the distinction was very elaborately discussed by counsel in the present case. But, after careful consideration, I must confess that, to my mind, the word *proximate* is unfortunately used, and serves often to mislead the inquirer, and to produce misapprehension of the real rule of law. That

which is the *actual* cause of the loss, whether operating directly or by putting intervening agencies — the operation of which could not be reasonably avoided — in motion, by which the loss is produced, is the cause to which such loss should be attributed. If, in the effort to extinguish fire, property is damaged or destroyed by water, the water may be said to be the *proximate* cause of the injury or destruction; yet in no just sense can it be said to be the *actual* cause. *That* was the fire. The fair and reasonable interpretation of a policy of insurance against loss by fire will include within the obligation of the insurer every loss which necessarily follows from the occurrence of the fire, to the amount of the actual injury to the subject of the risk, whenever that injury arises directly and immediately from the peril, or necessarily from incidental and surrounding circumstances, the operation and influence of which could not be avoided.

Under this rule, what was the plaintiff's loss in the present case? The property insured was situated within the fire limits of Detroit, within which the reconstruction or repair of any wood building injured by fire was prohibited, unless by leave of the common council. The charter and ordinances of the city upon this subject, and the refusal of the common council to permit the repair of the building injured, were offered in evidence to show the extent of the plaintiff's loss, and rejected. This charter and these ordinances were in existence at the time of the last renewal of the policy. They were local laws affecting the property, and the risk which the defendant assumed, and of which the latter is presumed to have had knowledge, and to have estimated in renewing the policy. Whether, therefore, in case of damage or partial loss, the common council would permit a repair of the building, was a risk which the company took upon itself, because the loss and injury to the plaintiff might depend in amount upon such action of the council, while such loss and injury would be absolutely and actually the consequence of the fire; and because by the terms of the policy the company reserved the right to repair or not at option, thus taking the risk of the power to repair, and of all loss which should accrue if repairing should be impossible from any cause. To hold that for an injury to the property, which results, without the fault of the insured, in a total loss to him, so far as value and use are concerned, the insured can only receive compensation to the extent of the appraised damage to the materials of which the building was constructed, and which were destroyed, would establish a narrow, illiberal, and illogical rule. The value of the building consisted in its adaptation to use, as well as in the materials of which it consisted; and if it could not be restored to use after the fire, the loss was total, less the value of the materials rescued. In the very pertinent language of the plaintiff's counsel, "The contract was not simply an agreement to pay for so much material as might be damaged by fire — to pay such amount as the material might actually be worth. Fixed by the conditions of the policy as the most hazardous of all structures, and with a premium

adjusted accordingly, the insurer took the risk upon a 'three-story wood warehouse,' actually in use as such. The risk was not taken upon a mere collection of beams, boards, and other materials, thrown together without purpose or special adaptation. It was upon a building for trade, situated within a particular locality, within the jurisdiction of municipal authorities vested with legislative powers for special purposes, and subject to the exercise of those powers ; " and the parties must be regarded as contracting with a full knowledge of all the facts and the law, and the risk to which the property was thereby subjected.

Of the power of the common council to pass the ordinances in question, we have no doubt. They contravene no provision of the Constitution as we read it, and they were made in the exercise of a police power necessary to the safety of the city. A regulation of the use of property, or a prohibition of its repair when partially destroyed, cannot, to my mind, be regarded as a condemnation to public use.

The court erred in excluding the testimony offered, and in the rule of damages given to the jury.

The judgment is reversed, and a new trial ordered.

MANNING and CHRISTIANCY, JJ., concurred.

CAMPBELL, J. As I do not concur in all the views expressed by the chief justice, and have arrived at a different conclusion upon the validity of the action of the Circuit Court, I proceed to state the reasons upon which I have formed my opinion.

I concur in holding that if the by-law of the city of Detroit is valid and applicable, the plaintiff should recover on the basis of the claim which he sets up.¹ . . .

I am also of opinion, with the chief justice, that the renewal of the policy in controversy was in law a new insurance, and subject to all legal regulations in force at the date of such renewal.

The by-law in question, having been previously enacted, must, if valid, govern the case. I do not, however, regard it as valid. . . .

I think there was no error in excluding the by-law from the case, and that the judgment should be affirmed.

*Judgment reversed, and new trial ordered.*²

¹ In reprinting this opinion, discussion has been omitted. — Ed.

² *Acc.*: Hamburg-Bremen F. Ins. Co. v. Garlington, 66 Tex. 103 (1886) ; Larkin v. Glens Falls Ins. Co., 80 Minn. 527 (1900).

See Brown v. Royal Ins. Co., 1 E. & E. 853 (1859). — Ed.

WHITE v. REPUBLIC FIRE INS. CO.
SAME v. RELIEF FIRE INS. CO.

SUPREME COURT OF MAINE, 1869. 57 Me. 91.¹

ASSUMPSIT on two policies of insurance against loss or damage by fire. The stock and tools covered were in the third story of a building in Portland. The great fire of July 4, 1866, destroyed the eastern portion of the city, including the easterly side of the first street east of the building, and the southerly side of the street just opposite that property. A heavy wind was blowing sparks and flames upon the building, and the roof was repeatedly on fire. All occupants removed their goods. The property left in the building was not damaged. Other facts appear in the opinion. The case was withdrawn from the jury and continued on report, the full court to render such judgment as the law and the evidence required.

S. C. Strout and *H. W. Gage*, for the plaintiff.

Davis & Drummond, for the defendants.

DICKERSON, J. Assumpsit on two policies of fire insurance, submitted on report.

On the night of the conflagration of July 4, 1866, at Portland, the plaintiff, apprehensive that the building known as Ware's block, on the northerly side of Federal Street, the third story of which was occupied by him for the manufacture of brushes, would be destroyed by fire, removed his stock, consisting of bristles and manufactured brushes, and his tools, from the building. The block was not destroyed or injured by the fire; and the plaintiff brings this action to recover the damages thus done to his stock and tools, and for the expense incurred in removing them.

The important and interesting question is raised whether the plaintiff's loss is covered by the policy. In general, the assured is entitled to indemnity, unless the loss happens from the qualities or defects of the subject insured, his own fault, or some peril for which he is answerable. 1 Phillips on Ins. 639.

It is argued by the learned counsel for the defendants that this is not a loss by fire; that fire was not the proximate cause of the damage, and that therefore the loss is not covered by the policy. While it has been held that a loss by lightning without combustion is not a loss by fire, it has also been held that the loss of a building by being blown up by gunpowder, and demolished to stop a conflagration, is within the terms of a fire policy. *Babcock v. Montgomery Co. Mut. Ins. Co.*, 6 Barb. 637; *Keniston v. Merrimack Co. Mut. Ins. Co.*, 14 N. H. 341; *City Ins. Co. v. Corlies*, 21 Wend. 367.

Damage done to goods by having water thrown upon them in extin-

¹ The statement has been rewritten. — Ed.

guishing a fire, and a loss of goods by theft after they have been removed from a fire, are covered by the policy. *Hillier v. Allegheny Ins. Co.*, 3 Penn. 470; *Witherell v. Maine Ins. Co.*, 49 Me. 200.

A bolt may be loosened, or a timber started in a storm, without causing any loss until the subsequent action of the water or climate, or the greater strain of a different cargo has so augmented the injury as to cause the loss of the vessel; and yet such a loss is a loss by the storm. *Stephenson v. Piscataquis Ins. Co.*, 54 Me. 76.

So if, after a storm has subsided, the boat is lost by reason of the disabled condition of the ship, in consequence of damage done during the storm, it is a loss by the storm. *Potter v. Ocean Ins. Co.*, 3 Sum. 27.

In these and like cases the direct proximate cause of the damage or loss is not to be found in the fire, or the storm, but in the water, the removal of the goods, the action of the climate, or strain of the cargo, or the disabled state of the ship. If courts were required to hold that no loss is caused by a policy of insurance unless the peril insured against is directly operating upon the subject insured at the time of the ultimate catastrophe, they would deny the right to recover in many cases where it has long been recognized by courts of the highest authority. The legal maxim, *causa proxima spectatur*, is by no means of unusual application in its strict technical sense.

If a loss from demolishing a building with gunpowder to stay the progress of a conflagration comes within the terms of a fire policy, ought not the damages and expense of removing such building to be recoverable if the object in view could be as speedily and successfully accomplished?

In such cases is not the fire, the impending conflagration, the existing operating cause alike of the destruction of the building or of its removal from danger? Is the assured entitled to recover damages for one of the effects of the same procuring cause, and not for the other? If by reason of the immobility of real estate, and the necessity of speedy action on such occasions, it becomes necessary to demolish a building, at the cost of the underwriters, to prevent it and other property from being destroyed by fire, does not the analogy of the law require that they should also be chargeable for the damage and expense of saving personal property from destruction by removing it to a place of safety? Is not the producing cause of both results the same?

So if the underwriters are liable for damage done to goods by having water thrown upon the building in which they are stored, to extinguish the fire, ought they not also to be liable for damage done to goods, in time of imminent peril, by throwing water upon the building containing them to prevent it and them from destruction, though actual ignition has not taken place? In both cases, technically speaking, the water, and not the fire, is the direct proximate cause of the damage. It is neither the policy of the law nor public policy to make it for the interest of the assured, in case of fire, to postpone the use of the means for

extinguishing the fire, and the removal of the goods, until the building containing them is actually on fire. In many, if not most cases, such delay would be tantamount to consigning both goods and building to destruction. Would the interests of insurance companies or the public morals be subserved by the establishment of such a policy?

The question presented is one of considerable difficulty, and one upon which the authorities are at variance. While the Supreme Court of Illinois, in a case like the one at bar, have held that the underwriters are liable for the damage to the goods and the expense of removing them, the court in Pennsylvania have denied them liability. *Case v. Hartford Ins. Co.*, 13 Ill. 676; *Hillier v. Allegheny Ins. Co.*, 3 Penn. 470. We think the liability of the underwriters, in these and similar cases, depends very much upon the imminence of the peril, and the reasonableness of the means used to effect the removal. The necessity for removal is analogous to the necessity that justifies the sale of a disabled vessel by the water. It is not to be determined by the result alone, but by all the circumstances existing at the time of the fire. The necessity for removal need not be actual, that is, the building may not have been actually burned, since this may have been prevented by a change in the direction or force of the wind, the more skilful or efficient management of the fire engines, or the sudden happening of a shower, or a like unforeseen event. But the imminence of the peril must be apparent, and such as would prompt a prudent uninsured person to remove the goods; it must be such as to inspire a conviction that to refrain from removing the goods would be the violation of a manifest moral duty; the damage and expense of removal, too, must be such as might reasonably be incurred under the circumstances of the occasion. *Angel on Fire Ins.* § 117.

When such a case exists, we think it the better opinion to hold that the underwriters are chargeable for the damage and expense of removing the goods, as this result seems most in accordance with reason, the analogies of the law, and public policy. Such, also, is the conclusion of Mr. Phillips, the learned commentator on the law of insurance. "It seems," he says, "to be the better doctrine, and the one most closely analogous to the jurisprudence on the subject of insurance generally, that the underwriters are liable for such damage and expense reasonably and expediently incurred, as being directly occasioned by the peril insured against." 1 Phillips' Ins. 645-6.

The doctrine we maintain on this subject is applicable to a large class of cases recognized by the law of insurance, and is found in that well-established principle of the law of insurance, that insurance against, or an exception of a peril, besides the consequences immediately following it, may include also a loss or expense arising on account of it, although what is insured against or excepted does not actually occur, provided the peril insured against, or excepted, is the efficient acting or imminent cause or occasion of the loss or expense. 1 Phillips' Ins. § 1131.

The proximity of the fire to the building occupied by the plaintiff, its rapid progress, terrible intensity, and fearful ravages, leave no reason to doubt but the goods were removed through a reasonable apprehension that they would be destroyed by fire if suffered to remain. Their situation, too, in the third story, requiring earlier attention, rendered their condition more hazardous than if they had been on the first floor. A prudent uninsured person could scarcely have omitted the precaution taken by the plaintiff.

In removing the goods the plaintiff was bound to exercise that reasonable degree of care which was suited to the circumstances of the occasion; and, when we consider the situation of the goods, the imminence of the peril, and the terror and consternation naturally excited by the progress and fury of the conflagration, we are not prepared to say that he did not exercise such care.

Under the rule for apportioning the damages between the two defendant companies, agreed upon by the parties, if the court should find that the plaintiff is entitled to recover, the plaintiff is to have judgment against the Relief Insurance Company for the sum of one thousand two hundred and twenty-nine dollars and seventy-six cents, and interest from the date of the writ; and also against the Republic Insurance Company for six hundred and seventy-three dollars and sixty-eight cents, and interest from date of the writ.¹

APPLETON, C. J., WALTON, BARROWS, and TAPLEY, JJ., concurred.

CUTTING and DANFORTH, JJ., did not concur.

LYNN GAS AND ELECTRIC CO. *v.* MERIDEN FIRE INS. CO. AND OTHERS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1893. 158 Mass. 570.²

ACTIONS were brought against several companies upon fire insurance policies of the Massachusetts standard form. The cases were tried together. The policies covered a building and contents used in the business of furnishing electricity for electric lighting. While the policies were in force, a fire occurred in the wire tower, which was that part of the building from which wires for electric lighting were carried. The tower and its contents were but slightly injured, and the fire was soon extinguished. Simultaneously, a fly-wheel and pulleys in a remote part of the building were disrupted, and thus this remote part of the building and the machinery contained therein suffered serious damage. The plaintiff's theory as to the connection of this damage with the fire was

¹ See *Holtzman v. Franklin Ins. Co.*, 4 Cranch C. C. 295 (1833); *Case v. Hartford F. Ins. Co.*, 13 Ill. 676 (1852); *Talamon v. Home Ins. Co.*, 16 La. Ann. 426 (1862). — Ed.

² The statement has been rewritten. — Ed.

that the fire caused a short circuit, as is more fully stated in the opinion. The defendants' theory was that the slipping of a belt caused both the fire and the disruption of the machinery, and that a defective pulley contributed to the disaster.

The defendants asked instructions: (1) That they were not liable for damage by disruption of machinery unless fire was the immediate operating cause of such disruption; (2) that if the fire in the tower was inadequate to produce the disruption without the intervention of some nearer cause, the fire was not the proximate cause of such disruption, and the defendants were not liable therefor; (3) that if the disruption of machinery and wreck of building would not have occurred but for some defect in the machinery, or some failure of the machinery to perform its office, such defect or failure not being caused by the fire, such defect or failure was the immediate cause of damage, and the defendants were not liable therefor; and (4) that if the damage by disruption was not occasioned by the direct action of fire, but was a consequence of defective machinery, or of neglect of the engine by a servant, such defect or neglect was the proximate cause of such damage, and the defendants were not liable therefor.

The presiding justice, HAMMOND, J., refused to give these instructions, but stated the various theories of the facts and said:—

"I instruct you as the law of this case, that if you are satisfied that by action of the fire this short-circuiting was effected in the tower, and that the short-circuiting in the tower was the cause of the crash below, the loss is a loss or damage by fire within the meaning of the policy, and that it is not necessary that you should be satisfied that anything below was burning. If you are satisfied that the short-circuiting was caused by the fire in the tower, and would not have existed but for that fire, whether it be caused by flame, by the interposition of partially consumed particles of wood falling from the burning substance, by the heated air, or by the heating of the lightning arresters, that is, if the short circuit occurred and was caused by the action of the fire in any one of those ways and would not have occurred but for the fire, and that the short-circuiting in the tower was the cause of the crash below, then the crash below is to be attributed to fire within the meaning of the policy, and the damage is a damage by fire within the meaning of the policy, and that this is so although you may be satisfied that the pulleys were defective, and if not so would not have burst, but would have withstood the strain caused by the short-circuiting. And I rule, as matter of law, that if the damage was caused in that way it was a loss or damage by fire. . . . It is not necessary that you should be satisfied the defendants' theory is correct in order to find for the defendants, but you must be satisfied that the plaintiff's theory is correct in order to find for the plaintiff, and if you are in doubt as to which way the evidence preponderates on this claim of the plaintiff your verdict should be for the defendants. You are not here to ascertain the cause of that fire except to this extent, namely, whether the plaintiff's view of the cause is correct or not."

The defendants excepted to the refusal to give the four instructions requested, and excepted to such part of the instructions given as were inconsistent with those requests.

The jury found for the plaintiff for the full damage.

S. Lincoln & J. D. Bryant, for the defendants.

W. H. Niles, for the plaintiff.

KNOWLTON, J. The only exception relied on by the defendants in these cases is that relating to the claim for damage to the machinery used in generating electricity and to the building from a disruption of the machinery. This machinery was in a part of the building remote from the fire, and none of it was burned. In his charge to the jury the judge stated the theory of the plaintiff as follows: "The plaintiff says the position of the lightning arresters in the vicinity of the fire was such that by reason of the fire in the tower a connection was made between them called a short circuit; that the short circuit resulted in keeping back or in bringing into the dynamo below an increase of electric current that made it more difficult for this armature to revolve than before, and caused a higher power to be exerted upon it, or at least caused greater resistance to the machinery; that this resistance was transmitted to the pulley by which this armature was run, through the belt; that that shock destroyed that pulley; that by the destruction of that pulley the main shaft was disturbed and the succeeding pulleys up to the jack-pulley were ruptured; that by reason of pieces flying from the jack-pulley, or from some other cause, the fly-wheel of the engine was destroyed, the governor broken, and everything crushed;—in a word, that the short circuit in the tower by reason of the fire caused an extra strain upon the belt through the action of electricity, and that caused the damage." The plaintiff contended that the short circuit was produced by the fire, either by means of heat on the horns of the lightning arresters, or by a flame acting as a conductor between the two horns, or in some other way. The jury found that the plaintiff's theory of the cause of the damage was correct, and the question is whether the judge was right in ruling that an injury to the machinery caused in this way was a "loss or damage by fire" within the meaning of the policy.

The subject-matter of the insurance was the building, machinery, dynamos, and other electrical fixtures, besides tools, furniture, and supplies used in the business of furnishing electricity for electric lighting. The defendants, when they made their contracts, understood that the building contained a large quantity of electrical machinery, and that electricity would be transmitted from the dynamos, and would be a powerful force in and about the building. They must be presumed to have contemplated such effects as fire might naturally produce in connection with machinery used in generating and transmitting strong currents of electricity.

The subject involves a consideration of the causes to which an effect should be ascribed when several conditions, agencies, or authors contribute to produce an effect. The defendants contend that the appli-

cation of the principle which is expressed by the maxim, *In jure non remota causa sed proxima spectatur*, relieves them from liability in these cases. It has often been necessary to determine, in trials in court, what is to be deemed the responsible cause which furnishes a foundation for a claim when several agencies and conditions have a share in causing damage, and the best rule that can be formulated is often difficult of application. When it is said that the cause to be sought is the direct and proximate cause, it is not meant that the cause or agency which is nearest in time or place to the result is necessarily to be chosen. *Freeman v. Mercantile Accident Association*, 156 Mass. 351. The active efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source is the direct and proximate cause referred to in the cases. *McDonald v. Snelling*, 14 Allen, 290; *Perley v. Eastern Railroad*, 98 Mass. 414, 419; *Gibney v. State*, 137 N. Y. 529. In *Milwaukee & St. Paul Railway v. Kellogg*, 94 U. S. 469, 474, Mr. Justice Strong, who also wrote the opinions in *Insurance Co. v. Transportation Co.*, 12 Wall. 194, and in *Western Massachusetts Ins. Co. v. Transportation Co.*, 12 Wall. 201, which are much relied on by the defendants, used the following language in the opinion of the court: "The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft cited case of the squib thrown in the market-place. 2 Bl. Rep. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?"

If this were an action against one who negligently set the fire in the tower, and thus caused the injury to the machinery, it is clear, on the theory of the plaintiff, that the negligent act of setting the fire would be deemed the active efficient cause of the disruption of the machinery and the consequent injury to the building. It remains to inquire whether there is a different rule in an action on a policy of fire insurance.

Under our statute creating a liability for damages received from defects in highways, it is held that the general rule is so far modified that there can be no recovery unless the defect is the sole cause of the accident; but this doctrine rests on the construction of the statute. *Tisdale v. Norton*, 8 Met. 388; *Marble v. Worcester*, 4 Gray, 395; *Jenks v. Wilbraham*, 11 Gray, 142; *McDonald v. Snelling*, 14 Allen, 290; *Babson v. Rockport*, 101 Mass. 93.

In suits brought on policies of fire insurance, it is held that the intention of the defendants must have been to insure against losses where the cause insured against was a means or agency in causing the loss, even though it was entirely due to some other active, efficient cause

which made use of it, or set it in motion, if the original efficient cause was not itself made a subject of separate insurance in the contract between the parties. For instance, where the negligent act of the insured, or of anybody else, causes a fire, and so causes damage, although the negligent act is the direct, proximate cause of the damage, through the fire, which was the passive agency, the insurer is held liable for a loss caused by the fire. *Johnson v. Berkshire Ins. Co.*, 4 Allen, 388; *Walker v. Maitland*, 5 B. & Ald. 171; *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213; *Peters v. Warren Ins. Co.*, 14 Pet. 99; *General Ins. Co. v. Sherwood*, 14 How. 351; *Insurance Co. v. Tweed*, 7 Wall. 44. This is the only particular in which the rule in regard to remote and proximate causes is applied differently in actions on fire insurance policies from the application of it in other actions. A failure sometimes to recognize this rule as standing on independent grounds, and established to carry out the intention of the parties to contracts of insurance, has led to confusion of statement in some of the cases. The difficulty in applying the general rule in complicated cases has made the interpretation of some of the decisions doubtful; but on principle, and by the weight of authority in many well-considered cases, we think it clear that, apart from the single exception above stated, the question, What is a cause which creates a liability? is to be determined in the same way in actions on policies of fire insurance as in other actions. *Scripture v. Lowell Ins. Co.*, 10 Cush. 356; *New York & Boston Despatch Express Co. v. Traders' & Mechanics' Ins. Co.*, 132 Mass. 377; *St. John v. American Ins. Co.*, 1 Kernan, 516; *General Ins. Co. v. Sherwood*, 14 How. 351; *Insurance Co. v. Tweed*, 7 Wall. 44; *Waters v. Merchants' Louisville Ins. Co.*, 11 Pet. 213, 225; *Livie v. Janson*, 12 East, 648; *Ionides v. Universal Ins. Co.*, 14 C. B. (N. S.) 259; *Transatlantic Ins. Co. v. Dorsey*, 56 Md. 70; *United Ins. Co. v. Foote*, 22 Ohio St. 340.

In the present case, the electricity was one of the forces of nature, — a passive agent working under natural laws, — whose existence was known when the insurance policies were issued. Upon the theory adopted by the jury, the fire worked through agencies in the building, the atmosphere, the metallic machinery, electricity, and other things; and working precisely as the defendants would have expected it to work if they had thoroughly understood the situation and the laws applicable to the existing conditions, it put a great strain on the machinery and did great damage. No new cause acting from an independent source intervened. The fire was the direct and proximate cause of the damage according to the meaning of the words "direct and proximate cause," as interpreted by the best authorities. The instructions to the jury were full, clear, and correct, and the defendants' requests for instructions were rightly refused.

*Exceptions overruled.*¹

¹ On proximate cause in fire cases, see also: —

Welles v. Boston Ins. Co., 6 Pick. 182 (1828);

St. John v. American Mut. F. & M. Ins. Co., 11 N. Y. 516 (1854).

Caballero v. Home Ins. Co., 15 La. Ann. 217 (1860);

Everett *v.* London Assurance, 19 C. B. N. S. 126 (1865);
Marsden *v.* City and County Assur. Co., L. R. 1 C. P. 232 (1866);
Insurance Co. *v.* Tweed, 7 Wall. 44 (1868);
Insurance Co. *v.* Transportation Co., 12 Wall. 194 (1870);
German Ins. Co. *v.* Sherlock, 25 Ohio St. 33 (1874);
Insurance Co. *v.* Boon, 95 U. S. 117 (1877);
New York and Boston Despatch Express Co. *v.* Traders' and Mechanics' Ins.
Co., 132 Mass. 377 (1882);
Ermentrout *v.* Girard F. & M. Ins. Co., 63 Minn. 305 (1895);
German F. Ins. Co. *v.* Roost, 55 Ohio St. 581 (1897). — ED.

SECTION III.

Life Insurance.

(A) DEATH.

AMICABLE SOCIETY, APPELLANTS, v. BOLLAND AND OTHERS,
RESPONDENTS.HOUSE OF LORDS, 1830. 4 Bligh, n. s. 194.¹

IN Hilary Term, 1825, the respondents filed a bill in the Court of Chancery against J. C. Disney and wife, Sir E. Home, J. Birch, and the appellants, stating, among other things, that in 1815 Henry Fauntleroy effected insurance upon his life with the appellants in a policy payable to his executors, administrators, or assigns, that Fauntleroy paid the premiums from 1815 until his death, that in 1819 Fauntleroy made a gratuitous assignment of the policy to Sir E. Home and J. Birch, in trust for the wife of J. C. Disney, that in 1824 a commission of bankrupt issued against Fauntleroy, under which his estate and effects became vested in the respondents as his assignees under such commission, and that later in 1824 Fauntleroy died.

It was prayed, among other things, that the assignment to Sir E. Home and J. Birch be set aside, that the respondents be declared entitled to the policy and the proceeds, that the appellants be decreed to pay what was so due to the respondents, and that J. C. Disney and wife, Sir E. Home, and J. Birch be decreed, if necessary, to assign the policy to the respondents.

The appellants' answer was to the effect that Fauntleroy was executed for a felony.

The respondents having settled with the claimants under the assignment of 1819 and having obtained a reassignment, the cause came on to be heard before the Master of the Rolls, Sir JOHN LEACH, and it was decreed that the appellants should pay to the respondents the proceeds of the policy. The appeal was against this decree.

For the appellants, Sir *C. Wetherell* and Mr. *Rose*.

For the respondents, Sir *E. B. Sugden*, S. G., and Mr. *Koe*.

THE LORD CHANCELLOR.² The circumstances of the case are shortly these: In January, 1815, Henry Fauntleroy insured his life with the Amicable Insurance Society. In the month of May in the same year he committed a forgery on the Bank of England. He continued to pay the premiums upon this insurance for a considerable period of time.

¹ s. c. 2 Dow & C. 1. The statement has been rewritten. Before the Master of the Rolls the case is reported *sub nom.* Bolland v. Disney, 3 Russ. 351 (1827). — ED.

² Lord LYNCHURST. — ED.

In the year 1824 he was apprehended, and on the 29th of October in that year he was declared a bankrupt, and an assignment of his effects was made to the respondents. On the following day, the 30th of October, he was tried for this forgery; he was found guilty, sentenced to death, and in the month of November following was executed.

The question under these circumstances is this: whether the assignees can recover against the insurance company the amount of this insurance; that is to say, whether a party, effecting with an insurance company an insurance upon his life, and afterwards committing a capital felony, being tried, convicted, and finally executed, — whether, under such circumstances, the parties representing him, and claiming under him, can recover the sum insured in the policy so effected. I attended to the argument at the bar, in conjunction with the noble lord¹ now present, and we have both come to the conclusion that the assignees cannot maintain this suit.

It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against: that is, that the party insuring had agreed to pay a sum of money year by year, upon condition that in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money — is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes, namely, the interest we have in the welfare and prosperity of our connections? Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on grounds of public policy, be sustained, how is it to be contended that, in a policy expressed in such terms as the present, and after the events which have happened, — that we can sustain such a claim? Can we, in considering this policy, give to it the effect of that insertion, which if expressed in terms would have rendered the policy, as far as that condition went, at least, altogether void?

Upon this short and plain ground, therefore, independently of the more complicated arguments referred to by the counsel at the bar, in the discussion of this case, I think that this policy cannot be sustained, and that the respondents are not entitled to recover. I submit, therefore, that the judgment of the court below ought, under these circumstances, to be reversed.

*Judgment reversed.*²

¹ Lord RADNOR. — REF.

² *Acc.* Burt v. Union Central L. Ins. Co., 105 Fed. R. 419 (C. C. A., Fifth Circuit, 1900), where a person procured insurance on his own life, later made an assignment of the policy, then was convicted, after a plea of insanity, of a murder committed subsequently to the assignment, and finally was executed; and it was held that a demurrer lay to the petition in which the assignees, after setting forth the conviction and execution, alleged that the insured person did not commit the murder and in fact was insane. — ED.

BORRADAILE, EXECUTOR, v. HUNTER.

COMMON PLEAS, 1843. 5 M. & G. 639.¹

THIS was an action of covenant upon a policy procured by W. Borradaile upon his own life, payable to his executors. The policy provided that "in case the assured shall die upon the seas, . . . or go beyond the limits of Europe, or enter into . . . naval or military service, . . . or shall die by his own hands, or by the hands of justice, or in consequence of a duel, or if the age of the said assured does now exceed thirty-six years, . . . this policy shall be void." The pleadings raised the issue whether W. Borradaile died by his own hands. It was proved that he threw himself into the Thames and was drowned. Evidence was given to show that he was insane. The jury returned a verdict that "Mr. Borradaile voluntarily threw himself from the bridge with the intention of destroying himself; but, at the time of committing the act, he was not capable of judging between right and wrong." The verdict was entered for the defendant, with liberty for the plaintiff to move that it be entered for him for the damages that had been assessed by the jury. A rule *nisi* to set aside the verdict was obtained accordingly.

Channell, Serjt. (with whom was *W. H. Watson*), showed cause.

Sir *T. Wilde*, Serjt., and *R. V. Richards*, in support of the rule.

Cur. adv. vult.

The learned judges, not being unanimous, now delivered their judgments *seriatim*, as follows:—

MAULE, J. In the judgment I am about to deliver I have not stated the facts, not having adverted to the circumstance of my opinion being delivered the first; they will, however, no doubt be fully stated by the learned judge before whom the cause was tried.

I have had much doubt in this case, but the conclusion at which I have at last arrived is, that the verdict for the defendant was right. The question is, what is the meaning, in the policy on the testator's life, of the words "in case the assured shall die by his own hands"?

In construing these words, it is proper to consider, first, what is their meaning in the largest sense, which, according to the common use of language, belongs to them; and, if it should appear that that sense is larger than the sense in which they must be understood in the instrument in question, secondly, what is the object for which they are used. They ought not to be extended beyond their ordinary sense, in order to comprehend a case within their object, for that would be to give

¹ s. c. 5 Scott N. R. 418.

The statement has been rewritten. — ED.

effect to an intention not expressed; nor can they be so restricted as to exclude a case both within their object and within their ordinary sense, without violating the fundamental rule which requires that effect should be given to such intention of the parties as they have used fit words to express.

The words in question in their largest ordinary sense comprehend all cases of self-destruction, and certainly include the case of the present testator; but, as it is admitted that in their largest sense they comprehend many cases not within their meaning, as used on the present occasion, it is to be considered whether the case of the testator falls within the object for which they are used in this policy. A policy by which the sum insured is payable on the death of the assured in all events, gives him a pecuniary interest that he should die immediately, rather than at a future time, to the extent of the excess of the value of a present payment over a deferred one, and offers therefore a temptation to self-destruction to this extent. To protect the insurers against the increase of risk arising out of this temptation is the object for which the condition in question is inserted. It ought, therefore, to be so construed as to include those cases of self-destruction in which, but for the condition, the act might have been committed in order to accelerate the claim on the policy, and to exclude those in which the circumstances, supposing the policy to have been unconditional, would show that the act could not have been committed with a view to pecuniary interest. This principle of construction requires and accounts for the exclusion from the operation of the condition of those cases falling within the general sense of its words, to which it is admitted not to apply, — such as those of accident and delirium. To apply it to the present case: it appears by the finding of the jury, that the testator voluntarily threw himself into the water, intending to destroy his life, but that at the time he did so he was not capable of judging between right and wrong; and, as a man who drowns himself voluntarily may do it to found a claim on a policy, though he may not think it wrong to do so, or though his mind may be so diseased that he does not know right from wrong, — which, as I understand the finding of the jury, was the case with the testator, — it seems to me that the object of the condition would not be effected unless it comprehended such a case of self-destruction.

For these reasons, I think the defendant ought to retain the verdict, though I cannot but distrust my opinion when it differs from the judgment of the Lord Chief Justice. It is also impossible not to feel that the condition in question is, in respect of the amount of forfeiture, a hard one, as it goes beyond what is necessary to remove the temptation to suicide arising out of the claim acquired by the death of the party. That object would be effected by reducing the claim in case of suicide, to the amount for which the policy could have been sold immediately before the death of the assured, as completely as by a forfeiture of the whole.

ERSKINE, J.¹ . . . The language adopted by the society is certainly not well selected; because, if taken literally, this case, and all other cases in which the work of self-destruction might be effected otherwise than by the hands of the assured, would be excluded from the operation of the proviso; while all cases of unintentional self-destruction by the hands of the assured would be included in it. But it was very properly conceded by the counsel for the plaintiff, that the clause must receive a reasonable construction, according to the plain and obvious intention of the parties, as collected from the whole of the instrument, and, therefore, that the proviso might be construed as if the words had been, "if the assured shall die by his own act." . . .

It has been argued, on the part of the plaintiff, that, as the very object of a life insurance is to secure a provision for a surviving family against the fatal consequences of decease in the assured, if the act occasioning the death can be traced as the result of a diseased mind, the case comes within the main scope and object of the contract of insurance. This argument would have been unanswerable if the policy had been wholly silent on the subject, as in the case of *The Amicable Life Insurance Company v. Bolland*, Selw. N. P. 10th ed. 1033, 4 Bligh, n. s. 194, 2 Dow & Cl. 1; or if the proviso had been couched in terms pointed only to acts resulting from a criminal intention; but the very object of a proviso like the present is to take out of the operation of the general terms of the policy, death resulting from causes which would otherwise fall within the general scope of the contract, although, *ex abundanti cautela*, it also includes cases which the law itself would except, as those of criminal suicide, and death by sentence of the law, or duelling. . . .

It is well known that the conduct of insane patients is, in some degree, under the control of their hopes and fears, and that especially their affection for others often exercises a sway over their minds where fear of death, or of personal suffering, might have no influence; and insurers might well desire not to part with this restraint upon the mind and conduct of the assured, nor to release from all pecuniary interest in the continuance of the life of the assured those on whose watchfulness its preservation might depend; and they might, further, most reasonably desire to exclude from all questions between themselves and the representatives of the assured the topic of criminality so likely to excite the compassionate prejudices of a jury, which were most powerfully appealed to on the trial of this cause. . . .

And, when I find the terms "shall commit suicide," that have been popularly understood and judicially considered as importing a criminal act of self-destruction, exchanged for terms not hitherto so construed, it may, I think, be fairly inferred that the terms adopted were intended to embrace all cases of intentional self-destruction, unless it can be

¹ The concurring opinions of ERSKINE and COLTMAN, JJ., and the dissenting opinion of TINDAL, C. J., have not been reprinted in full. — ED.

collected from the immediate context that the parties used them in a more limited sense. . . .

Other conditions precede and follow this clause which involve no criminality of intention, to some of which conditions no such intention could by any fair inference be possibly attached, and to others (which are also open to the inference arising from the context) the courts of law have decided that no such inference does attach. . . .

COLTMAN, J. . . . But it is urged, that, in this case, the words of the exception are not to be construed in a literal sense; for, many cases may be put which fall within the literal terms of the exception, which yet cannot reasonably be supposed to fall within the intention of the contracting parties; as, if in a state of delirium a man should remove bandages from a vein which had been opened, without being aware of the consequences, or should take poison by mistake. It may be true that there may be certain acts done by the hands of a party which occasion his death, where, such acts not having been done intentionally by the party, he might not be considered as having died by his own hands within the meaning of the policy. In such cases, a limitation not expressed might, perhaps, though not without some violence to the words, be introduced in construing the words of the exception, where such a limitation is necessary to give effect to what is assumed to be the clear intention of the contracting parties; yet it will not follow that a further limitation ought to be introduced in a case where there is no sufficient ground for inferring that such a construction is in accordance with the intention of the contracting parties. . . .

It was further urged on behalf of the plaintiff, that, at any rate, to bring a case within the meaning of the exception there must be an intention in the party to die by his own hands; and it was urged that an insane person could not be considered as having any intention; that by an intention was meant a controllable intention; that it was like the case of a man who should find himself suddenly on the brink of a precipice and irresistibly impelled to throw himself down it. But the fact in this case does not bear out the argument; there is no ground for saying that Mr. Borradaile acted under any such uncontrollable impulse; on the contrary, the jury have found that he did the act voluntarily, which implies that he had power to do the act or to abstain from it. . . .

TINDAL, C. J. . . . As the result of the finding of the jury is, that the assured killed himself intentionally, but not feloniously, the short question before us becomes this, whether the defendant can make out (for it lies on him to establish the affirmative) that the death of the assured under those circumstances falls within the meaning of the words in the proviso "dying by his own hands." And it appears to me that he cannot; but that, looking at the words themselves, and the context and position in which they are found, a felonious killing of himself, and no other, was intended to be excepted from the policy. . . . The expression — "dying by his own hand" — is, in fact, no more than the

translation into English of the word of Latin origin — “suicide;” but, if the exception had run in the terms “shall die by suicide, or by the hands of justice, or in consequence of a duel,” surely no doubt could have arisen that a felonious suicide was intended thereby; and, if so, ought a different construction to prevail because the English term is found in the policy instead of the Latin? . . .

I therefore found the opinion at which I have arrived in this case upon the consideration that the insurers intended by the proviso to confine their exemption from liability to the case of felonious suicide only; that, if they intended the exception to extend both to the case of felonious self-destruction and self-destruction not felonious, they ought so to have expressed it clearly in the policy; and that, at all events, if they have left it doubtful on the face of the policy whether it is so confined or not, that doubt ought, in my opinion, to be determined against them; for it is incumbent on them to bring themselves within the exception, and, if their meaning remains in doubt, they have failed so to do. . . .

*Rule discharged.*¹

LIFE INSURANCE COMPANY v. TERRY.

SUPREME COURT OF THE UNITED STATES, 1872. 15 Wall. 580.²

ERROR to the Circuit Court for the District of Kansas.

Mary Terry brought an action in the court below against the Mutual Life Insurance Company of New York, to recover the sum of \$2,000, claimed by her as due upon a policy of insurance on the life of her husband George Terry, made and issued to her as his wife.

The policy contained a condition, of which a portion was in these words:—

“If the said person, whose life is hereby insured, . . . shall die by his own hand, . . . this policy shall be null and void.”

Within the term of the policy, George Terry died from the effects of poison taken by him.

Evidence was given tending to show that at the time he took the poison he was insane. Evidence was also given tending to show that at that time he was sane, and capable of knowing the consequences of the act he was about to commit.

¹ *Acc.* Clift v. Schwabe, 3 C. B. 437 (Ex. Ch. 1846), (“commit suicide or die by duelling or the hands of justice”); Dean v. American Mut. L. Ins. Co., 4 Allen, 96 (1862), (“die by his own hand, or in consequence of a duel, or by the hands of justice, or in the known violation of . . . law”); Cooper v. Massachusetts Mut. L. Ins. Co., 102 Mass. 227 (1869), (“die by suicide”); Van Zandt v. Mutual Benefit L. Ins. Co., 55 N. Y. 169 (1873), (“die by his own hands”). — Ed.

² s. c. in the Circuit Court, *sub. nom.* Terry v. Life Ins. Co., 1 Dillon, 403 (1871). — Ed.

Thereupon the counsel for the defendant requested the court to instruct the jury thus : —

“ *First.* If the jury believe from the evidence in the case, that the said George Terry destroyed his own life ; and that, at the time of self-destruction, he had sufficient capacity to understand the nature of the act which he was about to commit, and the consequences which would result from it, then, and in that case, the plaintiff cannot recover on the policy declared on in this case.

“ *Second.* That if the jury believe from the evidence that the self-destruction of the said George Terry was intended by him, he having sufficient capacity at the time to understand the nature of the act which he was about to commit, and the consequences which would result from it, then, and in that case, it is wholly immaterial in the present case that he was impelled thereto by insanity, which impaired his sense of moral responsibility, and rendered him, to a certain extent, irresponsible for his action.”

The court refused to give either of these instructions, and charged as follows : —

“ It being agreed that the deceased destroyed his life by taking poison, it is claimed by defendant that he ‘died by his own hand,’ within the meaning of the policy, and that they are, therefore, not liable.

“ This is so far true that it devolves on the plaintiff to prove such insanity on the part of the decedent, existing at the time he took the poison, as will relieve the act of taking his own life from the effect which, by the general terms used in the policy, self-destruction was to have, namely, to avoid the policy.

“ It is not every kind or degree of insanity which will so far excuse the party taking his own life as to make the company insuring liable.

“ To do this, the act of self-destruction must have been the consequence of the insanity, and the mind of the decedent must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing.

“ If he was impelled to the act by an insane impulse which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, the company is liable. On the other hand, there is no presumption of law, *prima facie* or otherwise, that self-destruction arises from insanity, and if you believe from the evidence that the decedent, although excited, or angry, or distressed in mind, formed the determination to take his own life, because, in the exercise of his usual reasoning faculties, he preferred death to life, then the company is not liable, because he died by his own hand within the meaning of the policy.”

The cause came to this court on exceptions to the refusal of the court to give the instructions requested by the insurance company, and to the charge which was actually given.

Messrs. *H. E.* and *J. T. Davies*, for the plaintiff in error.

Mr. *W. W. Nevison*, *contra*.

Mr. Justice HUNT delivered the opinion of the court.

The request for instructions made by the counsel of the insurance company proceeds upon the theory that if the deceased had sufficient mental capacity to understand the nature and consequences of his act, that is, that he was about to take poison, and that his death would be the result, he was responsible for his conduct, and the defendant is not liable; and the fact that his sense of moral responsibility was impaired by insanity does not affect the case.

The charge proceeds upon the theory that a higher degree of mental and moral power must exist; that although the deceased had the capacity to know that he was about to take poison and that his death would be the result, yet, if his reasoning powers were so far gone that he could not exercise them on the act he was about to commit, its nature and effect, or if he was impelled by an insane impulse which his impaired capacity did not enable him to resist, he was not responsible for his conduct, and the defendant is liable.

It may not be amiss to notice that the case does not present the point of what is called emotional insanity, or *mania transitoria*, that is, the case of one in the possession of his ordinary reasoning faculties, who allows his passions to convert him into a temporary maniac, and while in this condition commits the act in question. This case is expressly excluded by the last clause of the charge, in which it is said that anger, distress, or excitement does not bring the case within the rule, if the insured possesses his ordinary reasoning faculties.¹ . . .

There is a conflict in the authorities which cannot be reconciled.

The propositions embodied in the charge before us are in some respects different from each other, but in principle they are identical. They rest upon the same basis, — the moral and intellectual incapacity of the deceased. In each case the physical act of self-destruction was that of George Terry. In neither was it truly his act. In the one supposition he did it when his reasoning powers were overthrown and he had not power or capacity to exercise them upon the act he was about to do. It was in effect as if his intellect and reason were blotted out or had never existed. In the other, if he understood and appreciated the effect of his act, an uncontrollable impulse caused by insanity compelled its commission. He had not the power to refrain from its commission, or to resist the impulse. Each of the principles put forth by the judge rests upon the same basis, — that the act was not the voluntary intelligent act of the deceased.² . . .

The question of sanity has usually been presented upon the validity of an agreement, the capacity to make a will, or upon responsibility for crime. If Terry had made an agreement under the circumstances stated in the charge, a jury or a court would have been justified in pro-

¹ The statement of the authorities has been omitted. — ED.

² Here followed a discussion of the causes of insanity. — ED.

nouncing it invalid. A will, then, made by him, would have been rejected by the surrogate if offered for probate. If upon trial for a criminal offence, upon all the authorities, he would have been entitled to a charge, that upon proof of the facts assumed, the jury must acquit him.

We think a similar principle must control the present case, although the standard may be different.

We hold the rule on the question before us to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character,¹ the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist,² such death is not within the contemplation of the parties to the contract, and the insurer is liable.

In the present instance the contract of insurance was made between Mrs. Terry and the company, the insured not being in form a party to the contract. Such contracts are frequently made by the insured himself, the policy stating that it is for the benefit of the wife, and that in the event of death the money is to be paid to her. We see no difference in the cases. In each it is the case of a contract, and is to be so rendered as to give effect to the intention of the parties. Nor do we see any difference for this purpose in the meaning of the expressions, "commit suicide," "take his own life," or "die by his own hands." With either expression, it is not claimed that accidental self-destruction, death in endeavoring to escape from the flames, or the like, is within the proviso.

*Judgment affirmed.*³

Mr. Justice Strong dissented.

¹ *Acc.*: *Breasted v. Farmers' L. & T. Co.*, 4 Hill 73 (1843), s. c. in the Court of Appeals, 8 N. Y. 299 (1853), ("die by his own hand"); *Phadenbauer v. Germania L. Ins. Co.*, 7 Heisk. 567 (1872), ("die by suicide or by his own hands"); *Life Association v. Waller*, 57 Ga. 533 (1876), ("die by suicide"); *Insurance Co. v. Rodel*, 95 U. S. 232 (1877), ("die by his own hand"); *Connecticut Mut. L. Ins. Co. v. Groom*, 86 Pa. 92 (1878), ("die by suicide"); *Manhattan L. Ins. Co. v. Broughton*, 109 U. S. 121 (1883), ("die by suicide"); *Schultz v. Ins. Co.*, 40 Ohio St. 217 (1883), ("under any circumstances, die by his own hand"); *Michigan Mut. L. Ins. Co. v. Naugle*, 130 Ind. 79 (1891), ("die by his own hand"); *Connecticut Mut. L. Ins. Co. v. Akens*, 150 U. S. 468 (1893), ("self-destruction . . . in any form, except . . . the direct result of disease or of accident occurring without the voluntary act of the insured"). — ED.

² *Acc.*: *Estabrook v. Union Mut. L. Ins. Co.*, 54 Me. 224 (1866); *Scheffer v. National L. Ins. Co.*, 25 Minn. 534 (1879). — ED.

³ See *Van Zandt v. Mutual Benefit L. Ins. Co.*, 55 N. Y. 169, 178-179 (1873). — ED.

BIGELOW v. BERKSHIRE LIFE INSURANCE CO.

SUPREME COURT OF THE UNITED STATES, 1876. 93 U. S. 284.

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

This is an action on two policies issued by the defendant on the life of Henry W. Bigelow. Each contained a condition in avoidance, if the insured should die by suicide, sane or insane; and in such case the company agreed to pay to the party in interest the surrender value of the policy at the time of the death of Bigelow. The defendant pleaded that Bigelow died from the effects of a pistol-wound inflicted upon his person by his own hand, and that he intended by this means to destroy his life. To this the plaintiffs replied, that Bigelow, at the time when he inflicted the pistol-wound upon his person by his own hand, was of unsound mind, and wholly unconscious of the act. A demurrer to this replication was sustained by the court below, and the plaintiffs bring the case here for review.

Mr. *Thomas Hoyme*, for the plaintiff in error.

Mr. *H. G. Miller*, *contra*.

Mr. Justice DAVIS delivered the opinion of the court.

There has been a great diversity of judicial opinion as to whether self-destruction by a man, in a fit of insanity, is within the condition of a life policy, where the words of exemption are that the insured "shall commit suicide," or "shall die by his own hand." But since the decision in *Life Ins. Co. v. Terry*, 15 Wall. 580, the question is no longer an open one in this court. In that case the words avoiding the policy were, "shall die by his own hand;" and we held that they referred to an act of criminal self-destruction, and did not apply to an insane person who took his own life. But the insurers in this case have gone further, and sought to avoid altogether this class of risks. If they have succeeded in doing so, it is our duty to give effect to the contract; as neither the policy of the law nor sound morals forbid them to make it. If they are at liberty to stipulate against hazardous occupations, unhealthy climates, or death by the hands of the law, or in consequence of injuries received when intoxicated, surely it is competent for them to stipulate against intentional self-destruction, whether it be the voluntary act of an accountable moral agent or not. It is not perceived why they cannot limit their liability, if the assured is in proper language told of the extent of the limitation, and it is not against public policy. The words of this stipulation, "shall die by suicide (sane or insane)," must receive a reasonable construction. If they be taken in a strictly literal sense, their meaning might admit of discussion; but it is obvious that they were not so used. "Shall die by his own hand, sane or insane," is, doubtless, a more accurate mode of expression; but it does not more clearly declare the intention of the parties. Besides, the authorities

uniformly treat the terms "suicide" and "dying by one's own hand," in policies of life insurance, as synonymous, and the popular understanding accords with this interpretation. Chief Justice Tindal, in *Borra-dalle v. Hunter*, 5 Mann. & Gr. 668, says, "The expression 'dying by his own hand,' is, in fact, no more than the translation into English of the word of Latin origin, 'suicide.'" Life insurance companies indiscriminately use either phrase, as conveying the same idea. If the words, "shall commit suicide," standing alone in a policy, import self-murder, so do the words, "shall die by his own hand." Either mode of expression, when accompanied by qualifying words, must receive the same construction. This being so, there is no difficulty in defining the sense in which the language of this condition should be received. Felonious suicide was not alone in the contemplation of the parties. If it had been, there was no necessity of adding anything to the general words, which had been construed by many courts of high authority as not denoting self-destruction by an insane man. Such a man could not commit felony; but, conscious of the physical nature, although not of the criminality, of the act, he could take his own life, with a settled purpose to do so. As the line between sanity and insanity is often shadowy and difficult to define, this company thought proper to take the subject from the domain of controversy, and by express stipulation preclude all liability by reason of the death of the insured by his own act, whether he was at the time a responsible moral agent or not. Nothing can be clearer than that the words, "sane or insane," were introduced for the purpose of excepting from the operation of the policy any intended self-destruction, whether the insured was of sound mind or in a state of insanity. These words have a precise, definite, well-understood meaning. No one could be misled by them; nor could an expansion of this language more clearly express the intention of the parties. In the popular, as well as the legal, sense, suicide means, as we have seen, the death of a party by his own voluntary act; and this condition, based as it is on the construction of this language, informed the holder of the policy that, if he purposely destroyed his own life, the company would be relieved from liability. It is unnecessary to discuss the various phases of insanity in order to determine whether a state of circumstances might not possibly arise which would defeat the condition. It will be time to decide that question when such a case is presented. For the purposes of this suit it is enough to say, that the policy was rendered void if the insured was conscious of the physical nature of his act, and intended by it to cause his death, although at the time he was incapable of judging between right and wrong, and of understanding the moral consequences of what he was doing.

Insurance companies have only recently inserted in the provisos to their policies words of limitation corresponding to those used in this case. There has been, therefore, but little occasion for courts to pass upon them. But the direct question presented here was before the Supreme Court of Wisconsin in 1874, in *Pierce v. The Travellers' Life*

Insurance Company, 34 Wis. 389, and received the same solution we have given it. More words were there used than are contained in this proviso; but the effect is the same as if they had been omitted. To say that the company will not be liable if the insured shall die by "suicide, felonious or otherwise," is the same as declaring its non-liability, if he shall die by "suicide, sane or insane." They are equivalent phrases. Neither the reasoning nor the opinion of that court is at all affected by the introduction of words which are not common to both policies.

It remains to be seen whether the court below erred in sustaining the demurrer. The replication concedes, in effect, all that is alleged in the plea; but avers that the insured at the time "was of unsound mind, and wholly unconscious of the act." These words are identical with those in the replication to the plea in *Breasted v. Farmers' Loan and Trust Company*, 4 Hill, 73; and Judge Nelson treated them as an averment that the assured was insane when he destroyed his life. They can be construed in no other way. If the insured had perished by the accidental discharge of the pistol, the replication would have traversed the plea. Instead of this, it confesses that he intentionally took his own life; and it attempts to avoid the bar by setting up a state of insanity. The phrase, "wholly unconscious of the act," refers to the real nature and character of the act as a crime, and not to the mere act itself. Bigelow knew that he was taking his own life, and showed sufficient intelligence to employ a loaded pistol to accomplish his purpose; but he was unconscious of the great crime he was committing. His darkened mind did not enable him to see or appreciate the moral character of his act, but still left him capacity enough to understand its physical nature and consequences.

In the view we take of the case, enough has been said to show that the court did not err in holding that the replication was bad.

*Judgment affirmed.*¹

BILLINGS v. ACCIDENT INS. CO.

SUPREME COURT OF VERMONT, 1891. 64 Vt. 78.

ASSUMPSIT upon a policy of life insurance. Plea, the general issue, and notice of special matter. Trial by jury at the March Term, Rutland County, 1889, Ross, J., presiding. The plaintiff offered certain evidence, as stated in the opinion, which the court refused

¹ *Acc.*: *Adkins v. Columbia L. Ins. Co.* 70 Mo. 27 (1879), ("by his own act and intention, whether sane or insane"); *Streeter v. Western Union Mut. L. & A. Soc.*, 65 Mich. 199 (1887), ("by his own hand, sane or insane"); *Tritschler v. Keystone Mut. Benefit Assn.*, 180 Pa. 205 (1897), ("by suicide, feloniously or otherwise, sane or insane"). — ED.

to admit. Thereupon the case was withdrawn from the jury, and passed to the Supreme Court upon the exception of the plaintiff for the determination of the question raised by this offer.

Bromley & Clark, and *H. A. Harman*, for the plaintiff.

Henry Ballard and *J. C. Baker*, for the defendant.

TAFT, J. It is a condition of the policy in question that it shall not cover a case if death results from suicide (sane or insane). It is not denied by the plaintiff but that the assured died from the effects of a pistol shot fired by himself; but she insists and offered testimony to show that, when the insured so fired the shot, his mind had become so dominated and controlled by an unnatural impulse to fire said pistol into his own forehead that his will could not resist said impulse, and that he did not voluntarily or intentionally fire the same, but in obedience to such impulse. That at the time when said shot was so fired, deceased had "become mentally incapable of understanding and appreciating the physical nature and consequences of the act he was then committing, and did not understand or appreciate the same, and did not then know nor recognize the fact that by so firing that pistol he would take his own life."

Life insurance companies long since inserted in their contracts a clause of non-liability in case the assured died by "suicide" or "by his own hand," which courts have construed as synonymous terms. In construing this clause, courts have widely differed, some—notably those of England, Massachusetts, and New York—holding that no recovery can be had in case of self-destruction, however insane the act of the assured might have been, while others, including this court, in *Hathaway v. National Life Ins. Co.*, 48 Vt. 335, have held that when one's reason and judgment had become so impaired that his mind was overthrown, and he could not resist the insane idea that he must take his own life, although his mind in that condition contrived the means, and his physical strength carried them out and took his life, that such self-destruction did not void the policy. After the decisions holding companies liable in case of suicide by the assured while insane, many companies inserted the condition of non-liability in case of "suicide, sane or insane." This clause has been before the courts for construction, and the decisions generally are, that a company is not liable if the assured designedly dies by his own hand, *i. e.*, if he commits the act intentionally with knowledge of its consequences, although unconscious of its criminal character. This is as far as many of the courts have been required to go upon the facts before them, but the question has arisen in some instances as to the liability of the insurer in case the assured destroys himself in such an insane condition as to be incapable of understanding the physical nature and consequences of the act he was doing; did not know that by firing the pistol, hanging himself, or doing like acts, he would take his own life. That the insurer is liable in such cases is maintained, apparently, in *Mut. B. L. Ins. Co. v. Davies*, 87 Ken. 541; and *Adkins v. Col. L. Ins. Co.*, 70 Mo. 27, and perhaps

some other cases. We think the contrary rule the better doctrine. The parties contracted, and the condition is expressed in terms not easily misunderstood; the words are "nor will it (the policy) cover death or injury resulting from suicide (sane or insane)." It is not contended that the insured was in any way misled, nor that the contract was contrary to sound morals or public policy. If the insured can contract against hazardous occupations, residence within the tropics in July and August, death in a duel, by the hands of the law, in war, or when intoxicated, why can they not limit their liability in case of suicide, felonious or otherwise? It is our duty to construe the contract made by the parties, not contract for them. The better construction to give a term or phrase in a contract is the one according to its ordinary and common meaning, as mankind would generally understand it. The defendant evidently was unwilling to incur the perils of insanity, and this clause limiting its liability was inserted for its protection. It was a valid contract. The defendant had the right to say that it would not hold itself responsible for the acts of the assured committed when insane, and the question is, can the court with such a contract before it, attempt to measure the degrees of insanity? The construction contended for by the plaintiff renders the words "sane or insane" immaterial surplusage, of no force whatever. They must have been inserted for some purpose. Felonious suicide was not alone in the contemplation of the parties to the contract. If it had been there was no necessity of adding anything to the general words. The defendant says that by force of them we are not to be liable in case the assured dies by suicide, sane or insane, and the only answer is, it is true the assured died by his own hand when insane; but he was very insane, in fact so insane that when he took his life he did not know what he was doing, nor the effect of his acts. If we adopt this construction of the contract, we add to it an element not agreed to by the parties. If the death of the assured was caused in the manner and under the circumstances stated in the plaintiff's offer of evidence, the defendant is not liable. There was nothing in the evidence nor offer of evidence tending to show an accidental discharge of the pistol, nor that death resulted from anything save the pistol shot fired by the assured. We hold there can be no recovery if the assured committed the fatal act otherwise than accidentally; that the clause "suicide, sane or insane," was intended to, and does include self-destruction irrespective of the assured's mental condition at the time of the act which caused his death. This is the better rule, in that it gives effect to the contract made by the parties, and the logical conclusion of the better considered cases. *De Gogorza v. Knick. Life Ins. Co.*, 65 N. Y. 232; *Pierce v. Trav. Ins. Co.*, 34 Wis. 389; *Scarth v. Security M. L. Society*, 75 Iowa, 346 (39 N. W. Rep. 658); *Bigelow v. Berk. L. Ins. Co.*, 93 U. S. 284; *Chapman v. Rep. L. Ins. Co.*, 6 Biss, 238 (5 Big. L. & A. Ins. 110); *Riley v. Hart. L. & A. Ins. Co.*, 25 Fed. Rep. 315; *Streeter v. West U. M. L. A. Soc.*, 65 Mich. 199.

The construction of, and ruling of the court upon, the clause of the contract in question is sustained.¹

Under the agreement of the parties the cause is remanded.

ROWELL, MUNSON, and START, JJ., concur.

TYLER and THOMPSON, JJ., dissent.

RITTER v. MUTUAL LIFE INS. CO.

SUPREME COURT OF THE UNITED STATES, 1898. 169 U. S. 139.²

CERTIORARI to the Circuit Court of Appeals for the Third Circuit.

THE action was brought by the executor of William M. Runk upon six policies of life insurance, each bearing date November 10, 1891, one for \$20,000, one for \$15,000, and four for \$10,000 each. Each policy was to the effect that, "in consideration of the application, . . . hereby made a part of this contract," the company promised to pay the amount of the policy to "William M. Runk, of Philadelphia, Pa., his executors, administrators, or assigns," upon the death of the said Runk, upon the condition that the annual premiums must be paid in advance. The premiums were duly paid. Runk died on October 5, 1892. The defence was that Runk committed suicide. At the trial, the defendant offered in evidence the applications, each of which contained a warranty and agreement that Runk would not die by his own act, whether sane or insane, within two years. This evidence was rejected, because the applications were not attached to the policies as required by Laws of Pennsylvania, 1881, No. 23, p. 20.

Evidence was given to the effect that Runk was insured to the amount of \$500,000, that prior to taking the policies in litigation he had embezzled large sums and was without resources of his own, and that on the day before his death he wrote a letter saying that he could only pay his debts with his life.

After various requests for instructions, the instructions actually given contained this passage: "If this man understood the consequences and effects of what he was doing or contemplating, to himself and to others, if he understood the wrongfulness of it, as a sane man would, then he was sane, so far as we have occasion to consider the subject; otherwise he was not. Here the insured committed suicide, and, as the evidence shows, did it for the purpose . . . of enabling the executor to recover on the policies, and use the money to pay his obligations. I therefore charge you that if he was in a sane condition of mind at the time, as I

¹ See *De Gogorza v. Knickerbocker L. Ins. Co.*, 65 N. Y. 232, 241-242 (1875); *Penfold v. Universal L. Ins. Co.*, 85 N. Y. 317, 322-323 (1881); *Northwestern Mut. L. Ins. Co. v. Hazelett*, 105 Ind. 212 (1885); *Scarth v. Security Mut. L. Ins. Society*, 75 Iowa, 346 (1888); *Mutual Benefit L. Ins. Co. v. Daviess*, 87 Ky. 541 (1888); *Spruill v. Northwestern Mut. L. Ins. Co.*, 120 N. Car. 141, 143-144, 150-151 (1897).—Ed.

² The statement has been based upon the opinion.—Ed.

have described, able to understand the moral character and consequences of his act, his suicide is a defence to this suit. The only question, therefore, for consideration is this question of sanity. . . . In the absence of evidence on the subject he must be presumed to have been sane. The presumption of sanity is not overthrown by the act of committing suicide. Suicide may be used as evidence of insanity, but standing alone it is not sufficient to establish it. . . . If you find him to have been insane, as I have described, your verdict will be for the plaintiff. Otherwise it will be for the defendant."

There was a verdict in favor of the defendant, upon which judgment was entered, and that judgment was affirmed in the Circuit Court of Appeals. 28 U. S. App. 612.

Mr. *Richard C. Dale* and Mr. *George Tucker Bispham*, for plaintiff in error. Mr. *John Hampton Burnes* was on their brief.

Mr. *John G. Johnson*, for defendant in error. Mr. *Charles P. Sherman* and Mr. *Edward Lyman Short* were on his brief.

Mr. Justice HARLAN delivered the opinion of the court.¹ . . .

No error of law having been committed in respect of the issue as to the insanity of the assured, it is to be taken as the result of the verdict that he was of sound mind when he took his life.

This brings us to the question whether the insurance company was liable — assuming that it was not a part of the contract enforceable in Pennsylvania, that the assured should "not die by his own act whether sane or insane," within two years from the date of the policy.

It is contended that the court erred in saying to the jury, as in effect it did, that intentional self-destruction, the assured being of sound mind, is in itself a defence to an action upon a life policy, even if such policy does not, in express words, declare that it shall be void in the event of self-destruction when the assured is in sound mind. But is it not an implied condition of such a policy that the assured will not purposely, when in sound mind, take his own life, but will leave the event of his death to depend upon some cause other than wilful, deliberate self-destruction? Looking at the nature and object of life insurance, can it be supposed to be within the contemplation of either party to the contract that the company shall be liable upon its promise to pay, where the assured, in sound mind, by destroying his own life, intentionally precipitates the event upon the happening of which such liability was to arise?

Life insurance imports a mutual agreement, whereby the insurer, in consideration of the payment by the assured of a named sum annually or at certain times, stipulates to pay a larger sum at the death of the assured. The company takes into consideration, among other things, the age and health of the parents and relatives of the applicant for insurance, together with his own age, course of life, habits, and present physical condition; and the premium exacted from the assured is determined by the probable duration of his life, calculated upon the basis of

¹ After stating the case and discussing the definition of insanity. — ED.

past experience in the business of insurance. The results of that experience are disclosed by standard life and annuity tables showing at any age the probable duration of life. These tables are deemed of such value that they may be admitted in evidence for the purpose of assisting the jury in an action for personal injury, in which it is necessary to ascertain the compensation the plaintiff is entitled to recover for the loss of what he might have earned in his trade or profession but for such injury. *Vicksburg & Meridian Railroad v. Putnam*, 118 U. S. 545, 554. If a person should apply for a policy expressly providing that the company should pay the sum named if or in the event the assured, at any time during the continuance of the contract, committed self-destruction, being at the time of sound mind, it is reasonably certain that the application would be instantly rejected. It is impossible to suppose that an application of that character would be granted. If experience justifies this view, it would follow that a policy stipulating generally for the payment of the sum named in it upon the death of the assured, should not be interpreted as intended to cover the event of death caused directly and intentionally by self-destruction whilst the assured was in sound mind, but only death occurring in the ordinary course of his life.

That the parties to the contract did not contemplate insurance against death caused by deliberate, intentional self-destruction when the assured was in sound mind, is apparent from the "provisions, requirements, and benefits" referred to in and made part of the policy. They show that the policy was issued on the twenty-year distribution plan, and was to be credited with its distributive share of surplus apportioned at the expiration of twenty years from the date of issue; that, after three full annual premiums were paid, the company would, upon the legal surrender of the policy, before default in the payment of any premium, or within six months thereafter, issue a non-participating policy for a paid-up insurance, payable as provided, for the amount required by the provisions of the New York statute of May 21, 1879, Laws of New York, c. 347; that the assured was entitled to surrender the policy at the end of the first period of twenty years "and the full reserve computed by the American table of mortality, and four per cent interest, and the surplus, as defined above, will be paid therefor in cash;" that if the assured surrendered the policy the total cash value at the option of the policyholder should be applied "to the purchase of an annuity for life, according to the published rates of the company at the time of surrender;" that after two years from the date of the policy the only conditions that should be binding on the holder of the policy were that "he shall pay the premiums at the time and place and in the manner stipulated in the policy, and that the requirements of the company as to age, and military or naval service in time of war, shall be observed;" that in all other respects, if the policy matured after the expiration of two years, the payment of the sum insured should not be disputed; and that the party whose life was insured should always wear a suitable

truss. These provisions of the contract tend to show that the death referred to in the policy was a death occurring in the ordinary course of the life of the assured, and not by his own violent act designed to bring about that event.

In the case of fire insurance it is well settled that although a policy, in the usual form, indemnifying against loss by fire, may cover a loss attributable merely to the negligence or carelessness of the insured, unaffected by fraud or design, it will not cover a destruction of the property by the wilful act of the assured himself in setting fire to it, not for the purpose of avoiding a peril of a worse kind, but with the intention of simply effecting its destruction. Much more should it be held that it is not contemplated by a policy taken out by the person whose life is insured and stipulating for the payment of a named sum to himself, his executors, administrators, or assigns, that the company should be liable, if his death was intentionally caused by himself when in sound mind. When the policy is silent as to suicide, it is to be taken that the subject of the insurance, that is, the life of the assured, shall not be intentionally and directly, with whatever motive, destroyed by him when in sound mind. To hold otherwise is to say that the occurrence of the event upon the happening of which the company undertook to pay, was intended to be left to his option. That view is against the very essence of the contract.

There is another consideration supporting the contention that death intentionally caused by the act of the assured when in sound mind — the policy being silent as to suicide — is not to be deemed to have been within the contemplation of the parties; that is, that a different view would attribute to them a purpose to make a contract that could not be enforced without injury to the public. A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice or be made the foundation of its judgment. If, therefore, a policy — taken out by the person whose life is insured, and in which the sum named is made payable to himself, his executors, administrators, or assigns — expressly provided for the payment of the sum stipulated when or if the assured, in sound mind, took his own life, the contract, even if not prohibited by statute, would be held to be against public policy, in that it tempted or encouraged the assured to commit suicide in order to make provision for those dependent upon him, or to whom he was indebted.

Is the case any different in principle if such a policy is silent as to suicide, and the event insured against — the death of the assured — is brought about by his wilful, deliberate act when in sound mind? Light will be thrown on this question by some of the adjudged cases, having more or less bearing upon the precise point now before this court for determination.¹ . . .

¹ Here were stated or quoted *Life Ins. Co. v. Terry*, ante, p. 766 (1872); *Borradaile v. Hunter*, ante, p. 762 (1843); *Hartman v. Keystone Ins. Co.*, 21 Pa. 466, 479 (1853);

For the reasons we have stated, it must be held that the death of the assured, William M. Runk, if directly and intentionally caused by himself, when in sound mind, was not a risk intended to be covered, or which could legally have been covered, by the policies in suit.

The case presents other questions, but they are of minor importance, and do not affect the substantial rights of the parties.

We perceive no error of law in the record, and the judgment is

Affirmed.

Mr. Justice PECKHAM did not take part in the consideration or decision of this case.

SEILER ET AL., APPELLEES, v. ECONOMIC LIFE
ASSOCIATION, APPELLANT.

SUPREME COURT OF IOWA, 1898. 105 IOWA, 87.¹

APPEAL from Clinton District Court, Hon. P. B. WOLFE, Judge.

Action was brought upon two policies issued to Joseph Seiler, on Aug. 31, 1895, for the benefit of the plaintiffs. Seiler committed suicide on Oct. 7, 1895. The policies contained no condition against suicide. The defendant, in its answer, set up two defences: (1) that Seiler while in a sound mental condition took his own life; and (2) that Seiler procured the policies with intent to defraud the company. A demurrer to the first defence was sustained, and the defendant excepted. A demurrer to the second defence was overruled, and upon this single issue of fact the case went to the jury, resulting in verdict and judgment for the plaintiffs. The defendant appealed, assigning fifty-nine errors, including the sustaining of the demurrer, the exclusion of evidence, the refusal and giving of instructions, and the ruling that the plaintiffs were entitled to open and close.

Hayes & Schuyler, for appellant.

Calvin H. George, for appellees.

WATERMAN, J.² . . . The question thus presented by the ruling on the demurrer is: If a policy of insurance on life, containing no stipulation as to suicide, is taken out in good faith by the assured, will it be avoided, as against a beneficiary named therein, by the fact that the assured thereafter, while sane, deliberately and purposely took his own life? The authorities are not many on the subject, and they are not seriously in conflict. While there are a number of cases in which some-

New York Mut. L. Ins. Co. v. Armstrong, 117 U. S. 591, 600 (1886); Hatch v. Mutual L. Ins. Co., 120 Mass. 550, 552 (1876); Supreme Commandery v. Ainsworth, 71 Ala. 436, 446 (1882); Amicable Society v. Bolland, *ante*, p. 760 (1830); Bunyon on Life Assurance, 3d ed., 96; Moore v. Woolsey, 4 E. & B. 243, 254 (1854). — Ed.

¹ The statement has been based upon the opinion. — Ed.

² Only so much of the opinion has been reprinted as deals with the sustaining of the demurrer. — Ed.

thing has been said upon this matter in the way of dicta, there is but one in which it has been expressly decided that the suicide of the assured, if sane, will avoid a policy that contains no provision of forfeiture in such case, and that is *Ritter v. Insurance Co.*, 18 Sup. Ct. Rep. 300, decided at the October Term, last, of the Federal Supreme Court. The opinion in this case in the Circuit Court of Appeals appears in 17 C. C. A. 537, and 70 Fed. Rep. 954. This last citation is given because we shall have occasion to refer to this opinion in the course of what we shall say. It was held in the *Ritter Case* that there could be no recovery on a policy of insurance by the executor of one who, while sane, intentionally took his own life, even though the policy contained no clause of forfeiture because of such act. We think that case is readily distinguishable from the case at bar. In the *Ritter Case* the action was brought by the personal representative of the assured, whose claim had to be made through the wrongdoer, while here the suit is instituted by beneficiaries named in the policy, and who claim in their own right. An investigation will disclose that the distinction we make is material, and supported by authority. In *Moore v. Woolsey*, 4 El. & Bl. 243, the policy contained a stipulation avoiding it, as far as regarded the executors and administrators of the assured, if he died by his own hand, but leaving it in force to the extent of any interest acquired by a third person. The plea was that the assured had committed suicide. Replication that one Kettle, before the death of the assured, had acquired by assignment an interest in the policy. Upon these issues, Lord Campbell, delivering the opinion, said: "If a man insures his life for a year, and commits suicide within the year, his executors cannot recover upon the policy, as the owner of a ship, who insures her for a year, cannot recover upon the policy, if within the year he cause her to be sunk. A stipulation that in either case upon such an event the policy would give a right of action would be void." This is the language quoted in the *Ritter Case*, and it was *obiter* only. But Lord Campbell said something more, and something not only pertinent to the issues before him, but that has direct application to the matter we are considering. He continues: "But where a man insures his own life, we can discover no illegality in a stipulation that if the policy should afterwards be assigned, *bona fide*, for a valuable consideration, or a lien upon it should afterwards be acquired, *bona fide*, for a valuable consideration, it might be enforced for the benefit of others, whatever may be the means of his death. . . . The supposed inducement to commit suicide under such circumstances cannot vitiate the condition, more than the inducement which the lessor may be supposed to have to commit murder should render invalid a beneficial lease granted for lives. When we are called upon to nullify a contract on the ground of public policy, we must take care that we do not lay down a rule which may interfere with the innocent and useful transactions of mankind." If public policy does not stand in the way of a recovery by an assignee, we can discern no reason why it should in the case of

a beneficiary named in the contract. It may be said that the assignee spoken of is one whose claim rests upon a consideration paid. To this we would say that the claim of the beneficiary is also based upon a consideration paid by the assured. If it should further be said that public policy does not bar a recovery by the assignee because the interests of creditors furnish little or no motive for the self-destruction of the assured, our answer would be this: The motives for suicide are manifold and varied. An inquiry as to what inducement is most likely to impel one to the act is profitless, for any rule of law that would prevent a recovery by these plaintiffs would operate in like manner against a mere creditor, if he were the beneficiary named. And, further, we might call attention to the *Ritter Case*, in which the assured admittedly sacrificed his life for the benefit of his creditors. In the opinion in the *Ritter Case* in the Circuit Court of Appeals it is said: "In the cases brought to our attention where suicide during sanity, by the person whose life was insured, was held not to be a valid defence, the policy was issued for the benefit of some other person, or an independent interest, by assignment or otherwise, had been acquired by a third person." Here is the distinction plainly made. So, also, in the opinion of Mr. Justice Harlan on appeal, we think the same idea is expressed. In commenting on an expression used in another case, he says: "This observation was irrelevant to the case before the court, and cannot be regarded as determining the point in judgment. If it was meant there should be a recovery by the personal representative, . . . we cannot concur in that view." Another and a convincing reason for thinking that the doctrine announced in the *Ritter Case* was not intended to go further than to deny a right of recovery to the personal representatives of the assured is that no one of the several cases in which beneficiaries named in the contract have been held entitled to recover was mentioned in that opinion. We shall now refer to these cases: *Fitch v. Insurance Co.*, 59 N. Y. 559, is the first. Suit was brought by the widow, to whom the policy was payable. The contract contained no clause avoiding it in case of suicide by the assured. One defence tendered was that the assured took his own life. Evidence to sustain it was excluded by the trial court. In affirming this ruling the Court of Appeals says: "The policy contained no stipulation that it should be void in case of the death of the insured by suicide. It was not taken out for the benefit of *Fitch*, but of his wife and children. Although they were bound by his representations, and any fraud he may have committed in taking out the policy, the policy having been obtained through his agency, yet they were not bound by any acts or declarations done or made by him after the issue of the policy, unless such acts were in violation of some condition of the policy. In *Darrow v. Society*, 116 N. Y. 537 (22 N. E. Rep. 1093), the plaintiff was the beneficiary under the contract. The assured committed suicide. There was a provision in the policy that it should "be void if the member herein shall die in consequence of a duel, or by the hands of justice, or in violation of, or

an attempt to violate, any criminal law of the United States, or of any state or country in which the member may be." Held that, suicide not being a crime in New York, the condition of the policy was not violated, and the plaintiff could recover. *Kerr v. Association*, 39 Minn. 174 (39 N. W. Rep. 312), is a case similar in principle to the last. The same holding in favor of a beneficiary has been made by this court in *Goodwin v. Society*, *supra*. The policy sued upon there provided for its forfeiture in the event of suicide within two years, and by its express terms it was incontestable after that time. After the lapse of that period the assured took his own life. The policy was issued to the wife. In an action by her, we held she could recover. Now, if suicide is a risk that the company is forbidden, by considerations of public policy, to take, it could not have been held as within the agreement not to contest; for, if a contract to insure as against the risk of suicide is void, the waiver here must have been invalid, and the defence should have been sustained. The question was brought directly to the attention of the court in argument, as appears from the language of the opinion. These are the cases which we have been able to find. We wish now to add a few words on principle, by way of emphasis of a thought already expressed. It is not the wrongdoer who makes claim here, nor any representative whose rights are to be measured by those of the wrongdoer, but persons who acquired an interest at the time the policy was taken out, and who are not in any way responsible for the loss under it. The defendant might well have guarded against this contingency in its contract. Not having done so, we think it is now in no position to complain. . . .

*The judgment below will be affirmed.*¹

¹ Acc.: *Morris v. State Mut. L. Assur. Co.*, 183 Pa. 563 (1898); *Patterson v. Natural Premium Mut. L. Ins. Co.*, 100 Wis. 118 (1898).

On the peril insured against in life insurance, see also: —

Howell v. Knickerbocker L. Ins. Co., 41 N. Y. 276 (1871);

Insurance Co. v. Seaver, 19 Wall. 531 (1873);

Hatch v. Mutual Life Ins. Co., 120 Mass. 550 (1876);

New York Mut. L. Ins. Co. v. Armstrong, 117 U. S. 591, 598-600 (1886);

Smith v. National Benefit Society, 123 N. Y. 85 (1890);

Cleaver v. Mutual Reserve Fund L. Assn., '92, 1 Q. B. 147 (C. A., 1891);

Holdom v. Ancient Order of United Workmen, 159 Ill. 619 (1896);

Schmidt v. Northern L. Assn., 83 N. W. Rep. 800 (Iowa, 1900). — ED.

SECTION III. (*continued*).

(B.) ACCIDENT

SINCLAIR, ADMINISTRATRIX, *v.* MARITIME PASSENGERS' ASSURANCE CO.

QUEEN'S BENCH, 1861. 3 E. & E. 478.¹

CASE stated by consent, and by order of BLACKBURN, J., for the opinion of the court, without pleadings.

Macnamara, for the plaintiff.

Geary, for the defendants.

Cur. adv. vult.

COCKBURN, C. J., now delivered the judgment of the court.² This was an action brought by the administratrix of one Lawrence Sinclair, on a policy of insurance effected by the deceased with the defendants, whereby he, being then about to proceed on a foreign voyage as master of a vessel, was insured to the extent of a reasonable compensation against any personal injury from or by reason of or in consequence of any accident which might happen to him upon any ocean, sea, river, or lake; and in the sum of £100 for the benefit of his personal representative, in the event of the assured dying from the effects of any such injury within three months of its occurrence. The assured being with his ship in the Cochin River, on the southwest coast of India, while doing duty on the ship was (as it is termed in the special case) struck down by a sunstroke, from the effects of which he died in the course of the same day. The question is, whether, under such circumstances, the death of the deceased can be said to have arisen from accident, within the meaning of the policy. We are of opinion that it cannot, and that our judgment must be for the defendants.

It is difficult to define the term "accident," as used in a policy of this nature, so as to draw with perfect accuracy a boundary line between injury or death from accident, and injury or death from natural causes, such as shall be of universal application. At the same time we think we may safely assume that, in the term "accident" as so used, some violence, casualty, or *vis major*, is necessarily involved. We cannot think disease produced by the action of a known cause can be considered as accidental. Thus disease or death engendered by exposure to heat, cold, damp, the vicissitudes of climate, or atmospheric influences, cannot, we think, properly be said to be accidental; unless, at all events, the exposure is itself brought about by circumstances which may give it the character of accident. Thus (by way of

¹ The reporter's statement has not been reprinted. — ED.

² COCKBURN, C. J., and HILL, J. — REP.

illustration), if, from the effects of ordinary exposure to the elements, such as is common in the course of navigation, a mariner should catch cold and die, such death would not be accidental; although if, being obliged by shipwreck or other disasters to quit the ship and take to the sea in an open boat, he remained exposed to wet and cold for some time, and death ensued therefrom, the death might properly be held to be the result of accident. It is true that, in one sense, disease or death through the direct effect of a known natural cause, such as we have referred to, may be said to be accidental, inasmuch as it is uncertain beforehand whether the effect will ensue in any particular case. Exposed to the same malaria or infection, one man escapes, another succumbs. Yet diseases thus arising have always been considered, not as accidental, but as proceeding from natural causes.

In the present instance, the disease called sunstroke, although the name would at first seem to imply something of external violence, is, so far as we are informed, an inflammatory disease of the brain, brought on by exposure to the too intense heat of the sun's rays. It is a disease to which persons exposing themselves to the sun in a tropical climate are more or less liable, just as persons exposed to the other natural causes to which we have referred are liable to disastrous consequences therefrom. The deceased in the discharge of his ordinary duties about his ship became thus affected and so died.

We think, for the reasons we have given, that his death must be considered as having arisen from a "natural cause," and not from "accident," within the meaning of this policy. There must be judgment for the defendants.

*Judgment for the defendants.*¹

SCHNEIDER v. PROVIDENT LIFE INSURANCE CO.

SUPREME COURT OF WISCONSIN, 1869. 24 Wis. 28.

APPEAL from the Circuit Court for Dane County.

Action upon a policy of insurance against personal injury arising from accident and causing death. The plaintiff appealed from a judgment of nonsuit, the grounds of which will appear from the opinion.

Alden S. Sanborn (with *S. U. Pinney*, of counsel), for the appellant.
Palmer, Hooker & Pitkin, for respondent.

PAINE, J. This action was upon a policy by which Bruno Schneider was insured against injury or death by accident. He attempted to get on a train of cars while in slow motion, and fell under them and was killed. The policy contained a clause that the company should not be liable for any injury happening to the assured by reason of his "wilfully

¹ Acc.: *Dozier v. Fidelity and Casualty Co.*, 46 Fed. R. 446 (C. C., W. D. Mo. 1891). — ED.

and wantonly exposing himself to any unnecessary danger or peril." And, on the trial, the plaintiff was nonsuited, upon the ground that the death was within this exception.

But the position most strongly urged by the respondent's counsel in this court was that, inasmuch as the negligence of the deceased contributed to produce the injury, therefore the death was not occasioned by an accident at all, within the meaning of the policy. I cannot assent to this proposition. It would establish a limitation to the meaning of the word "accident" which has never been established, either in law or common understanding. A very large proportion of those events which are universally called accidents happen through some carelessness of the party injured, which contributes to produce them. Thus, men are injured by the careless use of fire-arms, of explosive substances, of machinery, the careless management of horses, and in a thousand ways, where it can readily be seen afterward that a little greater care on their part would have prevented it. Yet such injuries, having been unexpected, and not caused intentionally or by design, are always called accidents, and properly so. Nothing is more common than items in the newspapers under the heading, "accidents through carelessness."

There is nothing in the definition of the word that excludes the negligence of the injured party as one of the elements contributing to produce the result. An accident is defined as "an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and, therefore, not expected."

An accident may happen from an unknown cause. But it is not essential that the cause should be unknown. It may be an unusual result of a known cause, and therefore unexpected to the party. And such was the case here, conceding that the negligence of the deceased was the cause of the accident.

It is true that accidents often happen from such kinds of negligence. But still, it is equally true that they are not the usual result. If they were, people would cease to be guilty of such negligence. But cases in which accidents occur are very rare in comparison with the number in which there is the same negligence without any accident. A man draws his loaded gun toward him by the muzzle—the servant fills the lighted lamp with kerosene—a hundred times without injury. The next time the gun is discharged, and the lamp explodes. The result was unusual, and therefore as unexpected as it had been in all the previous instances. So there are, undoubtedly, thousands of persons who get on and off from cars in motion without accident, where one is injured. And, therefore, when an injury occurs, it is an unusual result, and unexpected, and strictly an accident. There are not many authorities on the point.¹ . . .

¹ Here were discussed *Theobald v. Railway Passengers' Assur. Co.*, 10 Ex. 45 (1854), and *Trew v. Railway Passengers' Assur. Co.*, 6 H. & N. 839 (Ex. Ch., 1861). — Ed.

The question whether the injured party was guilty of negligence contributing to the accident does not arise at all in this class of cases. I think that is the true conclusion, both upon principle and authority, so far as there is any upon the subject; and the only questions are, first, whether the death or injury was occasioned by an accident within the general meaning of the policy, and, if so, whether it was within any of the exceptions.

This conclusion is also very strongly supported by that provision of the policy under which the plaintiff was nonsuited. That necessarily implies that any degree of negligence, falling short of "wilful and wanton exposure to unnecessary danger," would not prevent a recovery. Such a provision would be entirely superfluous and unmeaning in such a contract, if the observance of due care and skill on the part of the assured constituted an element to his right of action, as it does in actions for injuries occasioned by the negligence of the defendant.

The question, therefore, remains, whether the attempt of the deceased to get upon the train was within this provision, and constituted a "wilful and wanton exposure of himself to unnecessary danger." I cannot think so.¹ . . .

*Judgment reversed. Venire facias de novo awarded.*²

ACCIDENT INS. CO. v. CRANDAL.

SUPREME COURT OF THE UNITED STATES, 1887. 120 U. S. 527.³

ERROR to the Circuit Court of the United States for the Northern District of Illinois.

The action was upon an accident insurance policy procured by E. M. Crandal, and made payable to his wife. The policy provided that "this insurance shall not extend . . . to death or disability which may have been caused wholly or in part by bodily infirmities or disease, . . . and no claim shall be made under this policy when the death or injury may have been caused . . . by suicide, or by freezing, or sunstroke, or self-inflicted injuries." The defence was suicide. The jury found a special verdict to the effect, among other things, that E. M. Crandal hanged himself, and thereof died on the same day, and that he was insane at the time of his act of self-destruction. On this verdict, judgment was given for the plaintiff. A motion for a new trial was overruled. Thereupon the defendant sued out this writ of error.

¹ The discussion of this point has not been reprinted. — ED.

² See *Provident L. Ins. and Investment Co. v. Martin*, 32 Md. 310 (1870).

Compare *Standard Ins. Co. v. Langston*, 60 Ark. 381 (1895). — ED.

³ s. c. in the Circuit Court, *sub nom.* *Crandal v. Accident Ins. Co.*, 27 Fed. R. 40 (1886).

The statement has been rewritten. — ED.

Mr. *Emerson B. Tuttle*, for plaintiff in error.

Mr. *George C. Fry*, for defendant in error.

Mr. Justice GRAY¹ . . . delivered the opinion of the court.

The single question to be decided therefore is, whether a policy of insurance against "bodily injuries, effected through external, accidental, and violent means," and occasioning death or complete disability to do business; and providing that "this insurance shall not extend to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by suicide, or self-inflicted injuries," covers a death by hanging one's self while insane.

The decisions upon the effect of a policy of life insurance, which provides that it shall be void if the assured "shall die by suicide," or "shall die by his own hand," go far towards determining this question. . . .

In this state of the law, there can be no doubt that the assured did not die "by suicide," within the meaning of this policy; and the same reasons are conclusive against holding that he died by "self-inflicted injuries." If self-killing, "suicide," "dying by his own hand," cannot be predicated of an insane person, no more can "self-inflicted injuries;" for in either case it is not his act.

Nor does the case come within the clause which provides that the insurance shall not extend to "death or disability which may have been caused wholly or in part by bodily infirmities or disease."

If insanity could be considered as coming within this clause, it would be doubtful, to say the least, whether, under the rule of the law of insurance which attributes an injury or loss to its proximate cause only, and in view of the decisions in similar cases, the insanity of the assured, or anything but the act of hanging himself, could be held to be the cause of his death. *Scheffer v. Railroad Co.*, 105 U. S. 249, 252; *Trew v. Railway Passengers' Assurance Co.*, 5 H. & N. 211, and 6 H. & N. 839, 845; *Reynolds v. Accidental Ins. Co.*, 22 Law Times (N. S.) 820; *Winspear v. Accident Ins. Co.*, 42 Law Times (N. S.) 900; affirmed, 6 Q. B. D. 42; *Lawrence v. Accidental Ins. Co.*, 7 Q. B. D. 216, 221; *Scheiderer v. Travellers' Ins. Co.*, 58 Wis. 13.

But the words "bodily infirmities or disease" do not include insanity. Although, as suggested by Mr. Justice Hunt in *Life Ins. Co. v. Terry*, 15 Wall. 589, insanity or unsoundness of mind often, if not always, is accompanied by, or results from, disease of the body, still, in the common speech of mankind, mental are distinguished from bodily diseases. In the phrase "bodily infirmities or disease," the word "bodily" grammatically applies to "disease," as well as to "infirmities;" and it cannot but be so applied, without disregarding the fundamental rule of interpretation, that policies of insurance are to be construed most strongly against the insurers who frame them. The

¹ In reprinting the opinion, it has seemed necessary to omit passages on procedure and on life insurance as distinguished from accident insurance and on the effect of the application. — ED.

prefix of "bodily" hardly affects the meaning of "infirmities," and it is difficult to conjecture any purpose in inserting it in this proviso, other than to exclude mental disease from the enumeration of the causes of death or disability to which the insurance does not extend. . . .

The death of the assured not having been the effect of any cause specified in the proviso of the policy, and not coming within any warranty in the application, the question recurs whether it is within the general words of the leading sentence of the policy, by which he is declared to be insured "against bodily injuries effected through external, accidental, and violent means." This sentence does not, like the proviso, speak of what the injury is "caused by;" but it looks only to the "means" by which it is effected. No one doubts that hanging is a violent means of death. As it affects the body from without, it is external, just as suffocation by drowning was held to be, in the cases of Trew, Reynolds, and Winspear, above cited. And, according to the decisions as to suicide under policies of life insurance, before referred to, it cannot, when done by an insane person, be held to be other than accidental.

The result is, that the judgment of the Circuit Court in favor of the plaintiff was correct, and must be *Affirmed*.¹

UNITED STATES MUTUAL ACCIDENT ASSOCIATION
v. BARRY.

SUPREME COURT OF THE UNITED STATES, 1889. 131 U. S. 100.²

ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

Action was brought by Theresa A. Barry upon a policy whereby the association accepted John S. Barry as a member, and promised to pay to Theresa A. Barry, his wife, the proceeds of an assessment "within sixty days after sufficient proof that said member . . . shall have sustained bodily injuries effected through external, violent, and accidental means, within the intent and meaning of the by-laws of said association and the conditions hereunto annexed, and such injuries alone shall have occasioned death. . . . Provided always, that benefits under this certificate shall not extend to hernia, nor to any bodily injury of which there shall be no external and visible sign, nor to any bodily injury happening directly or indirectly in consequence of disease, nor to any death or disability which may have been caused wholly or in part by

¹ See *Carnes v. Iowa State Traveling Men's Assn.*, 106 Iowa, 281 (1898). — Ed.

² s. c. in the Circuit Court, *sub nom.* *Barry v. United States Mut. Acc. Assn.*, 23 Fed. R. 712 (1885).

The statement has been rewritten, and passages not bearing on the definition of an accident have been omitted. — Ed.

bodily infirmities or disease existing prior or subsequent to the date of the certificate, . . . nor to any case except where the injury is the proximate or sole cause of the disability or death. . . . And these benefits shall not be held to extend . . . to any case of death, . . . unless the claimant under this certificate shall establish by direct and positive proof that the said death or personal injury was caused by external violence and accidental means, and was not the result of design either on the part of the member or of any other person."

The testimony indicated that John S. Barry, while in good health, jumped from a platform that was four or five feet from the ground; that he landed upon his feet very heavily, as if he had come down solidly upon his heels; that the jarring of his body produced a stricture of the duodenum, and that on account of this stricture he died in nine days.

To rulings on evidence and on instructions the defendant took numerous exceptions; and, more particularly, the defendant excepted to the bracketed parts of the following passages in the charge to the jury: —

"If you find that injury was sustained, then the next question is, Was it effected through external, violent, and accidental means? This is a pivotal point in the case, and therefore vitally important. The means must have been external, violent, and accidental. Did an accident occur in the means through which the alleged bodily injury was effected?

[“The jumping off the platform was the means by which the injury, if any was sustained, was caused.]

[“Now, was there anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he alighted on the ground?]

[“The term ‘accidental’ is here used in its ordinary, popular sense, and in that sense it means ‘happening by chance; unexpectedly taking place; not according to the usual course of things;’ or not as expected.]

[“In other words, if a result is such as follows from ordinary means voluntarily employed in a not unusual or unexpected way, then, I suppose, it cannot be called a result effected by accidental means.]

[“But if in the act which precedes the injury something unforeseen, unexpected, unusual, occurs, which produces the injury, then the injury has resulted from the accident or through accidental means.]

[“We understand, from the testimony, without question, that the deceased jumped from the platform with his eyes open, for his own convenience, in the free exercise of his choice, and not from any perilous necessity. He encountered no obstacle in jumping, and he alighted on the ground in an erect posture. So far we proceed without difficulty; but you must go further and inquire, and here is the precise point on which the question turns: Was there or not any unexpected or unforeseen or involuntary movement of the body, from the time Dr.

Barry left the platform until he reached the ground, or in the act of alighting? Did he or not alight on the ground just as he intended to do? Did he accomplish just what he intended to, in the way he intended to? Did he or not unexpectedly lose or relax his self-control, in his downward movement? Did his feet strike the ground as he intended or expected, or did they not? Did he or not miscalculate the distance, and was there or not any involuntary turning of the body, in the downward movement, or in the act of alighting on the ground? These are points directly pertinent to the question in hand.]

“And I instruct you that if Dr. Barry jumped from the platform and alighted on the ground in the way he intended to do, and nothing unforeseen, unexpected, or involuntary occurred, changing or affecting the downward movement of his body as he expected or would naturally expect such a movement to be made, or causing him to strike the ground in any different way or position from that which he anticipated or would naturally anticipate, then any resulting injury was not effected through any accidental means. [But if, in jumping or alighting on the ground, there occurred, from any cause, any unforeseen or involuntary movement, turn, or strain of the body, which brought about the alleged injury, or if there occurred any unforeseen circumstance which interfered with or changed such a downward movement as he expected to make, or as it would be natural to expect under such circumstances, and as caused him to alight on the ground in a different position or way from that which he intended or expected, and injury thereby resulted, then the injury would be attributable to accidental means.”]

The verdict was for the plaintiff.

Mr. *B. K. Miller, Jr.*, for plaintiff in error.

Mr. *William F. Vilas*, for defendant in error.

Mr. *George McWhoeter* and Mr. *C. B. Bice* filed a brief for defendant in error.

Mr. Justice BLATCHFORD¹ . . . delivered the opinion of the court. . .

It is further urged that there was no evidence to support the verdict because no accident was shown. We do not concur in this view. The two companions of the deceased jumped from the same platform, at the same time and place, and alighted safely. It must be presumed not only that the deceased intended to alight safely, but thought that he would. The jury were, on all the evidence, at liberty to say that it was an accident that he did not. The court properly instructed them that the jumping off the platform was the means by which the injury, if any was sustained, was caused; that the question was, whether there was anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he alighted on the ground; that the term “accidental” was used in the policy in its ordinary, popular sense, as meaning “happening by chance; unexpectedly taking place; not according to the usual course

¹ In reprinting the opinion, passages not bearing upon the quotations from the charge have been omitted. — Ed.

of things; or not as expected;" that, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means. The jury were further told, no exception being taken, that, in considering the case, they ought not to adopt theories without proof, or substitute bare possibility for positive evidence of facts testified to by credible witnesses; that where the weight of credible testimony proved the existence of a fact, it should be accepted as a fact in the case; but that where, if at all, proof was wanting, and the deficiency remained throughout the case, the allegation of fact should not be deemed established.

In *Martin v. Travellers' Ins. Co.*, 1 Foster & Fin. 505, the policy was against any bodily injury resulting from any accident or violence, "provided that the injury should be occasioned by any external or material cause operating on the person of the insured." In the course of his business he lifted a heavy burden, and injured his spine. It was objected that he did not sustain bodily injury by reason of an accident. The plaintiff recovered.

In *North American Ins. Co. v. Burroughs*, 69 Penn. St. 43, the policy was against death "in consequence of accident," and was to be operative only in case the death was caused solely by an "accidental injury." It was held that an accidental strain, resulting in death, was an accidental injury within the meaning of the policy, and that it included death from any unexpected event happening by chance, and not occurring according to the usual course of things.

The case of *Southard v. Railway Passengers' Assurance Co.*, 34 Conn. 574, is relied on by the defendant. That case, though pending in a State court in Connecticut, was decided by an arbitrator, who was then the learned district judge of the United States for the District of Connecticut. But if there is anything in that decision inconsistent with the present one, we must dissent from its views. . . .

We see no error in anything excepted to by the defendant, and the judgment is *Affirmed*.¹

FIDELITY AND CASUALTY CO. v. JOHNSON.

SUPREME COURT OF MISSISSIPPI, 1895. 72 Miss. 333.

FROM the Circuit Court of Pike County, Hon. W. P. CASSEDY, Judge.

Action by appellee against appellant on an insurance policy for \$1,000, insuring the husband of appellee, an employee of the Illinois

¹ See *North American L. & A. Ins. Co. v. Burroughs*, 69 Pa. 43 (1871); *Feder v. Iowa State Traveling Men's Assn.*, 107 Iowa, 538 (1899); *Standard L. & A. Ins. Co. v. Schmaltz*, 66 Ark. 588 (1899). — ED.

Central Railroad Company, against "bodily injuries sustained through external, violent, and accidental means." The assured was hanged by a mob during the life of the policy. Plaintiff recovered judgment for the full amount of the policy. Motion for new trial overruled. Defendant appealed. The opinion contains such further statement of the case as is necessary to an understanding of the questions decided.

A. C. McNair, for appellant.

W. B. Mixon and *J. B. Sternberger*, for appellee.

WOODS, J., delivered the opinion of the court.¹ . . .

The court refused to charge the jury for appellant as asked in its twelfth instruction. This instruction reads as follows: "If the jury believe, from the evidence in this case, that John Johnson came to his death by the hands of a mob, his death was not the result of an accident, and this case is not within the terms and conditions of the policy sued on, and the jury will find for defendant." By the terms of the policy, indemnity against "bodily injuries sustained through external, violent, and accidental means" was secured by the insured. That Johnson came to his death by external and violent means is not denied, but death by hanging at the hands of a mob, it is said by appellant's counsel, is foreign to our preconceived ideas as to what constitutes an accident.

According to lexicographers, an accident is a sudden, unforeseen, and unexpected event. It has been held by courts adopting this or any similar definition that where a man was killed by robbers, that this was a case of death by accident in the sense in which that word is used in accident insurance policies. So, too, it has been held that death from a blow struck by one who has attempted to blackmail the assured was an accident covered by an accident insurance policy. In these and all like cases in which death occurs by violent means external to the man, and against or without intention or concurrence of will on the part of the man, death may properly be called an accident. A learned and laborious writer states the true rule for determining whether injuries are accidental. With great simplicity, clearness, and strength, Biddle says: "An injury may be said objectively to be accidental, though subjectively it is not; and, if it occur without the agency of the insured, it may logically be termed accidental, though it was brought about designedly by another person." See Biddle on Insurance and the numerous cases cited by him in his elaborate consideration of this subject in his vol. 2, chapter 10, beginning at page 780. See, too, Bacon's Benefit Societies and Life Insurance, vol. 2, chapter 15, and the many cases there cited. There is, upon authority, hardly room for controversy as to the rightfulness of the action of the court below in refusing to charge the jury that death by hanging at the hands of a mob was not an accident. There is evidence to support the verdict, and we are not authorized to substitute another finding, more in con-

¹ Passages as to procedure and as to payment of dues have been omitted. — Ed.

sonance with our views of the testimony, for that of the jury, which rests upon sufficient proof. We find no reversible error, and the judgment of the trial court is *Affirmed*.¹

WESTERN COMMERCIAL TRAVELERS' ASSN. v. SMITH.

CIRCUIT COURT OF APPEALS OF THE UNITED STATES, EIGHTH CIRCUIT,
1898. 85 Fed. R. 401.²

IN error to the Circuit Court of the United States for the Eastern District of Missouri.

F. N. Judson (*C. S. Taussig* and *Louis R. Tatum*, on the brief), for plaintiff in error.

S. L. Swarts (*E. M. Merriman* and *George H. Sanders*, on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. The Western Commercial Travelers' Association, the plaintiff in error, has sued out a writ to reverse a judgment against it upon a certificate of insurance against accident which is issued to Freeman O. Smith, one of its members, for the benefit of Sarah L. Smith, the defendant in error. A jury was waived, the court tried the case and made a special finding of the facts, and the error assigned is that the facts found do not support the judgment (1) because they show that immediate notice of the accident or injury was not given to the association, as required by the policy,³ and (2) because they fail to show that the death of the member was produced "by bodily injuries effected by external, violent, and accidental means."

These are the facts relative to the two questions thus raised, which appear from the pleadings and the findings: The certificate upon which the suit is based secured to the member, Freeman O. Smith, indemnity in various amounts for total disability, for the loss of an arm or a leg, or one arm and one leg, and for the loss of both arms or both legs, by accident; and it also secured to his beneficiary, the defendant in error, indemnity for his death produced "by bodily injuries effected by external, violent, and accidental means" alone. . . .

In the latter part of August, 1895, while this certificate was in force, Freeman O. Smith, who was a strong and healthy man, commenced wearing a pair of new shoes. About September 6, 1895, the friction of one of the shoes against one of his feet, unexpectedly and without design on his part, produced an abrasion of the skin of one of his toes. He gave the abrasion reasonable attention, but it neverthe-

¹ *Acc.*: *Lovelace v. Travelers' Protective Assn.*, 126 Mo. 104 (1894). — ED.

² s. c. 56 U. S. App. 393, and 29 C. C. A. 223. — ED.

³ Passages as to notice have not been reprinted. — ED.

less caused blood poisoning about September 26, 1895, which resulted in his death on October 3, 1895. . . .

It is earnestly contended, however, that the death was not caused by bodily injuries effected by external, violent, and accidental means (1) because the disease of blood poisoning was the cause, and the abrasion of the skin of the toe was only the occasion, the locality in which the disease first appeared, and (2) because the abrasion of the skin was not an accident, but was made in the ordinary course of things. The contract does not differ, in respect to the subject presented by this proposition, from those which have been repeatedly considered by this court, and we state its legal effect briefly, because the reasons and authorities in support of our views here have been frequently set forth in the opinions of this court which are cited below.

If the death was caused by a disease, without any bodily injury inflicted by external, violent, and accidental means, as in the case of the malignant pustule (*Bacon v. Association*, 123 N. Y. 304, 25 N. E. 399), and as in the case of sunstroke (*Sinclair v. Assurance Co.*, 3 El. & El. 478; *Dozier v. Casualty Co.*, 46 Fed. 446), the association was free from liability by the express terms of the certificate. If the deceased suffered an accident, but at the time he sustained it he was already suffering from a disease or bodily infirmity, and if the accident would not have caused his death if he had not been affected by the disease or infirmity, but he died because the accident aggravated the disease, or the disease aggravated the effects of the accident, as in the case of the insured who was subject to such a bodily infirmity that a short run, followed by stooping, which would not have injured a healthy man, produced apoplexy (*Insurance Co. v. Selden*, 24 C. C. A. 92, 78 Fed. 285), the association was exempt from liability, because the death was caused partly by disease and partly by accident. If the death was caused by bodily injuries effected by external, violent, and accidental means alone, the association was liable to pay the promised indemnity. If the death was caused by a disease which was not the result of any bodily infirmity or disease in existence at the time of the accident, but which was itself caused by the external, violent, and accidental means which produced the bodily injury, the association was equally liable to pay the indemnity. In such a case, the disease is an effect of the accident, the incidental means produced and used by the original moving cause to bring about its fatal effect, a mere link in the chain of causation between the accident and the death, and the death is attributable, not to the disease, but to the *causa causans*, to the accident alone. *Insurance Co. v. Melick*, 27 U. S. App. 547, 560, 561, 12 C. C. A. 544, 552, and 65 Fed. 178, 186; *Railway Co. v. Callaghan*, 12 U. S. App. 541, 550, 6 C. C. A. 205, 210, and 56 Fed. 988, 994; *Railway Co. v. Kellogg*, 94 U. S. 469, 475; *Association v. Shryock*, 36 U. S. App. 658, 663, 20 C. C. A. 3, 5, and 73 Fed. 774, 776.

Now, the finding of the facts made by the trial court is conclusive in this case, and the only question here presented is whether those facts

warrant the judgment below. That court has found that the deceased was an exceptionally strong and healthy man when the abrasion in question was produced. It has found that the wearing of the new shoe produced the abrasion on September 6, 1895, that this abrasion was the cause of blood poisoning on September 26, 1895, and that the blood poisoning produced the death on October 3, 1895. The question whether the death was produced by the abrasion or by the disease is, therefore, extracted from this case. There is no ground for the contention that the disease of blood poisoning was an intervening and independent cause of the death, because the finding of the court below is that that disease was a mere link in the chain of causation between the abrasion which produced it and the death which it produced.

The only question remaining, therefore, is whether or not the abrasion of the skin of the toe was produced by accidental means. If it was, the death was so produced; and if it was not, there was no accident, and consequently no cause of action. The contract was that the association would pay the promised indemnity for any death caused "by bodily injuries effected by external, violent, and accidental means." There is no claim that the friction of the shoe which caused the abrasion was not external and violent. The contention is that it was not accidental. The significance of this word "accidental" is best perceived by a consideration of the relation of causes to their effects. The word is descriptive of means which produce effects which are not their natural and probable consequences. The natural consequence of means used is the consequence which ordinarily follows from their use, — the result which may be reasonably anticipated from their use, and which ought to be expected. The probable consequence of the use of given means is the consequence which is more likely to follow from their use than it is to fail to follow. An effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of his deeds. On the other hand, an effect which is not the natural or probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of those means, an effect which the actor did not intend to produce and which he cannot be charged with the design of producing under the maxim to which we have adverted, is produced by accidental means. It is produced by means which were neither designed nor calculated to cause it. Such an effect is not the result of design, cannot be reasonably anticipated, is unexpected, and is produced by an unusual combination of fortuitous circumstances; in other words, it is produced by accidental means. *Railway Co. v. Elliott*, 12 U. S. App. 381, 386, 387, 389, 5 C. C. A., 347, 350, 351, 353, 55 Fed. 949, 942, 953, 955.

Was the abrasion of the skin of the toe of the deceased the natural and probable consequence of wearing new shoes? It must be conceded

that new shoes are not ordinarily worn with the design of causing abrasions of the skin of the feet, and the trial court has found that the abrasion upon the toe of the deceased was produced unexpectedly, and without any design on his part to cause it. An abrasion of the skin, certainly, is not the probable consequence of the use of new shoes; for it cannot be said to follow such use more frequently than it fails to follow it. Nor can such an abrasion be said to be the natural consequence of wearing such shoes, — the consequence which ordinarily follows, or which might be reasonably anticipated. How, then, can it fail to be the chance result of accidental means, — means not designed or calculated to produce it? If the deceased, without design, had slipped, and caused an abrasion of the skin, as he was walking down the street, or had punctured the skin of his foot by stepping on a nail in his room, or had pierced it with a nail in his shoe as he was drawing it upon his foot, there could have been no doubt that these injuries were produced by accidental means; and it is difficult to understand why an abrasion of the skin, produced unexpectedly and without design, by friction caused by wearing a new shoe, does not fall within the same category.

In *McCarthy v. Insurance Co.*, 8 Biss. 362, Fed. Cas. No. 8,682, it is held that death from the rupture of a blood-vessel caused by swinging Indian clubs for exercise may be a death from bodily injury caused by accidental means. In *Martin v. Insurance Co.*, 1 Fost. & F. 505, a total disability caused by straining the back while lifting a heavy burden was declared to be a disability produced by accident. In *Insurance Co. v. Burroughs*, 69 Pa. St. 43, 51, the court said that an accident is "an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected; chance; casualty; contingency," — and held that a strain of the abdominal muscles, produced by pitching hay, which caused an inflammation that resulted in death, was an accident. Death by drowning, by involuntarily inhaling illuminating gas, or by fright, is death by accidental means. *Trew v. Assurance Co.*, 6 Hurl. & N. 839; *Mallory v. Insurance Co.*, 47 N. Y. 52; *Paul v. Insurance Co.*, 112 N. Y. 472, 20 N. E. 347; *McGlinchey v. Casualty Co.*, 80 Me. 251, 14 Atl. 13. In *Insurance Co. v. Melick*, 27 U. S. App. 547, 12 C. C. A. 544, and 65 Fed. 178, this court affirmed a judgment based upon a verdict that a death caused by lock-jaw, which was produced by a shot wound unexpectedly inflicted upon himself by the deceased, without design, was a death caused by bodily injury produced by accidental means alone. In *Association v. Barry*, 131 U. S. 100, 9 Sup. Ct. 755, three persons jumped from the same platform at the same time and place. Two of them alighted in safety, while the third suffered a stricture of the duodenum which produced a disease which caused his death. The Supreme Court affirmed a judgment founded upon a verdict that his death was the result of bodily injuries effected through external, violent, and accidental means, and approved an instruction to the jury that: —

"The term 'accidental' was used in the policy in its ordinary, popular sense, as meaning 'happening by chance; unexpectedly taking place; not according to the usual course of things, or not as expected'; that, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs, which produces the injury, then the injury has resulted through accidental means."

We are unable to distinguish the case at bar from those to which we have referred, and the case last cited is of controlling authority in this court. The abrasion of the skin of the toe of the deceased was unexpectedly caused, without design on his part, by unforeseen, unusual, and unexpected friction in the act of wearing the shoe which preceded the injury. It was not the natural or probable consequence of that act, and it was, therefore, produced by accidental means. The judgment below must be affirmed, with costs; and it is so ordered.¹

¹ In *Northwestern Travellers' Assn. v. London Guarantee and Acc. Co.*, 10 Manitoba, 537 (1895), the policy insured against "bodily injuries effected through external violent and accidental means," but did "not extend to death or disability caused by an injury of which there shall be no external or visible signs, or wholly or in part by bodily infirmity or disease . . . nor to any case except where some injury effected as aforesaid is the proximate and sole cause of the disability or death." While the insured was travelling over the prairie in a severe snow-storm, his wagon broke down. Being too numb to walk, the insured sent the driver for assistance; but the driver lost his way, and, before assistance came, the weather became still colder and the insured was frozen to death. The case was tried without a jury, and a verdict was rendered against the insurer. This verdict was sustained by the Queen's Bench of Manitoba.

On the perils covered by an accident policy, see also:—

- Theobald v. Railway Passengers' Assur. Co.*, 10 Ex. 45 (1854);
- Trew v. Railway Passengers' Assur. Co.*, 6 H. & N. 839 (Ex. Ch., 1861);
- Fitton v. Accidental Death Ins. Co.*, 17 C. B. n. s. 122 (1864);
- Smith v. Accident Ins. Co.*, L. R. 5 Ex. 302 (1870);
- Northrup v. Railway Passenger Assur. Co.*, 43 N. Y. 516 (1871);
- Ripley v. Insurance Co.*, 16 Wall. 336 (1872);
- Winspear v. Accident Ins. Co.*, 6 Q. B. D. 42 (C. A. 1880);
- Lawrence v. Accidental Ins. Co.*, 7 Q. B. D. 216 (1881);
- Rodey v. Travelers' Ins. Co.*, 3 N. M. 316 (1886);
- McGlinchey v. Fidelity and Casualty Co.*, 80 Me. 251 (1888);
- Travelers' Ins. Co. v. McConkey*, 127 U. S. 661 (1888);
- Isitt v. Railway Passengers Assur. Co.*, 22 Q. B. D. 504 (1889);
- Paul v. Travelers' Ins. Co.*, 112 N. Y. 472 (1889);
- Cornish v. Accident Ins. Co.*, 23 Q. B. D. 453 (C. A., 1889);
- Bacon v. United States Mut. Acc. Assn.*, 123 N. Y. 304 (1890);
- Pickett v. Pacific Mut. L. Ins. Co.*, 144 Pa. 79 (1891);
- Hamlyn v. Crown Accidental Ins. Co.*, [1893] 1 Q. B. 750 (C. A.);
- American Acc. Co. v. Reigart*, 94 Ky. 547 (1893);
- Menneiley v. Employers' Liability Assur. Corp.*, 148 N. Y. 596 (1896);
- Travelers' Ins. Co. v. Dunlap*, 160 Ill. 642 (1896);
- McGlother v. Provident Mut. Acc. Assn.*, 60 U. S. App. 705 (Eighth Circuit, 1898), s. c. 32 C. C. A. 318, and 89 Fed. R. 685;
- Fidelity and Casualty Co. v. Sittig*, 181 Ill. 111 (1899). — Ed.

CHAPTER VIII.

THE AMOUNT OF RECOVERY.

Assecuratus enim non quærit lucrum, sed agit ne in damno sit.

STRACCHA *de Assecurationibus*,¹ glossa XX., num. 4 (1569).

SECTION I.

Marine Insurance.

(A) GENERAL PRINCIPLES, ESPECIALLY AS TO PARTIAL LOSSES.

LEWIS v. RUCKER.

KING'S BENCH, 1761. 2 Burr. 1167.²

THIS was an action, in behalf of Bourdieu, upon a policy insuring a cargo of sugars, coffee, and indigo, from St. Thomas to Hamburg. The clayed sugars were valued at £30 a hogshead, and the Muscovado sugars at £20 a hogshead. The sugars were warranted free from average under five per cent. The sea-water got in, and every hogshead of sugar was damaged. On account of the damaged state of the sugars, it was necessary to make sale immediately. The sugars sold at £20 0s. 8d. a hogshead. If not damaged, they would have then brought £23 7s. 8d. a hogshead. Just before the cargo reached Hamburg, the price of sugars fell suddenly by reason of the proposal of a congress and the expectation of peace. Upon the cessation of these causes the price rose again; and if the sugars could have been kept, as the owners had intended, more than £30 a hogshead would have been received. The defendant paid into court a sum determined by taking such proportion of the sum at which the sugars were valued in the policy as the price of the damaged sugars bore to the price of sound sugars at Hamburg. Lord MANSFIELD left it to the jury whether the difference between the sound and the damaged sugars at the port of delivery ought to be the rule, or whether the necessity of an immediate sale, certainly occasioned by the damage, and the loss thereby, should be taken into

¹ See *ante*, p. 1, n. 2. — ED.

² The statement has been based upon the opinion. — ED.

consideration. Upon verdict for the defendant, the plaintiff obtained a rule for the defendant to show cause why the verdict should not be set aside and a new trial had.

Cur. adv. vult.

LORD MANSFIELD, C. J.¹ . . . The special jury (amongst whom there were many knowing and considerable merchants) found the defendant's rule of estimation to be right, and gave their verdict for him. They understood the question very well, and knew more of the subject of it than anybody else present, and formed their judgment from their own notions and experience, without much assistance from anything that passed. . . .

No fact is disputed. The only question is whether, all the facts being agreed, the jury have estimated the damage by a proper measure.

To make the matter more intelligible, I will first state the rule by which the defendant and jury have gone; and then I will examine whether the plaintiff has shown a better.

The defendant takes the proportion of the difference between sound and damaged at the port of delivery, and pays that proportion upon the value of the goods specified in the policy; and has no regard to the price in money, which either the sound or damaged goods bore in the port of delivery. He says the proportion of the difference is equally the rule, whether the goods come to a rising or a falling market. For instance, suppose the value in the policy £30, — they are damaged, but sell for £40, if they had been sound they would have sold for £50, — the difference is a fifth; the insurer then must pay a fifth of the prime cost, or value in the policy (that is, £6). *E converso*, if they come to a losing market, and sell for £10, being damaged, but would have sold for £20 if sound, the difference is one-half: the insurer must pay half the prime cost, or value in the policy (that is, £15).

To this rule two objections have been made.

1st objection. That it is going by a different measure in the case of a partial from that which governs in the case of a total loss; for, upon a total loss, the prime cost, or value in the policy, must be paid.

Answer. The distinction is founded in the nature of the thing. Insurance is a contract of indemnity against the perils of the voyage; the insurer engages, so far as the amount of the prime cost, or value in the policy, "that the thing shall come safe;" he has nothing to do with the market; he has no concern in any profit or loss which may arise to the merchant from the goods; if they be totally lost, he must pay the prime cost, — that is, the value of the thing he insured at the outset; he has no concern in any subsequent value.

So likewise, if part of the cargo, capable of a several and distinct valuation at the outset, be totally lost; as if there be 100 hogsheads of

¹ Statements of the facts and of the arguments have been omitted. Apparent misprints have been corrected in accordance with the suggestions in 2 Evans' View of Lord Mansfield's Decisions, 16-21. — Ed.

sugar, and ten happen to be lost, the insurer must pay the prime cost of those ten hogsheads, without any regard to the price for which the other ninety may be sold.

But where an entire individual, as one hogshead, happens to be spoiled, no measure can be taken from the prime cost to ascertain the quantity of such damage; but if you can fix whether it be a third, fourth, or fifth worse, the damage is fixed to a mathematical certainty. How is this to be found out? Not by any price at the outset port; but it must be at the port of delivery, where the voyage is completed and the whole damage known. Whether the price there be high or low, in either case it equally shows whether the damaged goods are a third, a fourth, or a fifth worse than if they had come sound; consequently, whether the injury sustained be a third, fourth, or fifth of the value of the thing: and, as the insurer pays the whole prime cost, if the thing be wholly lost; so, if it be only a third, fourth, or fifth worse, he pays a third, fourth, or fifth of the value of the goods so damaged.

2d obj. The next objection with which this case has been much entangled is taken from this being a valued policy.

I am a little at a loss to apply the arguments drawn from thence. It is said "that a valued is a wager policy (like interest or no interest); if so, there can be no average loss, and the insured can only recover as for a total, abandoning what is saved, because the value specified is fictitious."

Ans. A valued policy is not to be considered as a wager policy, or like "interest or no interest;" if it was, it would be void by the act of 19 G. 2, c. 37. The only effect of the valuation is fixing the amount of the prime cost, just as if the parties admitted it at the trial; but in every argument, and for every other purpose, it must be taken that the value was fixed in such a manner as that the insured meant only to have an indemnity.

If it be undervalued, the merchant himself stands insurer of the surplus. If it be much overvalued, it must be done with a bad view; either to game, contrary to the 19th of the late king, or with some view to a fraudulent loss; therefore the insured never can be allowed in a court of justice to plead that he has greatly overvalued, or that his interest was a trifle only.

It is settled, "that upon valued policies, the merchant need only prove some interest, to take it out of 19 G. 2, because the adverse party has admitted the value; and if more was required, the agreed valuation would signify nothing." But if it should come out in proof that a man had insured £2,000, and had interest on board to the value of a cable only, there never has been, and I believe there never will be, a determination, that by such an evasion the act of parliament may be defeated.

There are many conveniences from allowing valued policies; but where they are used merely as a cover to a wager, they would be considered as an evasion.

The effect of the valuation is only fixing, conclusively, the prime cost. If it be an open policy, the prime cost must be proved; in a valued policy it is agreed.

To argue "that there can be no adjustment of an average loss upon a valued policy," is directly contrary to the very terms of the policy itself. It is expressly subject to average, if the loss upon sugars exceed £5 per cent; if it was not, the consequence would not be that every partial loss must thereby become total; but the event, to entitle the insured to recover, would not happen unless there was a total loss. Consequently, the plaintiffs in this case would not be entitled to recover at all; for there is no color to say this was a total loss. Besides, the plaintiffs have taken to the goods, and sold them.

In opposition to the measure the jury have gone by, the plaintiffs contend that they ought to be paid the whole value in the policy upon one of two grounds.

1st. Because the general rule of estimating should be the difference between the price the damaged goods sell for and the prime cost (or value in the policy). Here the damaged sold at £20 0s. 8d. per hogshead, and the underwriter should make it up £30.

Ans. It is impossible this should be the rule. It would involve the underwriter in the rise or fall of the market; it would subject him, in some cases, to pay vastly more than the loss; in others it would deprive the insured of any satisfaction, though there was a loss.

For instance, suppose the prime cost or value in the policy £30 per hogshead; the sugars are injured; the price of the best is £20 a hogshead, the price of the damaged is £19 10s. The loss is about a fortieth, and the insurer would be to pay above a third.

Suppose they come to a rising market, and the sound sugars sell for £40 a hogshead, and the damaged for £35, the loss is an eighth; yet the insurer would be to pay nothing.

The second ground upon which the plaintiff contends that the £30 should be made up, is, that it appears the sugars would have sold for that price if the damage from the sea-water had not made an immediate sale necessary.

The moment the jury brought in their verdict, I was satisfied that they did right in totally disregarding the particular circumstances of this case; and I wrote a memorandum, at Guildhall, in my notebook, "that the verdict seemed to me to be right."

As I expected the other cause would be tried, I thought a good deal of the point, and endeavored to get what assistance I could by conversing with some gentlemen of experience in adjustments. The point has now been very fully argued at the bar; and the more I have thought, the more I have heard, upon the subject, the more I am convinced that the jury did right to pay no regard to these circumstances.

The nature of the contract is, "that the goods shall come safe to the port of delivery; or if they do not, to indemnify the plaintiff to the amount of the prime cost, or value in the policy." If they arrive, but

lessened in value, through damages received at sea, the nature of an indemnity speaks demonstrably, that it must be by putting the merchant in the same condition (relation being had to the prime cost or value in the policy) which he would have been in if the goods had arrived free from damage; that is, by paying such proportion or aliquot part of the prime cost, or value in the policy, as corresponds with the proportion, or aliquot part of the diminution in value occasioned by the damage.

The duty accrues upon the ship's arrival and landing her cargo at the port of delivery; the insured has then a right to demand satisfaction. The adjustment never can depend upon future events or speculations. How long are they to wait? a week, a month, or a year?

In this case, the price rose; but if the congress had taken place, or a peace had been made, the price would have fallen. The defendant did not insure "that there should be no congress or peace." It is true Mr. Bourdieu acted upon political speculation, and ordered the sugars to be kept till the price should be £30 or upwards; but no private scheme or project of trade of the insured can affect the insurer; he knew nothing of it. The defendant did not undertake that the sugars should bear a price of £30 a hogshead.

If speculative destinations of the merchant, and the success of such speculations, were to be regarded, it would introduce the greatest injustice and inconvenience. The underwriter knows nothing of them. The orders here were given after the signing of the policy. But the decisive answer is, that the underwriter has nothing to do with the price, and that the right of the insured to a satisfaction, where goods are damaged, arises immediately upon their being landed at the port of delivery.

We are of opinion that the plaintiffs are not entitled to have the price for which the damaged sugars were sold made up £30 per hogshead; and it seems to us as plain as any proposition in Euclid, that the rule by which the jury have gone is the right measure.

*The rule must be discharged.*¹

¹ See *Johnson v. Sheddon*, 2 East, 581 (1802); *Lawrence v. New York Ins. Co.*, 3 Johns. Cas. 217 (1802); *Tunno v. Edwards*, 12 East, 488 (1810); *Goldsmid v. Gillies*, 4 Taunt. 803 (1812). — Ed.

NEWBY v. REED.

NISI PRIUS, KING'S BENCH, 1763. 1 W. Bl. 416.

It was ruled by Lord MANSFIELD, C. J., and agreed to be the course of practice, that upon a double insurance, though the insured is not entitled to two satisfactions, yet, upon the first action, he may recover the whole sum insured, and may leave the defendant therein to recover a rateable satisfaction from the other insurers.¹

USHER v. NOBLE.

KING'S BENCH, 1810. 12 East, 639.

THIS was an action upon a policy of insurance subscribed by the defendant for £200, on goods on board the "General Miranda" at and from Jamaica to London. In the declaration the loss was thus averred: That the ship, having the goods on board, was, in the river Thames, and before the discharge of the goods at London, by the mere danger of the seas, and force and violence of the tide and winds, and the pressure of other ships, stranded and sunk, and the goods thereby

¹ In *Godin v. London Ass. Co.*, 1 Burr. 489, 490 (1758), Lord MANSFIELD, C. J., for the court, said:—

"Before the introduction of wagering policies, it was, upon principles of convenience, very wisely established, 'that a man should not recover more than he had lost.' Insurance was considered as an indemnity only, in case of a loss: and therefore the satisfaction ought not to exceed the loss. This rule was calculated to prevent fraud; lest the temptation of gain should occasion unfair and wilful losses.

"If the insured is to receive but one satisfaction, natural justice says that the several insurers shall all of them contribute *pro rata*, to satisfy that loss against which they have all insured.

"No particular cases are to be found, upon this head; or, at least, none have been cited by the counsel on either side.

"Where a man makes a double insurance of the same thing, in such a manner that he can clearly recover against several insurers, in distinct policies, a double satisfaction, the law certainly says, 'that he ought not to recover doubly for the same loss, but be content with one single satisfaction for it.' And if the same man really, and for his own proper account, insures the same goods doubly, though both insurances be not made in his own name, but one or both of them in the name of another person, yet that is just the same thing; for the same person is to have the benefit of both policies. And if the whole should be recovered from one, he ought to stand in the place of the insured, to receive contribution from the other, who was equally liable to pay the whole."

See *Rogers v. Davis*, 2 Park Ins. (8th ed.), 601 (N. P. 1766); *Davis v. Gildart*, 2 Park Ins. (8th ed.) 601 (N. P. 1767); *Thurston v. Koch*, 4 Dall. 348 (U. S. C. C., D. Pa., 1800); *Potter v. Marine Ins. Co.*, 2 Mason, 475 (1822); *American Ins. Co. v. Griswold*, 14 Wend. 399 (1835); *McAllister v. Hoadley*, 76 Fed. R. 1000 (U. S. D. C., S. D. N. Y., 1896). — ED.

totally lost. The declaration also contained the money counts. The defendant pleaded *non assumpsit*, and paid £14 into court generally upon the whole declaration. And at the trial before Lord ELLENBOROUGH, C. J., at Guildhall, a verdict was found for the plaintiff for the damages laid in the declaration, subject to the opinion of the court upon this case. (It being agreed that the amount of the damage should be settled by arbitration, if the court should be of opinion that the plaintiff was entitled to recover anything beyond the sum paid into court).

On the 4th October, 1807, the ship "General Miranda" arrived from Jamaica with the plaintiff's goods insured on board in the river Thames, and anchored near the entrance into the West India docks. Shortly afterwards, and as soon as the necessary forms were complied with, the vessel left her anchorage in the river for the purpose of entering these docks, in order to unload her cargo there; but on her near approach, and when about to go through the dock gates, she was wrongfully refused admittance, and ordered back by the servants of the company, under whose direction and management these docks were placed. Upon this she returned back to the river, and endeavored to regain a place of safety there; but this was found impracticable; and the best thing that could be done was to moor her to a chain near the entrance to the docks, at which several other vessels that had returned from such entrance had previously moored. This was accordingly done, and the "General Miranda," being the vessel nearest the shore, was at the falling of the tide forced by the violence of the current and pressure of the other ships upon a shoal or bank of the river, and was there bilged and stranded; and, in consequence, a part of the plaintiff's goods consisting of coffee was greatly damaged. In consequence of this the plaintiff brought an action against the West India Dock Company, and recovered a verdict against them for the amount of the loss, estimated according to the market price of coffee in London at the time when the loss took place, but which was less than the prime cost of the coffee at Jamaica. The defendant obtained a judge's order for liberty to inspect and take copies of the statement of the loss, and the following was delivered as such copy:—

"Statement of average per 'General Miranda,' Orr.

Jamaica to London.

| | £ | s. | d. |
|---|------|----|----|
| Amount of goods per invoice No. 1 & 2, | | | |
| and bills of lading No. 3 & 4 | 6326 | 0 | 1 |
| Insuring £7600 to cover, as under, | | | |
| £6750 at 15 gs. per cent. | 1063 | 2 | 6 |
| 850 12 | 107 | 2 | 0 |
| <hr/> £7600 Policy | 19 | 0 | 0 |
| Carried over | 1189 | 4 | 6 |
| | 6326 | 0 | 1 |

| | | £ | s. | d. |
|---|------------------|-------------|----|----|
| Brought over | 1189 4 6 | 6326 | 0 | 1 |
| Commission $\frac{1}{2}$ per cent for effecting . . . | 38 0 0 | | | |
| Commission $\frac{1}{2}$ per cent for settling in case of loss | 38 0 0 | | | |
| | | <u>1265</u> | 4 | 6 |
| Deduct | | 7591 | 4 | 7 |
| Amount of sound coffee and wood per invoice No 5, and landing account No. 6 & 7 | 2570 3 2 | | | |
| Insurance on £3085 to cover, as under, £2740 at 15 gs. per cent | 413 11 0 | | | |
| 345 | 43 9 4 | | | |
| Policy for £3085 | 7 14 3 | | | |
| Commission $\frac{1}{2}$ per cent for effecting | 15 8 6 | | | |
| Ditto $\frac{1}{2}$ per cent for recovery in case of loss | 15 8 6 | | | |
| | <u>513 11 7</u> | 3083 | 14 | 9 |
| Add | | 4507 | 9 | 10 |
| General average per Mr. Parkinson, award No. 8 . . . | | <u>189</u> | 4 | 5 |
| | | 4696 | 14 | 3 |
| Deduct | | | | |
| Proceeds of damaged coffee per A sale, No. 9 | 174 12 9 | | | |
| Recovered from West India Dock Company per state- ment, ¹ No. 10 | 2741 15 8 | | | |
| From which deduct extra law expenses | 98 18 8 | | | |
| | <u>2642 17 0</u> | 2817 | 9 | 9 |
| | | 1879 | 4 | 6 |

If £7600 : 1879 :: £100

Answer, £24 : 14 : 6 $\frac{1}{2}$ per cent exclusive of return of premium for sailing in company with armed ship.

¹ The West India Dock Company
Cwt.

| | | | |
|---|-------------|----|----|
| To amount of loss on 748 2 10 damaged coffee, per "General Miranda," averaged per account sales of sound coffee, per said vessel, 430 3 12 of sound coffee having netted £1569 13s. 1d. | £ | s. | d. |
| | 2727 | 4 | 0 |
| Amount of general average | <u>189</u> | 4 | 5 |
| | 2916 | 8 | 5 |
| Deduct | | | |
| Proceeds of damaged coffee | 174 | 12 | 9 |
| | <u>2741</u> | 15 | 8 |

— REP.

The only question at the trial was, by what measure the damage was to be estimated between the assured and the underwriters. The plaintiff contended that he was entitled to such proportion of the prime cost as would correspond with the proportion of the diminution of the market price occasioned by injury which the coffee had sustained, according to the rule laid down in *Lewis v. Rucker*, 2 Burr. 1169. If this measure should be adopted, the sum paid into court was insufficient. The defendant contended that the case of *Lewis v. Rucker* did not apply to this case; and that the plaintiff was only entitled to the difference between the actual value of the damaged and sound coffee at the market price in London, when the ship arrived; and according to which rule he had received a compensation from the West India Dock Company, who had been the cause of the loss. If the plaintiff were entitled to recover according to the prime cost, it was admitted that the £7 per cent paid into court was not enough to cover the whole extent of the defendant's liability, the ulterior amount of which was agreed to be settled by arbitration. If the plaintiff were entitled to recover only according to the actual value of the coffee in London when the loss took place, the sum paid into court was sufficient to recover the defendant's liability. The question therefore was whether the plaintiff were entitled to recover anything beyond the sum paid into court? If he were, the present verdict was to stand, and the amount to be settled by arbitration; if not, a nonsuit was to be entered.

Abbott, for the plaintiff.

Carr, for the defendant.

LORD ELLENBOROUGH, C. J. As the court will have to promulgate a rule which will bind, in future in similar cases, it will perhaps be more willingly acquiesced in if delivered upon more mature deliberation; we will therefore take further time before we give our opinion. The question will be whether every case be not in effect the case of a valued policy so far as it involves this consideration, and consequently within the rule laid down in *Lewis v. Rucker*. Where the parties have put an express valuation on the subject-matter of the insurance, that rule is admitted to govern; and the question is whether general usage has not established the invoice price as the basis of the value in all other cases where the policy is open. Some rule there must be, and I rather think that the one laid down in *Lewis v. Rucker* was adopted as being upon the whole the most convenient in all cases.

The case stood over for further consideration till this term, when his Lordship delivered the opinion of the court.

It is admitted that the assured is entitled to an indemnity, and no more; but by what standard of value the indemnity sought should be regulated is the question. In the case of a valued policy, the valuation in the policy is the agreed standard; in case of an open policy, the invoice price at the loading port, including premiums of insurance and commission, is, for all purposes of either total or average loss, the usual standard of calculation resorted to for the purpose of ascertaining this

value. The selling or market price at the port of delivery cannot be alone the standard; as that does not include premiums of insurance and commission which must be brought into the account, in order to constitute an indemnity to an owner of goods who has increased the original amount and value of his risk by the very act of insuring. The proportion of loss is necessarily calculated through another medium, namely, by comparing the selling price of the sound commodity with the damaged part of the same commodity at the port of delivery. The difference between these two subjects of comparison affords the proportion of loss in any given case; *i. e.*, it gives the aliquot part of the original value, which may be considered as destroyed by the perils insured against, and for which the assured is entitled to be recompensed. When this is ascertained, it only remains to apply this liquidated proportion of loss to the standard by which the value is calculated, *i. e.*, to the invoice price, being itself calculated as before stated; and you then get the 1-half, the 1-4th, or 1-8th of the loss to be made good in terms of money. This rule of calculation is generally favorable to the underwriter, as the invoice price is less in most cases than the price at the port of delivery; but the assured may obviate this inconvenience by making his policy a valued one, or by stipulating that, in case of loss, the loss shall be estimated according to the value of like goods at the port of delivery. In the absence of any express contract on the subject, the general usage of the assured and underwriters supplies the defect of stipulation and adopts the invoice value, with the additions I have mentioned as the standard of value for this purpose. In this case, after receiving the money paid by the West India Dock Company, the assured is left short of his full reimbursement (even on the defendant's own calculation) by the premiums of insurance at 15 guineas per cent commission, and extra costs of suit, for which no allowance was made by the West India Dock Company; so that *quacunqve via data*, the £7 per cent paid into court is too little. The consequence is that the verdict must stand, subject to the reference of account to an arbitrator, as agreed by the case.

BYRNES AND OTHERS v. NATIONAL INSURANCE CO.

SUPREME COURT OF NEW YORK, 1823. 1 Cow. 265.

ASSUMPSIT upon a policy of insurance. The ship "Hercules," owned by the plaintiffs, was insured by the defendants, on a voyage from New York to Liverpool, and at and from thence to New York, to the amount of \$10,000, by policy in the usual form, dated October 19, 1820. In coming down the river, after leaving the dock at Liverpool on her return voyage, she got aground, and was obliged to put back, unload her cargo, and repair. She had been copper-sheathed about two years

before, and some of the sheathing having been rubbed off by grounding, a part of it was taken off and replaced by new sheathing, also of copper. The bills and costs of her repairs, adjusted, and admitted, between the parties to be particular average, after deducting the usual allowance of one third, new for old, amounting to \$1,612.76, all of which the defendants paid, except \$279.26, their liability to pay which depended upon the determination of the question hereafter mentioned, and which sum was retained by them until the question should be decided by this court. The tradesmen who furnished the copper for re-sheathing the ship, retained and credited in their account the value of the old copper taken off the vessel, as far as it went, in part payment. The new copper furnished amounted to £358 5s. 8d., and the old copper received by them amounted to £188 10s. They rendered their bill accordingly, charging the new copper furnished and crediting the old copper received by them, which left a balance due them of £169 15s. 8d., which the plaintiffs paid, and which balance only they charged in their account of particular average. Upon this balance the deduction of one third new for old was made. But the defendants insisted that they had a right to claim the deduction or allowance of one third, new for old, upon the whole amount of the bill for new copper used in the repair, including the £188 10s. which was paid for by the old copper taken by the tradesmen. On the other hand, the plaintiffs contended, that the deduction in respect of the copper ought to be made only on the balance of £109 15s. 8d., paid by them to the tradesmen, and for which only they made their claim on the defendants. If the defendants were right in their position, then the particular average had been fully paid, and it was agreed that they would be entitled to judgment; but that, if the plaintiffs were right, then they would be entitled to judgment for the \$279.26, with interest from 23d June, 1821, that being the amount of the deduction claimed, of the one third new for old, on the sum of £188 10s. paid by the old copper. A copy of the tradesmen's bill as furnished, and of the adjustment between the parties, was annexed to the case; and a *cognovit* was given to cover the amount, if the court should be of opinion with the plaintiffs.

W. Slosson, for the plaintiffs.

J. Wells, *contra*.

Curia, per SUTHERLAND, J. The general rule is unquestionable that, in the adjustment of a claim made by the insured upon the underwriters for repairs put upon a vessel, the underwriters are entitled to a deduction of one third from the expenses of the repairs;¹ or, in other words, that they are bound to pay but two thirds of the expense. This deduction of one third new for old, as it is termed, is allowed upon the supposition that the vessel, after being repaired, is in better condition than she was at the commencement of the voyage, in consequence of new materials having been substituted for old. And, as the contract

¹ *Stevens on Average*, 159; *Da Costa v. Newnham*, 2 T. R. 407; *Smith v. Bell*, 2 Caines' Cas. 153; *Dunham v. Commercial Ins. Co.*, 11 Johns. 315. — REP.

of the underwriters is one of indemnity merely, it is equitable that a deduction should be made in their favor, from the cost of the repairs, equal to the enhanced condition of the vessel.

To avoid the inconvenience and embarrassment of an inquiry in each particular case into the difference in value between the present and former condition of the vessel, it has been established as a general rule that this difference shall be estimated at one third of the cost of the repairs.

In the English courts, if the inquiry is sustained and the repairs are made when the vessel is new, that is, in her first voyage, no deduction is allowed to the underwriters; because the vessel being new, it is not to be supposed that she is put in better condition by the repairs. But in this court that distinction has not been adopted; and the deduction is made alike, whether the vessel is new or old.¹

This being the general principle, the question is presented in this case, whether the value of the old materials, whatever it may be, is to be deducted from the gross amount of repairs, and the deduction of one third new for old made from the balance; or whether the one third is to be deducted from the gross amount, and the old materials to belong to the underwriters. For instance, suppose the gross amount of repairs to be four hundred dollars — the old materials to be worth one hundred dollars. The assured contend that the amount is to be thus stated: —

| | |
|---|----------|
| Repairs | \$400.00 |
| Deduct value of old materials | 100.00 |
| <hr/> | |
| Balance | 300.00 |
| Deduct one third new for old | 100.00 |
| <hr/> | |
| To be paid by underwriters | \$200.00 |

The underwriters, on the contrary, contend that the true principle of settlement is as follows: —

| | |
|--|----------|
| Repairs | \$400.00 |
| Deduct one third new for old | 133.33 |
| <hr/> | |
| | 266.67 |
| Deduct also old materials applied to repairs . . . | 100.00 |
| <hr/> | |
| | \$166.67 |

This question has never arisen, that I can find, either in the English courts or our own; and, although cases will not frequently occur in which the old materials will be of sufficient value to induce a discussion of it, some rule upon the subject ought to be established. It seems to me to resolve itself into the inquiry to whom do the old materials belong?

¹ Dunham v. Commercial Ins. Co., 11 Johns. 315. — REF.

If they belong to the assured there is an end of the question; for having been applied by them to the payment of the repairs, *pro tanto*, the assurer cannot possibly claim any further benefit from them. If there is anything in the nature of an abandonment of them to the underwriters, then the principle contended for by the defendant may be well founded. But there is nothing like an abandonment. The assured do not, and could not, claim from the underwriters the gross amount of repairs. They can only claim the difference between that amount and the value of the old materials; for to that extent only are they injured, and an indemnity is all that they can claim. It is more analogous to the adjusting of a partial loss,¹ in which case the title to the goods remains in the assured.

The rule, therefore, seems to me to be this: to apply the old materials towards payment of the new, and to allow the deduction of the one third new for old upon the balance. This rule is simple, and capable of universal application. It affords full indemnity to the assured, and gives to the underwriters all the benefit that the principle, upon which the practice of deducting one third new for old has been established, will justify. The plaintiffs are, therefore, entitled to judgment for \$279.26, with interest from the 3d day of June, 1821, as stated in the case.

*Judgment for the plaintiffs accordingly.*²

RYDER AND ANOTHER v. PHŒNIX INSURANCE CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1867. 98 Mass. 185.

CONTRACT on a policy of insurance against the usual marine risks, made by the defendants June 26, 1866, for one year from June 14, 1866, on the barque "Dreadnaught," for seven thousand eight hundred dollars, payable to the plaintiffs. The vessel was valued at thirty thousand dollars in the policy, on the face of which was printed the following clause:

"It is hereby agreed, that if the insured shall have made any other insurance upon the barque aforesaid, prior in date to this policy, then the said insurance company shall be answerable only for so much as the amount of such prior insurance may be deficient towards fully covering the property hereby insured, whether for the whole voyage, or from one port of lading or discharge to another; and the said insurance company shall return the premium, or a ratable part thereof, upon so much of the sum by them insured, or for such part of the voyage as

¹ *Vide* Lawrence v. New York Ins. Co., 3 Johns. Cas. 217; Lewis v. Rucker, 2 Burr. 1167, 1170; Johnson v. Sheddon, 2 East, 581. — REP.

² *Acc.* : Brooks v. Oriental Ins. Co., 7 Pick. 259 (1828).

See Wallace v. Ohio Ins. Co., 4 Ohio, 234 (1829). — ED.

they shall be exonerated from by such prior insurance ; provided, that no return premium shall be made for any passage whereon the risk has once commenced. And in case of any insurance upon the said barque, whether it be for the whole or part of the voyage, subsequent in date to this policy, the said insurance company shall, nevertheless, be answerable to the full extent of the sum herein insured, without right to claim contribution from such subsequent insurers ; and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent insurance had been made. And, in case of loss, such loss shall be paid in sixty days after proof and adjustment thereof."

The declaration contained also a count in money had and received for the premium of seven hundred and forty-two dollars paid upon this policy.

The case was submitted to the determination of the court on agreed facts, the material part of which was as follows :

The barque was totally lost at sea on August 2, 1866. The defendants, a corporation established under the laws of New York and doing business in this Commonwealth under the laws thereof, admit that they had due notice of the loss, and that after proof and adjustment thereof more than sixty days elapsed before this action was brought. The plaintiffs, on June 26, 1866, and at the time of the loss, had other subsisting policies on the barque, from the Triton, the New England, and the Equitable Insurance Companies, to the amount of twenty-two thousand dollars, against the same risks as the policy made by the defendants. The Columbian Insurance Company, a corporation established under the laws of New York and doing business in Boston by an agent under the statutes of this Commonwealth, had also, in November and December, 1865, made three policies, amounting in all to the sum of twenty-four thousand dollars, on the same property and against the same risks, each for a year, which expired in November, 1866. In all these various policies, as in that made by the defendants, the vessel was valued at thirty thousand dollars. In January, 1866, the Columbian Insurance Company became notoriously insolvent, and the plaintiffs proposed to pay the premiums due on their policies therein up to the time when the vessel had been last heard from, and to cancel the same ; but this proposition was not accepted. In February, 1866, a judgment was entered by the Supreme Court of New York declaring that company dissolved and appointing receivers of their property. [The proceedings in that case are stated in *Taylor v. Columbian Insurance Co.* 14 Allen, 353.] The receivers so appointed have never paid, and it is now unlikely that they will ever pay, any dividends to the creditors of the company.

R. H. Dana, Jr., and L. S. Dabney, for the plaintiffs.

B. R. Curtis and G. L. Roberts, for the defendants.

GRAY, J. In case of double insurance, that is, of two insurances on the same interest at the same time and against the same risks, the

general maritime law and the custom, understanding and practice of merchants have often differed from the common law as to the proportions in which the different underwriters should contribute, and the mode of enforcing their liability.

By the general maritime law and the French ordinance of 1681, in case of two policies upon the same property, the amount of the first of which equalled its full value, that alone was binding, and the second underwriters were exempt, and returned the premium, reserving one half per cent; and if the first policy did not amount to the whole value of the property, the second underwriters answered for the surplus only. 2 Valin, 73, and authorities cited. As was observed by Mr. Justice Paterson in *Thurston v. Koch*, 4 Dall. 350, "the solvency of the first insurer to the full value being assumed, the ordinance is predicated on the principle that there remains no property to be insured, and of course no risk to be run." A like rule prevailed by custom of merchants in England in the latter part of the seventeenth century. *Malynes Lex Merc.* 112, 118; *African Co. v. Bull*, 1 Show. 132.

Before the American Revolution the rule of the common law was declared and established, that in this, as in any case of two sureties for the same debt, the creditor might recover the whole amount from either, leaving him to sue the other for contribution. *Godin v. London Assurance Co.*, 1 Burr. 492, 495; *Millar on Ins.* 266; *Marshall on Ins.*, part 1, c. 4, § 4. See also *Fisk v. Masterman*, 8 M. & W. 165; *Bruce v. Jones*, 1 H. & C. 769. In the leading American case of *Thurston v. Koch*, 4 Dall. 348, xxxii, decided in the Circuit Court of the United States in Pennsylvania in 1800, the law of England, as thus established before the Declaration of Independence, was held to be binding as law here, although the usage in Philadelphia for years had been to settle losses in accordance with the French ordinance and the early English custom. And that decision has been uniformly recognized and followed, in the absence of express stipulation to the contrary in the policy. *Craig v. Murgatroyd*, 4 Yeates, 161; *American Insurance Co. v. Griswold*, 14 Wend. 461, 473, 493; *Millaudon v. Western Insurance Co.*, 9 La. 27; *Cromie v. Kentucky & Louisville Insurance Co.*, 15 B. Monr. 432; 3 Kent Com. (6th ed.), 280, 281.

But this rule, which obliges the assured to pay a double premium while he secures only one insurance, and allows him to elect, at any time within the period of the statute of limitations, which insurer he will sue and compel to seek contribution of the other (who may meanwhile have become insolvent), has proved so unsatisfactory to merchants and underwriters, that clauses substantially reviving the older rule have been generally introduced in this country. And such a clause is contained in the policy now in suit.

The manifest purpose of this clause is in case of loss to fix by the policy itself the amount for which the underwriter shall be responsible, unaffected by the subsequent insolvency of either underwriter or by any choice of the assured. Insurance of the solvency of an insurer is per-

mitted and practised on the continent of Europe, but has never been in use in England or America. Marshall on Ins., part 1, c. 4, § 3; 3 Kent Com. 280. The contingency in which the liability of the defendants is limited by their policy is not "if there shall be any prior insurance actually existing at the time of the loss," but "if the insured shall have made any other insurance prior in date" upon the same property, in which is of course implied "against the same risks, and outstanding at the time of obtaining the second insurance." The amount for which these defendants as second insurers shall be answerable is declared to be, not that amount which the prior insurers may be unable to pay, but "so much as the amount of such prior insurance may be deficient towards fully covering the property hereby insured, whether for the whole voyage, or from one port of lading or discharge to another." In other words, it is determined, not by the amount which can be recovered of the prior insurers, dependent upon the contingency of their solvency, but by the sum insured by them, as expressed on the face of their policy. The premium to be returned is not merely upon so much of the sum insured as the defendants shall not be required to pay, by reason of its being recovered of the earlier underwriters, but upon so much of the sum or for such part of the voyage insured by them as they "shall be exonerated from by such prior insurance," that is, by the fact of being thereby already insured.

The stipulation does not indeed apply unless both policies according to their terms cover the property at the time and place of the loss. It was therefore held in *Kent v. Manufacturers' Insurance Co.*, 18 Pick. 19, that if the first policy had expired by its own limitation of time before the loss, the second insurers were liable. But the court said, in illustration of the proposition that the clause regulated the extent of the liability which the second underwriters incurred, "If, for example, the subsequent policy covers the same vessel, voyage and risks, as were covered by the prior policy, the assured would not by the terms of the contract be entitled to recover anything upon the subsequent policy. And it is well settled that nothing done by the parties to the first policy after the execution of the second can alter the relative situation of the parties to the latter, as fixed by the terms of their own contract. It was therefore held by Mr. Justice Story that a discharge of the first policy by agreement of the parties to it, after the making of the second policy, though before any risk attached under the latter, had no effect upon it. *Seamans v. Loring*, 1 Mason, 127. In *Macy v. Whaling Insurance Co.*, 9 Met. 354, this court approved of that decision; and held that the cancelling of the first policy after the making of a second containing a clause like that now in question, even before the loss, did not increase the liability of the second insurers; for, by a construction which would allow it such an operation, as was said by Mr. Justice Hubbard, speaking for the court, "The relations of the parties are altered injuriously to the second underwriters without their consent, and the effect is not only to increase the risk directly,

but its tendency, if allowed, would be to make the subsequent underwriters insurers of the solvency of the prior; because, on any misfortune happening to the prior underwriters, by which their ability to pay losses should be impaired or destroyed, the party would cancel his policy to enable him to resort to his subsequent insurers for losses for which they would not be accountable in case of the continuance of the prior policy." See also *McKim v. Phoenix Insurance Co.*, 2 Wash. C. C. 95; *Murray v. Insurance Co. of Pennsylvania*, Id. 189.

The facts agreed in this case show that at the time of the making of the policy in suit the plaintiffs held other policies prior in date upon the same property, to its full valuation against the same risks, which had not been then cancelled, and which would not expire according to their terms until after the time when the loss happened. Upon the grounds already stated, neither the insolvency of the Columbian Insurance Company and the want of funds to pay its liabilities, nor any discharge of those liabilities without the defendants' consent since they made their policy, could increase the liability which they by the terms of that policy had assumed. We need not particularly consider the effect of the proceedings in the courts of New York; for, even if the corporation was thereby dissolved (which is by no means clear), its liabilities would be no more thrown upon the defendants, who were not sureties for the payment of their debts nor insurers of their solvency, than if the prior underwriters, being natural persons, had died or become insolvent without performing their agreement. The very statutes of New York, upon which the plaintiffs rely, by providing a mode in which the policies of an insolvent corporation may be cancelled imply that if not so cancelled they continue to be existing contracts. *Rev. Sts. of N. Y.* (5 ed.) part 3, tit. 4, c. 8, § 86. *Leroy v. State Insurance Co.*, 2 Edw. Ch. 673; *In re Croton Insurance Co.*, 3 Barb. Ch. 643.

The cases of fire insurance, cited for the plaintiffs, in which this court has held that a policy, declared on its face to be void in case of previous insurance on the same property, or in case of obtaining subsequent insurance, was valid if the only other insurance was void for misrepresentation or by its own terms, have no application to this case; for they were not decided, as the learned counsel argued, upon the ground that such other insurance was worthless and could not be enforced, but upon the ground that it was in law and in fact no insurance.

As the defendants' policy never attached, the plaintiffs, as was admitted at the argument, are entitled, upon the second count in their declaration, to

*Judgment for a return of premium.*¹

¹ See *Carleton v. China Mut. Ins. Co.*, 174 Mass. 280 (1899).—ED.

SECTION I. (*continued*).

(B) VALUED POLICIES.

SHAWE v. FELTON.

KING'S BENCH, 1801. 2 East, 109.

THIS was an action on a policy of insurance on the ship "Indian," and goods, valued at £6,600, on a voyage at and from Liverpool to the coast of Africa, during her stay and trade there, and from thence to her port or ports of discharge, sale, and final destination in the West Indies and America, and until she was moored twenty-four hours in safety. At the trial before Lord KENTON, C. J., at the last Sittings at Guildhall, it was proved that the ship was seaworthy when she sailed from Liverpool; and it was not disputed that the insurers were interested in the ship and outfit (including provisions and sea-stores laid in for the slaves, which were to be taken in on the coast of Africa, and also wages advanced to the crew) to the extent of the value insured. The ship arrived on the coast of Africa, took in a cargo of slaves there, and proceeded to Demerara. In the course of her voyage thither, and in calm weather, she met with a violent concussion, described to resemble an earthquake, from which she received so much damage that it was with the greatest difficulty she was kept afloat by pumping until she reached Demerara, almost a wreck, where she was obliged to be lashed alongside of a hulk to keep her from sinking; and in attempting to remove her from thence to the shore, a few days afterwards, she sunk, although the distance was only about fifty yards. At the time of her arrival at Demerara her stores were considerably expended. The ship was originally destined there, in the first instance, with directions to the captain to proceed to other ports and places in case he could not dispose of the slaves there at a certain average price. And his letter of instructions from his owners contained the following direction: "As your vessel is not according to the late act of Parliament,¹ we would have you sell her in the West Indies, provided you can procure £1,200, but expect you will get from £1,500 to £1,200. Should you not dispose of her, you will procure what freight you can for Liverpool." In fact, the vessel having been surveyed at Demerara, and condemned as unserviceable, was sold only for £388. In consequence of this, the captain was obliged to dispose of all the slaves there, not indeed so advantageously as he

¹ This was one of the several acts which passed for the regulation of the African slave trade; limiting the number of slaves to the tonnage, and requiring the vessels to be of a certain build. The act alluded to was to take place after the voyage in question commenced. — REP.

might otherwise have done had he been enabled to proceed to other places, but still so as to cover the average price to which he was limited by his instructions. The plaintiff gave notice of abandonment to the underwriters, and recovered as for a total loss on the ship; and the verdict was taken for the full amount of the sum insured, it being a valued policy.

A rule was obtained, calling on the plaintiff to show cause why the verdict should not be set aside and a new trial had, on the grounds that the subject matter of the insurance was so much reduced from the original value at the time of the loss (if it were to be considered as a total loss), that the sum valued in the policy ought not to conclude the underwriter. That a policy, though valued, was still no more than a contract of indemnity, and was only meant to bind the parties when the subject-matter continued nearly in the same state as at first, allowing for usual wear and tear. That in particular it ought not to conclude in this case; because not only the actual worth of the ship was by the owner's own confession of so much less than the stipulated value, but also the stores which were included in the insurance were profitably expended by him in the purchase and sustenance of the slaves, all of whom had been brought to an advantageous market; and therefore, so far from the plaintiff having incurred any loss in this respect for which he was entitled to an indemnity, he was in fact a considerable gainer by the adventure.

The Attorney-General (Sir *Edward Law*), *Erskine*, *Park*, and *Wood*, showed cause against the rule.

Gibbs and *Cassels*, in support of the rule.

LORD KENYON, C. J. The jury had no doubt but that the ship was seaworthy when she sailed, and that there was a total loss; for though she arrived at Demerara, she was never moored twenty-four hours, nor a moment in safety. She came there a perfect wreck, having received her death's wound at sea, and was with the utmost difficulty kept afloat till all the people on board were landed. It is not pretended now that there was any fraud in the case; but it is contended that the underwriter is not bound by the valuation in the policy. It is of little consequence to inquire what my opinion would have been upon the subject of valued policies in the year 1746, immediately after the Stat. of the 19 Geo. II. passed: for very soon after they were decided to be legal by as cautious and upright and painstaking a judge as ever presided in this court (Lord C. J. Lee). He was succeeded by Sir Dudley Ryder, and this latter by Lord Mansfield; and during all this period such policies have been sanctioned by one uniform course of decisions. All this is now supposed to be wrong; and the rules by which this and other commercial nations have so long regulated their dealings is now wished to be disturbed; but I will not lend my aid to open such a new and wide door of litigation, much exceeding everything that has gone before. If we were to enter into the calculations which have been contended for, every valued policy would be to be opened. Every man's

meal on board a ship would take from the value of the original outfit. Is this to be endured? Will good faith admit of it? Where is the line to be drawn between a greater or less diminution of the value? Therefore as the rule and practice of valued policies have been acted upon and sanctioned since the passing of the statute, I am not one who wish *quieta movere*.

GROSE, J. We are desired by this motion to open a valued policy, contrary to the practice, and in a case where no fraud is imputed; for doing which no authority has been cited. If we were to admit it in this instance, it would be required in every other; and thus a door would be opened to endless litigation. Therefore, to avoid great injustice to individuals, and great public inconvenience, I think we are bound to refuse the application.

LAWRENCE, J. As the practice of binding parties as to the amount of their interest by valued policies has obtained ever since the Stat. of Geo. II., it would require very strong reasons to show that it is wrong. That statute was passed to prohibit mere wagering policies by persons insuring who had no interest in the thing insured, and therefore it avoids policies made, interest or no interest, or without further proof of interest than the policy itself. The effect therefore of a valued policy is not to conclude the underwriter from showing that the assured had no interest, and that in fact it was a mere wagering policy within the statute; but in order to avoid disputes as to the quantum of the assured's interest, the parties agree that it shall be estimated at a certain value. Here it is not pretended that the subject matter of the insurance was not at first of the value estimated in the policy. Then how does this differ from the case of an open policy in this respect? Would it not be sufficient for the assured in an open policy to prove that at the time the ship sailed the subject-matter of the insurance was of such a value? Is not that the period to look to, and not the state of the thing at the time of the total loss happening? If on account of the peculiar nature of an African voyage there ought to be a difference in this respect between these and other trading adventurers, the underwriters may, if they please, introduce a special clause in the policy to provide for the diminution in value by the expenditure of stores and provisions in the purchase and sustaining of the slaves. As it stands at present, there appears no ground for making any such distinction.

LE BLANC, J. The present is an extreme case, because the loss happened at the last period of the voyage at which it could happen. But the same thing must occur more or less in every policy upon ship and outfit. The value of the property must be continually diminishing, and if the loss happen at the latter end of a long voyage, no doubt the property must be considerably deteriorated at the time by the usual wear and tear; and yet it is never objected that the underwriter is not liable for the original value. As to the owner himself having estimated the value of the property at so much less than the sum at which it was insured, many things may happen to render a vessel of less value

when the voyage is concluded, although the subject matter exists; the amount of the repairs required, &c. The rule having been so long laid down as to valued policies, it is too late to open it again.

*Rule discharged.*¹

¹ In *Grant v. Parkinson*, 3 Doug. 16 (1781), Lord MANSFIELD, C. J., said: "Before the statute, nothing was so common as a valued policy; and then, at the trial, there was no necessity to prove either value or interest, whether the words 'without further proof than the policy' were or were not added. Then this statute was made; and in the construction of it, it has been held, whether right or wrong it is now immaterial to inquire, that a valued policy is not void, but it is sufficient if the party proves some interest. The other side may show that this is a mere evasion of the act; but in general nothing is necessary on a valued policy but to prove some actual interest. In the present case the insurance is made by a contractor for spruce beer on the profits to arise from a cargo of molasses. If the ship arrives, the profit is certain. The policy is not meant to conceal the interest, but to get rid of the proof of the quantum."

In *Barker v. Janson*, L. R. 3 C. P. 303 (1868), a ship worth more than £8,000 sailed from England, and on the outward voyage was injured to such an extent that the cost of repairs would exceed the value when repaired. While the ship was at Calcutta in this condition, the owners, in ignorance of the facts, obtained insurance for £6,000 in a time policy that valued the ship at £8,000. During the time of this policy, and before repairs had been executed, the ship was lost in a storm. The jury found that the vessel was a ship at the time of the storm. It was held, that the policy attached, and that, although because of the original damage the owners had recovered £7,000 from other underwriters as for a partial loss, the valuation could not be opened. BOVILL, C. J., said: "There is no doubt, however, now that the parties may use either an open or a valued policy. In this case both parties have agreed upon a time policy (in which there is no warranty of seaworthiness); and have further agreed that, whatever its condition may have been at the time when the policy attached, they will treat the value of the vessel as of a certain amount, and both parties acting in good faith are willing to be bound by that valuation. If such be the agreement of the parties, upon what principle would the court be justified in setting it aside? An exorbitant valuation may be evidence of fraud, but when the transaction is *bona fide*, the valuation agreed upon is binding." And MONTAGUE SMITH, J., said: "It has been found convenient that the value of a ship should be agreed on, and stated in the policy, in order to avoid such inquiries as that now brought before us. If we were to grant this rule, it would become a question of degree in each case whether the difference in value was sufficient to entitle the parties to re-open the valuation. A thousand things might lessen the value of a vessel between the time of a policy being made and the time of its attaching, such as natural decay, worms, or the ship becoming a drug in the market; and all the evils intended to be avoided by this kind of policy would arise again. The estimated value, if excessive, may often be evidence of fraud, or of an intention to make a wagering policy; but here it is admitted that there was no intention to value the vessel beyond what was reasonable and fair. I think there is no pretence, either, for saying that there was a mistake; it is a misuse of the term, for the intention was to avoid all questions as to what was the real value of the ship, and both parties were aware that it could not at the time be ascertained with certainty what that value was."

See *Lidgett v. Secretan*, L. R. 6 C. P. 616 (1871). — ED.

FORBES AND ANOTHER *v.* ASPINALL.

KING'S BENCH, 1811. 13 East, 323.

THIS case came before the court upon a motion for a new trial in an action on a policy of insurance, in which the plaintiffs had recovered a verdict at the Sittings after last Trinity Term at Guildhall. It was first moved in the last term, when a rule to show cause was granted; and it was afterwards argued at length in the same term by the Attorney-General, Scarlet and Richardson, on the part of the plaintiffs, and by Park and Littledale for the defendant. The court took till this term to consider of their judgment; in delivering which the Lord Chief Justice went so fully into the arguments urged and the cases cited at the bar, that it is unnecessary to repeat them.

The insurance, as it concerned this case, was on freight valued at £6,500 upon the ship "Chiswick" "at and from any port or ports in Hayti to Liverpool, or her port of discharge in the United Kingdom." The declaration alleged that on the 9th of July, 1808, the ship was in safety in a certain port in Hayti, and that divers goods and merchandises were then and there loaded on board to be carried on the voyage insured; that the plaintiffs were interested in the freight, &c. to the amount insured; and that on the 15th July, the ship, with the goods on board, was lost by the perils of the seas, and the plaintiffs thereby lost their freight, &c.

The facts proved and admitted were that the plaintiffs were the owners of the ship "Chiswick"; that she sailed from Liverpool with the goods to Hayti to trade there, and to bring home a return cargo of produce, and arrived at Hayti on the 4th of July, 1808, with goods to be there bartered for other goods to be brought back to Liverpool. Part of the goods were accordingly bartered and exchanged for fifty-five bales of cotton, which were shipped on board at Jaquemel (on the south side of Hayti), the remaining part of her outward cargo was still on board, and would in all probability have been exchanged for other goods, but for the loss after-mentioned. That the ship proceeded from Jaquemel to Au Cayes, another port of Hayti, to barter away the residue of her outward cargo, and to complete her lading home; and with such cargo, and the fifty-five bales on board, was in safety on the 15th of July, when, by the perils of the seas, she was driven on shore and lost. That the defendant settled for the freight of the fifty-five bales of cotton, without prejudice to the plaintiff's claim for further loss of freight, if they were entitled to it. That the remaining part of the outward cargo, though damaged, was saved from the wreck, and, in twelve days after the loss of the ship, was exchanged for 250 tons of coffee and 100 tons of wood, the freight of which would have been of larger value than the sum insured on freight, if the ship had not been lost.

Lord ELLENBOROUGH, C. J., now delivered the judgment of the court.

This was a motion for a new trial in an action upon a policy of insurance "at or from any port or ports in Hayti to Liverpool," &c., on freight valued at £6,500. The ship had sailed from Liverpool to Hayti with a cargo intended for barter; had bartered away part of her outward cargo, and taken in fifty-five bales of cotton in part of her return cargo; and was proceeding from one port in Hayti to another; viz., from Jaquenel to Au Cayes, to barter away the residue of her outward cargo, and to complete her lading home, when she met with an accident by the perils of the seas which occasioned a total loss. If the plaintiffs be only entitled to a satisfaction for a partial loss, that satisfaction has already been made, and a nonsuit should be entered. But the plaintiffs contend that as this was a valued policy, and as part of the goods to be carried upon the freight insured were on board at the time of the loss, they are entitled to claim their verdict for a total loss. Freight is the profit earned by the ship-owner in the carriage of goods on board his ship, and an insurance upon freight is an insurance made in order to secure that profit to the ship-owner in case he is prevented by any of the perils insured against from actually earning such profit. An insurance upon freight has no reference to the hull of the ship, or to its outfit for the voyage, both of which are protected by insurance upon the ship; but its sole object is to protect the assured from being deprived, by any of the perils insured against, of the profit he would otherwise earn by the carriage of goods. To recover, therefore, in any case upon a policy upon freight, it is incumbent on the assured to prove that unless some of the perils insured against had intervened to prevent it, some freight would have been earned; and where the policy is open, the actual amount of the freight, which would have been so earned, limits the extent of the underwriter's liability. In every action upon such a policy evidence is given, either that goods were put on board, from the carriage of which freight would result, or that there was some contract, under which the ship-owner, if the voyage were not stopped by the perils insured against, would have been entitled to demand freight; and in either case, if the policy be open, the sum payable to the ship-owner for freight, together with the premiums of insurance and commission thereupon, is the extent to which the underwriters are chargeable. In this case, therefore, as there was no contract under which the ship-owner could claim freight but for goods actually shipped on the homeward voyage, the assured could have made no claim, had this been an open policy, but to the extent of the actual freight on the fifty-five bales of cotton, which were shipped for this country, and of the premiums and commission thereon. And indeed that point has been settled against this very plaintiff in an action on an open policy on this very risk, in *Forbes and Another v. Cowie*, in Mr. Park's Addenda to the last edition, p. 604. The question then is, whether it makes any essential difference, that this is the case of a valued policy? And we are of

opinion, upon full consideration, that it does not. The object of valuation in a policy is to fix by agreement between the parties an estimate upon the subject insured, and to supersede the necessity of proving the actual value, by specifying a certain sum as the amount of that value. In fixing that sum, if the assured keep fairly within the principle of insurances, which is merely to obtain an indemnity, he will never go beyond the first cost, in the case of the goods; adding thereto only the premium and commission, and, if he think fit, the probable profit; and in the case of freight, he will not go beyond the amount of what the ship would earn, with the premiums and commission thereupon. The valuation, however, in the case of goods, looks to all the goods intended to be loaded; and in the case of freight, it looks to freight upon all the goods the ship is intended to carry upon the voyage insured; and if by the perils insured against in a valued policy on goods, part only of the goods intended to be covered be lost, the valuation must be opened, and the assured can only recover in respect of that part; and so, if by the perils insured against the freight of part only of the goods to be carried be lost, the assured can only recover in respect of that loss, according to the proportion which that part bears to the whole sum at which the entire freight was estimated in the valuation. If, for instance, the insurance be generally upon goods, and the goods intended to be protected be 500 hogsheads of sugar, and a valuation be made accordingly, but the ship by accident takes on board 100 only, and sails, and is afterwards lost by one of the perils insured against with those 100 on board, can it be contended that the assured shall recover to the full amount of the valuation, that is for the whole 500, when he has lost only 100? So in the case of freight, if the ship would carry 500 tons, and, in fixing the valuation, the assured calculate his freight upon 500 tons, but when he reaches the loading port he can get 10 tons only upon freight, and sails upon the voyage insured with those 10 tons only, is it to be allowed that if the ship be lost by any of the perils insured against, and he thereby lose freight upon 10 tons, he shall be entitled to the valuation which includes the freight upon 500 tons? And yet to this extent the plaintiff's argument in this case is carried. The proposition is monstrous: instead of consigning the policy, as it ought to be consigned, to a contract as nearly as may be of indemnity, against what may be lost in respect of freight by the perils insured against, it converts it into a contract of indemnity against a different class of accidents, which may operate to prevent the assured from being able to procure a full cargo upon freight, and may make it the interest of the assured, which it never ought to be, that a loss should happen. The court, therefore, will look for very strong authorities before they yield to such a proposition. It was pressed, upon the argument, that in the case of a valued policy, if any interest be proved to be on board, and there be no fraud, a total loss will entitle the assured to recover the sum specified in the valuation. And to that position we accede, with this limitation, that is, provided there is a total loss, by any of the

perils insured against, of the whole subject-matter of insurance to which the valuation applied, viz., of all the intended cargo of goods, where the insurance was on goods; and of all the intended freight, where the insurance was upon freight. But if it be meant to carry that position to this extent, that the underwriter is not at liberty to inquire what was intended to have been included in the valuation, or when he has ascertained that point, that he cannot reduce the sum below the valuation, by proving that a part only of what was included in the valuation has been lost by a peril insured against; we deny the position when so extended.¹ . . . In a case, therefore, circumstanced as this is, where the valuation was with reference to freight upon a complete cargo; where a complete cargo, or anything like a complete cargo, never was in fact obtained, and for all that appears never might have been obtained; where there was no contract by any person to load a complete cargo, or pay dead freight, but the ship was a mere seeking ship; we cannot feel ourselves warranted in saying that there has been a total loss by any peril insured against of that which the insurance was intended to cover, and which the valuation contemplated, viz., freight upon a complete cargo; but are obliged to pronounce that no loss by the perils insured against is made out beyond the loss of freight upon part of a cargo only, viz., upon the fifty-five bales of cotton; that the assured are therefore not entitled to recover a total loss, but an apportionment only, according to the measure of their actual loss: and as that apportionment has been already allowed to the plaintiffs, that there must be a new trial.²

HAIGH AND OTHERS, ASSIGNEES, v. DE LA COUR.

NISI PRIUS, COMMON PLEAS, 1812. 3 Camp. 319.

THIS was an action on a policy of insurance on goods valued at £5,000 on board the "Maria" at and from London to Pernambuco.

In this case the defendant had signed an adjustment, on invoices and bills of lading being produced to him which had been furnished by the assured, representing that goods above the value of £5,000 had been shipped by them on board the "Maria." These invoices were now proved to have been fictitious and the bills of lading to have been interpolated after they were signed by the captain. In fact, goods were shipped by the bankrupts to the value of £1,400 and no more. The ship was afterwards run away with and carried to the West Indies,

¹ Here were discussed *Shawe v. Felton*, *ante*, p. 815 (1801), and *Montgomery v. Egginton*, 3 T. R. 362 (1789). — Ed.

² *Acc.*: *Rickman v. Carstairs*, 5 B. & Ad. 651 (1833); *Tobin v. Harford*, 17 C. B. n. s. 528 (Ex. Ch. 1864); *Denoan v. Home and Colonial Assur. Co.*, L. R. 7 C. P. 341 (1872).

where the cargo was disposed of by a person whom the bankrupts put on board in quality of supercargo.

Shepherd, Serjt., for the plaintiffs, allowed they could not recover to the full amount of the valuation in the policy, but insisted that as there were some goods on board belonging to the bankrupts, the assignees had a right to the verdict *pro tanto*. This could only be looked upon as a case of short interest.

Sir JAMES MANSFIELD, C. J. If the bankrupts intended from the beginning to cheat the underwriters, the assignees can recover nothing. The fraud entirely vitiates the contract.

*Plaintiffs nonsuited.*¹

Shepherd and *Best*, Serjts., and *Copley*, for the plaintiffs.

Lens and *Vaughan*, Serjts., and *Campbell*, for the defendant.

BRUCE v. JONES.

EXCHEQUER, 1863. 1 H. & C. 769.

DECLARATION on a policy of insurance for £2,400 on the ship "Hero," on a voyage from Cardiff to Manilla, and in which the ship was valued at £3,200 and underwritten by the defendant for £125. The declaration alleged a total loss.

Plea (*inter alia*). That the plaintiff made other policies of insurance on the same ship on the same voyage, viz., a policy dated the 30th of July, 1860, in which the said ship was valued at £3,000, which said policy was underwritten for sums amounting altogether to £725; a policy dated the 8th May, 1861, in which the same ship was valued at £3,000, and the policy underwritten for £500; a policy dated the 20th June, 1861, in which the same ship was valued at £5,000, and underwritten for the sum of £3,450. Averments: that the said ship mentioned and insured in each of the said policies was the same ship, and the risk intended to be covered the same risk; that the said ship was lost after the making of the said policies, and that divers of the said several insurers upon the said ship, whose names were subscribed to the said policies other than the policy in the declaration mentioned, paid to the plaintiff, and the plaintiff accepted and received of and from the said underwriters, sums amounting altogether to the sum of £3,200, and the plaintiff then and thereby became satisfied and indemnified for the said loss of the said ship as agreed upon in the said policy in the declaration mentioned. Issue thereon.

At the trial, before WILLES, J., at the last Liverpool Summer Assizes, it appeared that the policy in question, which was dated the 6th August,

¹ In *Ionides v. Pender*, L. R. 9 Q. B. 531 (1874), s. c. quoted *ante*, p. 167 n., it was held that a marine policy is invalidated by non-disclosure of such excessive over-valuation as would be deemed material by a reasonable underwriter. — Ed.

1860, was effected at Liverpool for £2,400 on the plaintiff's ship "Hero," valued at £3,200, and was underwritten by the defendant for £125. The loss of the ship having been proved, the defendant gave in evidence three other policies effected by the plaintiff on the same ship for the same voyage, viz., a policy effected at Bristol, dated the 30th July, 1860, for £725, in which the ship was valued at £3,000; another effected at Aberdeen, dated the 8th May, 1861, for £500, in which the ship was valued at £3,000; and another effected in London, dated the 20th June, 1861, for £3,450, in which the ship was valued at £5,000. There was conflicting evidence as to the real value of the ship. The plaintiff had received from the underwriters of the Bristol policy £492 6s. 6d., from the underwriters of the Aberdeen policy £684 7s., and from the underwriters of the London policy £1,950, amounting in the whole to £3,126 13s. 6d.

The learned judge, in leaving the question of damage to the jury, told them that insurance was a contract of indemnity, and that, for the purpose of the present action and as between the plaintiff and defendant, the value agreed upon and stated in the policy must be taken as the real value of the ship, viz., £3,200, and that as the plaintiff was entitled to recover in respect of a total loss, he was entitled to be indemnified to that amount; but that the sums which the plaintiff had received on the three other policies, amounting to £3,126 13s. 6d., must be deducted from the agreed value; so that there would only be due on the policy on which this action was brought £73 6s. 6d., of which the defendant's proportion as one of the underwriters was £3 16s., which was all that the plaintiff was entitled to recover against him; that the fact that the ship had been valued at a larger sum in another policy ought not to be taken into consideration. The jury found a verdict for the plaintiff for £3 16s.

Brett, in last Michaelmas Term, obtained a rule *nisi* for a new trial, on the ground of misdirection as to the measure of damages; against which

Edward James (with whom was *Milward*) showed cause (Jan. 23). The direction of the learned judge was correct. The plaintiff is only entitled to recover from the defendant the balance of the amount insured, after giving credit for the sums already received by the plaintiff under the other policies. Insurance is a contract of indemnity: if there be an open policy, the assured is entitled to recover the value of the ship; but where there is a valued policy the sum stated in it is the agreed value as between the parties, and the assured cannot recover more. In *Bousfield v. Barnes*, 4 Camp. 228, the plaintiff had effected two policies, one for £600, valued at £6,000, and the other for £6,000, valued at £8,000. The ship having been wrecked, the underwriters paid him the £6,000, and he then sued upon the other policy. Evidence was adduced that the ship was worth more than £8,000, and on that ground it was held that he was entitled to recover. Lord Ellenborough there said: "I will take care that the assured do not

recover upon the whole more than the real value of the subject-matter insured. But I think it is not enough for the underwriters on a particular policy to show that the assured has received from another quarter the amount of the valuation in that policy, unless this amounts in point of fact to a complete indemnity." Where a person effects two policies of insurance in each of which the same value is declared, he is bound by that sum: *Irving v. Richardson*, 1 Moo. & R. 153; *Morgan v. Price*, 4 Exch. 615. [WILDE, B. — Insurance is a contract of indemnity as respects the true value; and therefore, to the extent to which the assured has been damnified he is entitled to recover. But where the policy is valued the assured is estopped from saying that he has sustained damage to a greater extent than the agreed value.] In *Park on Insurance*, vol. 2, p. 600, 8th ed., it is said: "Where a man has made a double insurance, he may recover his loss against which of the underwriters he pleases, but he can recover for no more than the amount of his loss." In *Lewis v. Rucker*, 2 Burr. 1167, 1171, Lord Mansfield, C. J., said: "The only effect of the valuation is fixing the amount of the prime cost; just as if the parties admitted it at trial; but in every argument, and for every other purpose, it must be taken that the value was fixed in such a manner as that the insured meant only to have an indemnity."

Brett and Quain, in support of the rule. It is not contended that an underwriter is liable to pay more than the agreed value of the ship as between him and the assured; but he is not entitled to any deduction in respect of sums received by the assured on other policies. The sum stated in each policy is not the actual but the agreed value of the ship. It is well known that the value of a ship varies according to the demand for shipping. It depends on the state of trade, not on the cost of the ship. A ship may be undervalued at one time and overvalued at another, and therefore to avoid all dispute the parties agreed to a value by which they shall be bound. Here the plaintiff, having sustained a total loss, is *prima facie* entitled to recover the agreed value. The defendant admits the loss, but gives in evidence policies between the plaintiff and other underwriters for the purpose of showing that he has been paid. But those documents being in evidence must be taken for all purposes. For instance, the London policy being given in evidence for the purpose of showing a payment under it of £1,950, it must be taken that at the time that policy was effected the ship was of the value stated in it, viz., £5,000, and therefore only two fifths of its value has been paid under that policy. Again, under the Bristol policy, £492 has been paid, which is only one sixth of the agreed value; and under the Aberdeen policy £684 has been paid, which is only seven thirty-seconds of the agreed value. This mode of calculation shows a much larger sum due to the plaintiff on the present policy than was found by the jury. In *Arnould on Insurance*, vol. 1, p. 346, 2d ed., it is said that the rule established by Lord Mansfield is as follows: "In case of over-insurance, the different sets of policies are considered as making

but one insurance, and are good to the extent of the value of the effects put in risk; the assured can recover on the different policies no more than their value, but he may sue the underwriters on either of the policies, and recover from those he so sues to the full extent of his loss, supposing it to be covered by the policy on which he elects to sue, leaving the underwriters on that policy to recover a ratable sum, by way of contribution, from the underwriters on the other policy." Reference is there made to *Newby v. Reed*, 1 W. Black. 416, which was a case of open policies, and the question is whether the same rule applies to valued policies in each of which a different value is stated. If the rule contended for by the defendant is to prevail, this strange consequence will follow, that supposing the plaintiff sued on all the policies except the London one, and recovered their full amount, he would receive upon those policies £3,625, and he might then sue upon the London policy and recover £1,375, being the difference between £3,625 and £5,000, the agreed value in the London policy. So that the amount which the plaintiff would be entitled to recover would depend upon which policy he first put in suit. The more rational rule is to take the average value of the four policies, by adding together the several agreed values in each and dividing it by four, which in this case would give £3,600 as the value of the ship.

POLLOCK, C. B. We are all of opinion that the rule ought to be discharged. I think my brother WILLES was quite right in his direction, and that it is fortified by authority and reason. The action is brought on a policy of insurance for £2,400, effected on a ship valued at £3,200. It appears that the ship was insured by other policies and that the assured has received on them £3,126 13s. 6d., and the question is whether he is entitled to recover more than the difference between that and £3,200, viz., £73 6s. 6d. The plaintiff seeks to recover more, on the ground that the sums which he has received on the other policies ought not to be taken into consideration. The learned judge who tried the cause did not adopt that view, and I think properly. He considered that, as between the plaintiff and defendant, the value of the vessel must be taken as £3,200, and it appears to me that is the correct view. It may happen that when a vessel is insured for a long time or a long voyage, her value may not be the same at the beginning as at the end of the voyage. More freight being carried might increase her value, or she might have met with an accident and have been so thoroughly repaired that her value might be considerably increased. But in general the value must be taken to be that which is stated in the policy. If that is binding upon the underwriter, so that he cannot give evidence of the real value of the vessel, and so prevent the assured from recovering the amount stated in the policy, the assured is equally bound by the agreed value, and if he has received that amount he has no further claim upon any other underwriter. If he has received less he can only recover on other policies the difference. Upon these grounds I think that the rule ought to be discharged.

MARTIN, B. I am of the same opinion. I admit that a judgment given in a matter of this kind is not altogether satisfactory, which arises from the circumstance that courts of law view policies of insurance in one light, whilst the assured views them in a totally different light. Courts of law are obliged to discuss these questions on the principle that the sum to be recovered is an indemnity for the value of the ship, but persons who insure entertain an entirely different notion, so that we have to decide on principles at variance with those of the parties when they enter into these contracts. It is therefore scarcely possible that the decision of a court of law can be satisfactory to them. If the practice between the ship-owner and the underwriter were founded on the principle alluded to by Lord Mansfield in his judgment in *Lewis v. Rucker*, 2 Burr. 1167, 1171, viz., "that the value is fixed in such a manner that the insured means only to have an indemnity," the matter would be plain. But that is not the mode in which ship-owners and underwriters do business. I remember a case respecting a ship the owner of which, who was a witness, proved that he had effected a policy and valued the ship upon a principle which had no reference whatever to its real value. He had opened a debtor and creditor account between himself and the ship, and insured the ship for the balance owing to him. A lawyer would say that a ship-owner had no right to insure on that principle, and that he ought to value the ship on the principle stated by Lord Mansfield, to which I have referred.

It seems to me in this case that the view taken by my brother WILLES was in accordance with authority. He considered that, by the agreement between the assured and the underwriters, the value of the ship was to be taken at £3,200, and that the plaintiff was entitled to recover that sum in respect of the loss of the ship. He then inquired what sum of money the assured had received, leaving out of consideration how he got it, and finding that he had received £3,126 13s. 6d., he treated it as if there had been a salvage of the ship, and the assured had received that amount after the ship was sold. He then placed that amount to the credit of the underwriter as against the £3,200, and he entirely dismissed from his consideration what was stated as the value of the ship in other policies between the plaintiff and individuals to whom the defendant was a stranger. According to the best judgment I can form on the matter, that is the more correct mode of estimating the damage. It is in accordance with the view taken by courts of law, that insurance is a contract of indemnity against the loss actually sustained. I am not insensible to the observation that the amount which the assured is entitled to recover may depend upon which policy he first puts in suit; but, in point of fact, each policy is a separate contract, and the assured must deal with each underwriter according to his particular contract.

CHANNELL, B. I am of the same opinion. The damages were assessed under the direction of the learned judge; and an application is made for a new trial on the ground that he misdirected the jury in

stating his view as to the measure of damage. The broad question is whether the plaintiff is entitled as against the defendant to damages to a greater amount than he has recovered. If so, there would be ground for granting a new trial; but, being of opinion that the damages were rightly assessed, it is unnecessary to consider whether any other mode of assessment should be resorted to. The plaintiff has recovered from the defendant, not his proportion of the £3,200, the agreed value in the policy, but his proportion of the difference between that sum and the amount which the plaintiff received on the three other policies. I think that is all the plaintiff is entitled to; and that, when the defendant is sued for his proportion upon a policy in which the ship is valued at £3,200, that must be taken as the value of the ship for the purpose of his liability; and the question is how far that is lessened by the sums received on other policies. I agree that some inconvenience may result from the rule now laid down, and it is not satisfactory to find that, if the order of suing on the policies had been inverted, a different amount would have been recovered. But I think that is in a great degree attributable to the character of these insurances, as explained by my brother Martin; and that, at all events, as the plaintiff has effected an insurance in which his ship is valued at £3,200, we must abide by the rule of law that, for the purpose of estimating the liability of the defendant, that amount must be taken as fixed by the policy.

*Rule discharged.*¹

¹ Other cases of inconsistent valuations are: *Kenny v. Clarkson*, 1 Johns. 385 (1806); *Murray v. Ins. Co. of Pennsylvania*, 2 Wash. C. C. 186 (1808); *Watson v. Ins. Co. of North America*, 3 Wash. C. C. 1 (1811).—ED.

SECTION I. (*continued*).

(C) TOTAL LOSSES, ACTUAL AND CONSTRUCTIVE.

HAMILTON v. MENDES.

KING'S BENCH, 1761. 2 Burr. 1198.¹

THIS was a special case reserved at Guildhall, at the Sittings there before Lord MANSFIELD, after Michaelmas Term, 1760, in an action brought against the defendant, as one of the insurers, upon a policy of insurance from Virginia or Maryland to London, of a ship called the "Selby," and of goods and merchandise therein, until she shall have moored at anchor twenty-four hours in good safety.

The case stated for the opinion of the court was as follows: —

That the ship "Selby," mentioned in the policy, being valued at £1,200, and the plaintiff having interest therein, caused the policy in question to be made; and the same was accordingly made, in the name of John Mackintosh, on behalf and for the use and benefit of the plaintiff, and which was subscribed by the defendant, for the sum of £100.

That the ship being of the burthen of two hundred tons, was, on the 28th of March, 1760, in good safety at Virginia, where she took on board 192 hogsheads of tobacco, to be delivered at London.

That on the said 28th day of March, she departed and set sail from Virginia for London; and on the 6th day of May following, as she was sailing and proceeding in her said voyage, was taken by a French privateer called the "Aurora," of Bayonne, Captain Jean Piena Lesea commander, who, with his company, were subjects of the French king, then being at war with our lord King George the Second.

That at the time of the capture the "Selby" had nine men on board, and the captain of the said privateer took out six, besides the captain, Dorsdill, leaving only the mate and one man on board.

That the French put a prize-master and several men on board the said ship "Selby," to carry her to France.

That as the French were carrying the said ship "Selby" towards France, on the 23d day of the said May, she was retaken off Bayonne, by the "Southampton," an English man-of-war, commanded by Captain Antrobus, who sent her into Plymouth, where she arrived the 6th day of June following.

That the plaintiff living at Hull, as soon as he was informed what had befallen his said ship the "Selby," wrote a letter, on the 23d day of June, to his agent, John Mackintosh, living in London, to acquaint the defendant, "That the plaintiff did from thenceforth abandon to

¹ s. c., *sub nom.* Hamilton v. Mendez, 1 W. Bl. 276. — Ed.

him his interest in the said ship, as to the said £100 by the defendant insured."

That the said John Mackintosh, on the 26th day of the said June, acquainted the defendant with an offer to abandon the ship; to which the defendant said, "He did not think himself bound to take to the ship; but was ready to pay the salvage and all other losses and charges that the plaintiff sustained by the capture."

That upon the 19th day of August the said ship "Selby" was brought into the port of London, by the order of the owners of the cargo and the re-captors.

That the said ship "Selby" sustained no damage from the capture.

That the whole cargo of the said ship "Selby" was delivered to the freighters at the port of London, who paid the freight to Benjamin Vaughan, without prejudice.

The question therefore submitted to the opinion of the court in this case is, "Whether the plaintiff, on the said 26th day of June, had a right to abandon, and hath a right to recover as for a total loss?" If he is entitled to recover for a total loss, then the jury find a verdict for the plaintiff, damages £98, costs 40s. But if the court shall be of opinion that he had no right to abandon on the said 26th day of June, or he ought only to recover an average loss, then the jury find a verdict for the plaintiff, damages £10, costs 40s.

Mr. *Morton* and Mr. *Norton*, for the plaintiff.

Mr. *Aston* and Mr. *Gould*, for the defendant.

Cur. adv.

Lord MANSFIELD now delivered the resolution of the court, having first stated the case, as settled at *nisi prius*.

The plaintiff has averred in his declaration, as the basis of his demand for a total loss, "that by the capture the ship became wholly lost to him."

The general question is, Whether the plaintiff, who at the time of his action brought, at the time of his offer to abandon, and at the time he was first apprised of any accident having happened, had only, in truth, sustained an average loss, ought to recover for a total one?

In support of the affirmative, the counsel for the plaintiff insisted upon the four following points:—

1st. That by this capture the property was changed, and therefore the loss total forever.

2dly. If the property was not changed, yet the capture was a total loss.

3dly. That when the ship was brought into Plymouth, particularly on the 26th of June, the recovery was not such as, in truth, changed the totality of the loss into an average.

4thly. Supposing it did, yet, the loss having once been total, a right vested in the insured to recover the whole upon abandoning; which right could never afterwards be divested or taken from him by any subsequent event.

As to the first point, If the change of property was at all material as between the insurer and insured, it would not be applicable to the present case, because, by the marine law received and practised in England, there is no change of property, in case of a capture, before condemnation; and now, by the act of Parliament, in case of a recapture, the *jus postliminii* continues forever.¹

I know, many writers argue, between the insurer and insured, from the distinction, "whether the property was or was not changed by the capture, so as to transfer a complete right from the enemy to a recaptor or neutral vendee, against the former owner." But arbitrary notions concerning the change of property by a capture, as between the former owner and a re-captor or vendee, ought never to be the rule of decision, as between the insurer and insured upon a contract of indemnity, contrary to the real truth of the fact. And therefore I agree with the counsel for the plaintiff, upon their second point, "that by this capture, while it continued, the ship was totally lost," though it be admitted, "that the property, in case of a recapture, never was changed, but returned to the former owner."

The third point depends, as every question of this kind must, upon the particular circumstances. It does not necessarily follow that, because there is a recapture, therefore the loss ceases to be total.² . . .

Therefore it is most clear that upon the 26th of June, the ship had sustained no other loss by reason of the capture than a short temporary obstruction, and a charge which the defendant had offered to pay and satisfy.

This brings the whole to the fourth and last point.

The plaintiff's demand is for an indemnity. His action, then, must be founded upon the nature of his damnification, as it really is, at the time the action is brought. It is repugnant, upon a contract of indemnity, to recover as for a total loss, when the final event has decided that the damnification, in truth, is an average, or perhaps no loss at all.

Whatever undoes the damnification, in whole or in part, must operate upon the indemnity in the same degree. It is a contradiction in terms to bring an action for indemnity, when, upon the whole event, no damage has been sustained. This reasoning is so much founded in sense and the nature of the thing that the common law of England adopts it (though inclined to strictness). The tenant is obliged to indemnify his landlord from waste; but if the tenant do, or suffer waste to be done, in houses, yet if he repair before any action brought, there lies no action of waste against him;³ but he cannot plead *non fecit vas-tum*, but the special matter. The special matter shows that the injury being repaired before the action brought, the plaintiff had no cause of action, and whatever takes away the cause takes away the action.

Suppose a surety sued to judgment, and afterwards, before an action

¹ 29 G. II. c. 34, s. 24. — REP.

² The discussion of this point has been omitted. — ED.

³ Co. Lit. 53 a. — REP.

brought, the principal pays the debt and costs, and procures satisfaction to be acknowledged upon record; the surety can have no action for indemnity, because he is indemnified before any action brought. If the demand, or cause of action, does not subsist at the time the action is brought, the having existed at any former time can be of no avail.

But in the present case, the notion of a "vested right in the plaintiff to sue as for a total loss before the re-capture," is fictitious only, and not founded in truth; for the insured is not obliged to abandon, in any case: he has an election. No right can vest as for a total loss till he has made that election. He cannot elect before advice is received of the loss; and if that advice shows the peril to be over, and the thing in safety, he cannot elect at all; because he has no right to abandon when the thing is safe.

Writers upon the marine law are apt to embarrass general principles with the positive regulations of their own country; but they seem all to agree "that if the thing is recovered before the money paid, the insured can only be entitled according to the final event."¹ . . .

The present attempt is the first that ever was made to charge the insurer as for a total loss upon an interest policy after the thing was recovered. . . .

But without dwelling longer upon principles or authorities, the consequences of the present question are decisive. It is impossible that any man should desire to abandon in a case circumstanced like the present but for one of two reasons, viz., either because he has over-valued, or because the market has fallen below the original price. The only reasons which can make it the interest of the party to desire, are conclusive against allowing it.

It is unjust to turn the fall of the market upon the insurer, who has no concern in it, and who could never gain by the rise. And an over-valuation is contrary to the general policy of the marine law, contrary to the spirit of the Act of 19 G. II., a temptation to fraud, and a source of great abuse; therefore no man should be allowed to avail himself of having over-valued.

If the valuation be true the plaintiff is indemnified by being paid the charge he has been put to by the capture. If he has over-valued, he will be a gainer if he is permitted to abandon; and he can only desire it because he has over-valued. This was avowed upon the first argument, and that very reason is conclusive against its being allowed.

The insurer, by the maritime law, ought never to pay less upon a contract of indemnity than the value of the loss, and the insured ought never to gain more. Therefore if there was occasion to resort to that argument the consequence of the determination would alone be sufficient upon the present occasion.

But, upon principles, this action could not be maintained as for a total loss, if the question was to be judged by the strictest rules of

¹ Here, and in subsequent parts of the opinion, the discussion of the authorities has been omitted. — ED.

common law; much less can it be supported for a total loss, as the question ought to be decided, by the large principles of the marine law, according to the substantial intent of the contract and the real truth of the fact.

The daily negotiations and property of merchants ought not to depend upon subtleties and niceties, but upon rules, easily learned and easily retained, because they are the dictates of common sense, drawn from the truth of the case.

If the question is to depend upon the fact, every man can judge of the nature of the loss before the money is paid; but if it is to depend upon speculative refinements, from the law of nations, or the Roman *jus postliminii* concerning the change or reversion of property, no wonder merchants are in the dark, when doctors have differed upon the subject from the beginning, and are not yet agreed.

To obviate too large an inference being drawn from this determination I desire it may be understood that the point here determined is, "That the plaintiff, upon a policy, can only recover an indemnity according to the nature of his case at the time of the action brought, or (at most) at the time of his offer to abandon."

We give no opinion how it would be in case the ship or goods be restored in safety, between the offer to abandon and the action brought; or between the commencement of the action and the verdict. And particularly I desire that no inference may be drawn, "that in case the ship or goods should be restored after the money paid as for a total loss, the insurer could compel the insured to refund the money and take the ship or goods." That case is totally different from the present, and depends, throughout, upon different reasons and principles.

Here the event had fixed the loss to be an average only, before the action brought, before the offer to abandon, and before the plaintiff had notice of any accident, consequently before he could make an election.

Therefore, under these circumstances, we are of opinion "that he cannot recover for a total, but for an average loss only;" the quantity of which is estimated and ascertained by the jury.

*The judgment must be entered up as for the average loss stated in the case.*¹

¹ See *Bainbridge v. Neilson*, 10 East, 329 (1808); *Ruys v. Royal Exchange Assur. Corp.*, [1897] 2 Q. B. 135. — ED.

GARDINER AND OTHERS v. SMITH.

SUPREME COURT OF NEW YORK, 1799. 1 Johns. Cas. 141.

THIS was an action on a policy of insurance on goods "at and from New York to any port or ports in Jamaica, and twenty-four hours after the goods, as named in the margin, are landed in Jamaica." The policy was against the usual risks, and also against the risk of contraband and illicit trade.

The plaintiff declared for a total loss by seizure for illicit trade. On the trial before Mr. Justice RADCLIFF, at the last March circuit in the city of New York, it appeared that the goods as mentioned in the margin of the policy, were duly shipped on the voyage insured; that they consisted partly of dry goods which were illicit by the laws of Jamaica, and partly of lumber and provisions which were not illicit; that the vessel and goods arrived at Kingston in Jamaica, on the 12th October; that the vessel was duly entered, and on the 14th of October began to discharge her cargo. On that day she put on shore her deck lading, and on the day following she discharged part of the cargo from the hold; the next day being Sunday, nothing was done, but early in the succeeding day, to wit, the 17th of October, while proceeding in the further discharge of the cargo, the vessel and the remaining goods on board, the quantity of which was unknown, were seized by the custom-house officers of the port; the greater part of the dry goods had been landed, and some of them which had been so landed were put into a store, and were also seized, but part of them had been on shore for twenty-four hours. Of the above-mentioned goods, there were afterwards libelled in the Court of Admiralty at Jamaica, as having become forfeited, 5,000 pieces of nankeen, 55 pieces of linen, and 74 pieces of painted cloth, and upon computation it appeared that the value of the articles saved was less than half the amount insured. The libel was also given in evidence, but no sentence of condemnation was produced.

The plaintiff on receiving notice of the loss, which was accompanied with information of the articles saved, consisting of lumber, provisions, and some of the dry goods, abandoned to the underwriters, and offered the usual proof of loss and interest. The consignee of the goods sold those which were reported to be saved, and rendered to the plaintiff an account of sales which, however, did not comprise as many goods as would be equal to the difference between those shipped and the articles specified in the libel. The consignee afterwards sent to New York a quantity of rum and sugar towards the payment of the balance of his account, which was partly composed of the proceeds of the articles saved. On the arrival of the rum and sugar, the plaintiff offered to the underwriters, rum at the first cost and charges, equal to the amount of the proceeds of the goods saved, which they refused to accept, and the rum was afterwards sold by the plaintiff and sustained a loss.

The judge directed the jury, that by the true construction of the policy, the risk continued upon all the goods insured until twenty-four hours after they were all landed; and informed them that in his opinion the plaintiffs were entitled to recover as for a total loss.

The jury found accordingly, for the plaintiffs for a total loss, crediting the underwriters for the proceeds of the articles saved according to the account of sales, and debiting them for the loss on the rum. It was agreed by the parties, that if the court should be of opinion that the adjustment for a total loss was right, and the debit for the loss of the rum was wrong, then the debit should be deducted proportionably from the amount of the verdict.

On the part of the defendant three points were made:—

1. Whether the policy ought to be construed to protect all the goods until all of them were landed.

2. Whether the plaintiffs were entitled to recover for a total or a partial loss.

3. Whether the loss on the remittance of the rum and sugar was chargeable to the defendants.

Harrison, for the plaintiffs.

B. Livingston, for the defendant.

LANSING, C. J. This was a voyage undertaken expressly for the purpose of illicit trade in a foreign country. A policy on such a voyage against our own laws would be void, but we are not bound to declare it void when merely contravening the positive regulations of another state. On account of the nature of the voyage, the insurance in point of time, was extended to twenty-four hours after the goods should be landed. A protection against the risk of seizure until they should be so landed, was a direct and important stipulation in the contract, and the insurance being entire, we are of opinion that the risk continued on the entire goods until twenty-four hours after all of them were landed. This is the correct sense of the terms of the policy, and it would be inconvenient to admit a different construction. The risk cannot reasonably be divided and applied to separate parcels. It would be difficult if not impossible, under the usual circumstances of such a voyage, to descend to the minute details which would be requisite, and to distinguish the precise time of landing each article.

As to the second question, it is admitted that, by a computation, the accuracy of which is not denied, the value of the goods saved did not amount to half the value insured. The loss was therefore total, according to the rule which has been established where a moiety is lost. The plaintiffs having abandoned, are therefore entitled to recover for a total loss.

The last point respects the conduct of the consignee. After the abandonment he became the agent of the assurer, and the disposition of the goods saved as made by him, while he acted *bona fide*, ought to be at the risk and for the benefit of the assurer. The loss on the sugar and rum, in which the proceeds of the property saved were invested,

ought, therefore, to be charged to the defendant. The plaintiffs, on the arrival of these articles, tendered to the defendant the rum only, but it appears that the rum and sugar were part of a mixed cargo, which was the product of different funds, and difficult to be distinguished; that the sugar was not withheld from an improper motive, but omitted to be tendered through mistake, and that the assurer wholly declined having anything to do with the shipment. Under such circumstances attending a commercial transaction, and considering that the defendant refused to accept any part of the shipment, I think the strictness of a complete tender may well be dispensed with, and that the plaintiff is entitled to judgment on the verdict generally.

The other judges concurred, except on the last point, as to which they were of opinion that the defendant was entitled to a deduction for a proportional part of the rum and sugar, by a calculation to be made on the product of the whole cargo.

Judgment for the plaintiffs accordingly.¹

DUTILH v. GATLIFF.

SUPREME COURT OF PENNSYLVANIA, 1806. 4 Dall. 446.

THE following case was stated for the opinion of the court:—

“Case. On the 24th of September, 1799, the defendant, Samuel Gatliff, underwrote seven hundred and fifty dollars upon a policy of insurance on the schooner ‘Little Will,’ belonging to John Dutilh and Thomas Lillibridge, for whom the plaintiff was agent, on a voyage at and from Philadelphia to Havanna.

“On the 26th of September, 1799, the ‘Little Will’ sailed on her voyage from Philadelphia for Havanna, and on the 8th day of October following she was captured by three British privateers, and carried into the port of Nassau, New Providence, where she arrived on the 13th of the same month.

“Upon her arrival in Nassau the said schooner was libelled in the Admiralty Court, and on the 9th day of November following was regularly acquitted; and in the whole she remained thirty-seven days at Nassau, during thirty-five of which she was in custody of the captors; but the fact of her acquittal was not known to the plaintiff until subsequent to the abandonment hereafter mentioned, although it was known to John Dutilh, one of the owners, and supercargo, who was with her at Nassau.

¹ On the American fifty per cent rule, see also *Ludlow v. Columbian Ins. Co.*, 1 Johns. 335 (1806); *Vandenhoevel v. United Ins. Co.*, 1 Johns. 406 (1806); *Wood v. Lincoln and Kennebeck Ins. Co.*, 6 Mass. 479 (1810); *Ralston v. Union Ins. Co.*, 4 Binn. 386 (1812); *Marcadier v. Chesapeake Ins. Co.*, 8 Cranch, 39 (1814); *Peters v. Phoenix Ins. Co.*, 3 S. & R. 25 (1817); *Peele v. Merchants Ins. Co.*, 3 Mason, 27, 58–62, 69–70 (1822); *Deblois v. Ocean Ins. Co.*, 16 Pick. 303, 309–310 (1835). — ED.

“On the 13th day of November the plaintiff wrote the letter of abandonment, enclosing the papers therein referred to, which was received by the defendant the same day.

“On the 20th November the said schooner sailed from Nassau for Havanna, where she arrived on the 21st of the same month, and sold her cargo, except three boxes plundered at New Providence. Afterwards the said schooner sailed from Havanna for Philadelphia, where she arrived on the 26th or 27th of February, in the year 1800, with a cargo of sugars, on which freight became due and was received by Stephen Dutilh, for the benefit of those who were entitled to it. Each party refusing to accept the schooner, she was sold for wharfrage, and the whole proceeds of sale applied to the payment thereof.

“The schooner ‘Little Will’ was American property, as warranted.

“The question for the court is, whether the plaintiff is entitled to recover as for a *total* loss?

“If the court shall be of opinion that the loss was total, then it shall be referred, in the usual form, to three persons, to be appointed by the court, to ascertain what is due, after the legal and just deductions.

“If the court shall be of opinion it was not a total loss, it shall, in like manner, be referred to three referees, or any two of them, to be appointed by the court, to ascertain the partial loss to which the defendant is liable.

“*J. Ingersoll*, for the plaintiff.

“*W. Lewis*, for the defendant.”

After argument, the chief justice delivered the unanimous opinion of the court.

TILGHMAN, chief justice. On the case stated, the question submitted to the court is, whether the plaintiff is entitled to recover for a total loss?

In resolving this question I shall divide it into two points.

1st. Did there ever exist a *total* loss?

2d. Supposing that there once existed a total loss, has any circumstance occurred which excludes the plaintiff from recovering for more than a *partial* loss?

1st. The case before us includes one of the risks expressly mentioned in the policy, *a taking at sea*. But it has been objected that this taking was not by an enemy; and that when a belligerent takes a neutral, it is to be presumed that the taking is only for the purpose of searching for the property of his enemy, or goods contraband of war; and that in the end justice will be done to the neutral. To a certain extent there is weight in this distinction; but it must not be carried too far. At the time when the capture in question was made the United States acknowledged the right of the British to detain their vessels for the purpose of a reasonable search. The bare taking of the vessel, therefore, could by no means constitute a loss; and if under suspicious circumstances she should be carried into port, to afford an opportunity for a complete investigation, perhaps, even that ought not of itself to be

considered as a total loss. On this, however, I give no opinion. But when the captor, having carried the vessel into port, and completed the examination of the cargo and papers, instead of discharging her, proceeds to libel her as prize, I think the loss is complete. The property is no longer subject to the command of the owner, and it is unreasonable that he should wait the event of judicial proceedings, which may continue for years. The case of an embargo is less strong; because, there the confiscation of the property is not intended, and a temporary interruption of the voyage is all that in general is to be apprehended. Yet the assured is not obliged to wait the result, but may abandon immediately on receipt of intelligence of the embargo. Not many judicial decisions have been produced on the point in question. Where principles are strong it is sufficient that there have been no decisions to the contrary. It appears, however, that in the State of New York the precise point has been determined. In the case of *Mumford v. Church*, decided in the Supreme Court of New York, July term, 1799, the assured recovered for a total loss, where there was a capture, carrying into port, and libelling by a British captor, although after the abandonment the property was restored. It is necessary that some general rule should be established, some line drawn, by which the assured may know at what time he has a right to abandon. In most cases the voyage is extremely injured by proceedings in the Court of Admiralty, and the event is doubtful. For it cannot be denied that of late years such extraordinary occurrences have taken place in war and politics as have very much affected the principles and practice of foreign Courts of Admiralty. Whatever may be said of the law of nature and nations, and the immutable principles of justice, we see very plainly that the courts obey the will of the sovereign power of their country; and this will fluctuates with the circumstances of the times. I am, therefore, of opinion that, both by the words and spirit of a policy of insurance, the assured may abandon when he receives intelligence of the libelling of his vessel.

2d. This brings me to the consideration of the second point. Has any circumstance occurred which limits the plaintiff to a recovery for only a partial loss?

It is contended that such an event has occurred; that the vessel was acquitted by the decree of the Court of Admiralty; that after acquittal she proceeded on her voyage, and that one of the owners was on the spot, and knew of the acquittal. I do not think there is much weight in the circumstance of one of the owners being on the spot; because the general agent of all the owners was in Philadelphia. This general agent effected the insurance, and conducted all the business with the underwriters, and the owner, who was in New Providence, gave him intelligence of what occurred from time to time, and by no means intended, from anything that appears, to restrain him from making an abandonment. It is true that the vessel proceeded on her voyage after she was restored; but it is not stated, nor can the court presume, that

any of the owners acted in a manner inconsistent with the abandonment made by their agent. It was proper, at all events, to pursue the voyage for the benefit of whoever might be interested in it. This is the usual practice, and a practice authorized by the policy, and very much for the advantage of the underwriters.

The only difficulty in the case before the court arises from this circumstance, that before the action was brought the vessel was restored, and even at the time of the abandonment there was a decree of acquittal, although restitution does not appear to have been actually made till some days after. The counsel for the defendant have relied much on the opinion of Lord Mansfield in the case of *Hamilton v. Mendez*, to establish this principle, that a policy of insurance, being in its nature a contract of indemnity, the plaintiff can recover no more than the amount of his actual loss at the commencement of the action. There is no doubt of the soundness of the principle — I mean that a policy is a contract of indemnity. The only question is, at what period the rights of the parties are to be tested by this principle, whether at the time of abandonment or at the commencement of the action. I have considered attentively the case of *Hamilton v. Mendez*. It must be obvious to every one that the decision in that case was perfectly right. It was simply this: that a man shall not be permitted to abandon and recover for a total loss, when he knew at the time of his offer to abandon that his property, which had been lost, was restored, and the voyage very little injured. But in reading the opinion of Lord Mansfield we find a want of accuracy with which that great man was seldom chargeable. Sometimes it appears as if he thought the period for fixing the rights of the insurers and insured was the commencement of the suit; sometimes the time of abandonment; and sometimes he even seems to extend his ideas so far as the time of the verdict. But finally he explicitly declares that he decides nothing but the point before him. He seems to have felt a little sore at the improper application of some general expressions used by him in the case of *Goss v. Withers*. Anxious to cut off all pretense for doing the same in *Hamilton v. Mendez*, he has taken too much pains to avoid the possibility of misrepresentation. Hence his argument, considered in the detail, is not altogether clear and consistent. Upon the whole of this case of *Hamilton v. Mendez*, I think it most safe to confine its authority to the point actually decided, which was very different from that we are now considering. Some period must be fixed for determining the right of the parties. To limit it to the time of commencing the action would be of little service to the insurers; for the law being once so established, an action would be brought in every instance on the first default of payment. The time of abandonment seems the most natural and convenient period; because the assured must make his election to abandon or not in a reasonable and short time after he hears of the loss, and the property, being transferred by the abandonment, can never after be reclaimed by the assured. Want of mutuality is want of justice.

There is no reason why the assured should be bound, but the assurer left free to take advantage of events subsequent to the abandonment.

It has been contended by the plaintiff's counsel that the right to abandon would not have been affected, even if the property had been restored at the time of abandonment, because the restitution was unknown to the plaintiff. As to this, I give no opinion. It is unnecessary; because it is stated that the vessel remained in the custody of the captors at the time of abandonment. The defendant's counsel have urged that this was the fault of the captain, or of one of the owners, who was at New Providence; because, after a decree of acquittal, a writ of restitution might have been sued out. But it not being stated that there was any fault or negligence in the captain or owner, I do not think that the court can infer it. It being stated that the vessel remained in the custody of the captors, we must presume that the custody was legal. Whether for the purpose of giving the captors an opportunity of entering an appeal, or for what other purpose it was that the restitution was delayed, we are at a loss to determine. But as restitution was not actually made, and as the plaintiff was ignorant even of the decree of acquittal, his right to abandon remained unimpaired.

Upon the whole, we are of opinion *that the plaintiff is entitled to recover for a total loss.*

Judgment for the plaintiff.¹

ROUX v. SALVADOR.

EXCHEQUER CHAMBER, 1836. 3 Bing. N. C. 266.²

ASSUMPSIT on a policy of insurance, subscribed by the defendant for £200.

Maule, for the plaintiff.

Sir *J. Campbell*, Attorney-General, *contra*.

Cur. adv. vult.

LORD ABINGER, C. B. This was a writ of error upon a judgment of the Court of Common Pleas, in an action on a policy of insurance upon goods by the "Roxalane" at and from any ports or places in South

¹ See *Rhineland v. Insurance Co.*, 4 Cranch, 29 (1807); *Orient Ins. Co. v. Adams*, 123 U. S. 67 (1887).

On the necessity of prompt notice of election to abandon, see *Mitchell v. Edie*, 1 T. R. 608 (1787); *Allwood v. Henckell*, 1 Park Ins. 8th ed. 399 (N. P. 1795); *Anderson v. Royal Exchange Assur. Co.*, 7 East, 38 (1805); *Smith v. Newburyport M. Ins. Co.*, 4 Mass. 668 (1808); *Gernon v. Royal Exchange Assurance*, 6 Taunt. 383 (1815), s. c. 2 Marsh. 88; *Mellon v. Louisiana State Ins. Co.*, 5 Martin, n. s. 563 (1827); *Reynolds v. Ocean Ins. Co.*, 22 Pick. 191 (1839); *Howland v. India Mut. Ins. Co.*, 131 Mass. 239, 253, 256-257 (1881).—ED.

² The reporter's statement has been omitted. In the Common Pleas the case is reported in 1 Bing. N. C. 526 (1835).—ED.

America, or to a port in France or the United Kingdom, with various liberties, not material to be mentioned. By a written memorandum at the foot of the policy, the insurance was declared to be on hides shipped at Valparaiso free of average, unless the ship should be stranded; and, in case of average loss, the underwriters were to pay the expense of washing and drying in full. The declaration contains the usual averments, and states that the hides were shipped at Valparaiso; that the vessel set sail with them on board for Bordeaux, a port in France; and that in the course of the voyage, the hides became lost by the perils of the sea, and never arrived at Bordeaux.

The plea is the general issue.

It appears by the record that the cause was tried, and a special verdict found, which after stating the facts necessary to support those parts of the declaration upon which no question arises, sets forth the loss, in substance as follows: That the hides of the value of £1,000 having been shipped in the vessel, she set sail on her voyage; in the progress of which she encountered perils of the sea, and sprung a leak, in consequence of which she was compelled to put into Rio Janeiro, being the nearest port; that her cargo was taken out and landed, when it was found, as the fact was, that the hides were damaged by the perils of the sea; that by reason of their being wetted by the water issuing through the leak, and of the consequent dampness of the hold, they were undergoing a process of fermentation, which could not be checked; and that in consequence of their progressive putrefaction it was impossible to carry them, or any part of them, in a saleable state, to the termination of the voyage; and that if it had been attempted to take them to Bordeaux they would in consequence of the putrefaction have lost the character of the hides before their arrival. The special verdict further states, that the hides were in consequence sold at Rio Janeiro by order of the French consul there, for the sum of £270; that they were purchased to be tanned, and were afterwards tanned; that the ship being repaired, set sail for Bordeaux, and was stranded upon entering the Garonne; and that the earliest intelligence of the damage and sale were received at the same time in a letter from Bordeaux.

The judgment is entered for the defendant: to set aside which judgment this writ of error is brought. The stranding of the vessel upon entering the river Garonne in her passage to Bordeaux, is introduced into the special verdict, with a view to meet the supposed case of a partial loss: and it has been contended, that the fact of stranding, being a condition to let in the claim for a partial loss, it is not material whether the stranding takes place whilst the goods insured are on board, or after they have been landed. We are not prepared to adopt that conclusion: but the view we take of this case renders it unnecessary to enter into any discussion of the argument, or to pronounce any opinion upon it. It appears from the report of the judgment of the Court of Common Pleas upon this case, that the learned judges were of opinion that there was a constructive total loss, in case it had been

followed by an abandonment to the underwriters; and that their judgment for the defendant was grounded upon the want of such abandonment.

It has been urged before us in support of the judgment, first, that there was no total loss; secondly, that if there were any circumstances which might have amounted to more than an average or partial loss, they were not such as without an abandonment could have been converted into a total loss. Upon the first point it has been contended, that even if these goods had not been excepted from average loss by the memorandum, unless upon the condition of stranding, there would not in this case have been a total loss, and that, *à fortiori*, being goods so expressly excepted from average loss by the memorandum, they could not become totally lost so long as any part of them remained in specie at the termination of the risk; that the risk terminated when the goods were taken out at Rio de Janeiro, when they were so far from being destroyed by the perils of the sea, that they were actually sold as hides, and were capable of being tanned.

It appears to us that there is no ground whatever for this assumed distinction between goods that are subject to a partial loss unconditionally, and goods excepted by the memorandum from such a loss. The interest which the assured may have in certain cases to convert a partial loss into a total loss, may be a fair argument to a jury upon a doubtful question of fact as to the nature of the loss or the motive for an abandonment; and, in the same view that interest has been adverted to occasionally by judges, where the conclusions to be drawn from facts upon a special case, or upon a motion for a new trial, were open to discussion. But there is neither authority nor principle for the distinction in point of law; whether a loss be total or partial in its nature, must depend upon general principles. The memorandum does not vary the rules upon which a loss shall be partial or total; it does no more than preclude the indemnity for an ascertained partial loss, except on certain conditions. It has no application whatever to a total loss, or to the principle on which a total loss is to be ascertained.

Dismissing this distinction then, the argument rests upon the position, that if, at the termination of the risk, the goods remain in specie, however damaged, there is not a total loss. Now this position may be just, if by the "termination of the risk," is meant the arrival of the goods at their place of destination according to the terms of the policy. But there is a fallacy in applying those words to the termination of the adventure before that period by a peril of the sea. The object of the policy is to obtain an indemnity for any loss that the assured may sustain by the goods being prevented by the perils of the sea from arriving in safety at the port of their destination. If, by reason of the perils insured against, the goods do not so arrive, the risk may in one sense be said to have terminated at the moment when the goods are finally separated from the vessel: whether, upon such an event, the loss is total or partial, no doubt, depends upon circumstances. But the ex-

istence of the goods, or any part of them, in specie, is neither a conclusive, nor, in many cases, a material circumstance to that question. If the goods are of an imperishable nature, if the assured become possessed or can have the control of them, if they have still an opportunity of sending them to their destination, the mere retardation of their arrival at their original port may be of no prejudice to them beyond the expense of re-shipment in another vessel. In such a case, the loss can be but a partial loss, and must be so deemed, even though the assured should, for some real or supposed advantage to themselves, elect to sell the goods where they have been landed, instead of taking measures to transmit them to their original destination. But if the goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of that damage, in such a state, though the species be not utterly destroyed, that they cannot with safety be reshipped into the same or any other vessel; if it be certain that, before the termination of the original voyage, the species itself would disappear, and the goods assume a new form, losing all their original character; if, though imperishable, they are in the hands of strangers not under the control of the assured; if by any circumstance over which he has no control they can never, or within no assignable period, be brought to their original destination; in any of these cases, the circumstance of their existing in specie at *that forced termination* of the risk, is of no importance. The loss is, in its nature, total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle.¹ . . . In the case before us the jury have found that the hides were so far damaged by a peril of the sea, that they never could have arrived in the form of hides. By the process of fermentation and putrefaction, which had commenced, a total destruction of them before their arrival at the port of destination, became as inevitable as if they had been cast into the sea or consumed by fire. Their destruction not being consummated at the time they were taken out of the vessel, they became in that state a salvage for the benefit of the party who was to sustain the loss, and were accordingly sold; and the facts of the loss and the sale were made known at the same time to the assured. Neither he nor the underwriters could at that time exercise any control over them, or by any interference alter the consequences. It appears to us, therefore, that this was not the case of what has been called a constructive loss, but of an absolute total loss of the goods: they could never arrive; and, at the same moment when the intelligence of the loss arrived, all speculation was at an end. It has indeed been strenuously contended before us, that the sale of the hides whilst they remained in specie, rendered abandonment necessary to make the

¹ Here were stated *Hunt v. Royal Exchange Assurance*, 5 M. & S. 47 (1816); *Anderson v. Wallis*, 2 M. & S. 240 (1813); *Glennie v. London Assur. Co.*, 2 M. & S. 371 (1814); *Thompson v. Royal Exchange Assur. Co.*, 16 East, 214 (1812); and *Anderson v. Royal Exchange Assur. Co.*, 7 East, 38 (1805). — Ed.

loss total; that the money produced at the sale became vested in the assured; that he had an undoubted right to keep it if he thought proper, and to treat the loss as partial; and that, wherever it is in his power to treat the loss as partial, an abandonment is necessary to make it a total loss. The assured certainly has always an option to claim or not; but his abstaining from his right does not alter the nature of it: and if it be true that the proceeds of the sale vested in him, they would equally have done so, if, instead of being sold in specie, the hides had actually changed their form, and been sold as glue, or manure, or ashes. The argument, therefore, in effect, resolves itself into this question, whether, when a total loss has taken place before the termination of the risk insured, with a salvage of some portion of the subject insured, which has been converted into money, the insured is bound to abandon before he can recover for a total loss. If any doubt should exist upon this point, it is important that it should be well considered and determined.

The history of our own law furnishes few, if any, illustrations of the subject of abandonment before the time of Lord Mansfield. That great judge was obliged to resort to the aid of foreign codes, and to the opinions of foreign jurists, for the rules and principles which he laid down in the leading cases of *Goss v. Withers*, 2 Burr. 683, and *Hamilton v. Mendez*, 1 W. Bl. 276.¹ . . .

But whatever lights might have been heretofore derived from foreign codes and jurists, the practice of insurance in England has been so extensive, and the questions arising upon every branch of it have been so thoroughly considered and settled, that we need not now look beyond the authorities of the English law to illustrate the principle on which the doctrine of abandonment rests, and the consequences which result from it. It is, indeed, satisfactory to know, that however the laws of foreign states upon the subject may vary from each other, or from our own, they are all directed to the common object of making the contract of insurance a contract of indemnity, and nothing more. Upon that principle is founded the whole doctrine of abandonment in our law. The underwriter engages, that the object of the assurance shall arrive in safety at its destined termination. If, in the progress of the voyage, it becomes totally destroyed or annihilated, or if it be placed, by reason of the perils against which he insures, in such a position, that it is wholly out of the power of the assured or of the underwriter to procure its arrival, he is bound by the very letter of his contract to pay the sum insured. But there are intermediate cases — there may be a capture, which, though *prima facie* a total loss, may be followed by a recapture, which would revert the property in the assured. There may be a forcible detention which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship unnavigable, without any reasonable hope of

¹ A discussion of foreign law has been omitted. — ED.

repair, or by which the goods are partly lost, or so damaged, that they are not worth the expense of bringing them, or what remains of them, to their destination. In all these or any similar cases, if a prudent man not insured, would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit, as well as that of the underwriter, treat the case as one of a total loss, and demand the full sum insured. But if he elects to do this, as the thing insured, or a portion of it still exists, and is vested in him, the very principle of the indemnity requires that he should make a cession of all his right to the recovery of it, and that too, within a reasonable time after he receives the intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value; and that he may, if he pleases, take measures, at his own cost, for realizing or increasing that value. In all these cases not only the thing assured or part of it is supposed to exist in specie, but there is a possibility, however remote, of its arriving at its destination, or at least of its value being in some way affected by the measures that may be adopted for the recovery or preservation of it. If the assured prefers the chance of any advantage that may result to him beyond the value insured, he is at liberty to do so; but then he must also abide the risk of the arrival of the thing insured in such a state as to entitle him to no more than a partial loss. If, in the event, the loss should become absolute, the underwriter is not the less liable upon his contract, because the insured has used his own exertions to preserve the thing assured, or has postponed his claim till that event of a total loss has become certain which was uncertain before. In the language of Lord Ellenborough, in the case of *Mellish v. Andrews*, 15 East, 13: "It is an established and familiar rule of insurance, that when the thing insured subsists in specie, and there is a chance of its recovery, there must be an abandonment. A party is not in any case obliged to abandon, neither will the want of an abandonment oust him of his claim for that which is in fact an average or total loss, as the case may be." Again, in *Mullett v. Shedden*, 13 East, 304, the same learned judge says, "If, instead of the saltpetre having been taken out of the ship and sold, and the property divested, and the subject-matter lost to the owner, it had remained on board the ship, and been restored at last to the owner, I should have thought there was much in the argument, that, in order to make it a total loss, there should have been notice of abandonment, and that such notice should have been given sooner: but here the property itself was totally lost to the owner, and the necessity of any abandonment was altogether done away." In that case, the sentence under which the sale was made had been reversed, and the proceeds directed to be paid to the owner. So that there was a substitution of money for a portion at least of the matter insured. Both these cases are direct authorities that no abandonment is necessary where there is a total loss of the subject-matter insured. To which may be added the

cases of *Green v. The Royal Exchange Assurance Company*, 6 Taunt. 68; *Idle v. The Royal Exchange Assurance Company*, 8 Taunt. 755; *Robertson v. Clarke*, 1 Bing. 445; *Cambridge v. Anderton*, 2 B. & C. 697: this last is in all points similar to the present, and is an express decision that, when the subject-matter insured has, by a peril of the sea, lost its form and species, where a ship, for example, has become a wreck or a mere congeries of planks, and has been *bona fide* sold in that state for a sum of money, the assured may recover a total loss without any abandonment. In fact, when such a sale takes place, and in the opinion of the jury is justified by necessity and a due regard to the interest of all parties, it is made for the benefit of the party who is to sustain the loss; and if there be an insurance, the net amount of the sale, after deducting the charges, becomes money had and received to the use of the underwriter, upon the payment by him of the total loss. It may be proper to mention, however, that the assured may preclude himself from recovering a total loss, if, by any view to his own interest, he voluntarily does, or permits to be done, any act whereby the interests of the underwriter may be prejudiced in the recovery of that money.¹ . . .

*Judgment for plaintiff.*²

¹ Here was discussed *Mitchell v. Edie*, 1 T. R. 608 (1787). — Ed.

² Acc.: *De Peyster v. Sun Mut. Ins. Co.*, 19 N. Y. 275 (1859).

See *Wallerstein v. Columbian Ins. Co.*, 44 N. Y. 204 (1870); *Insurance Co. v. Fogarty*, 19 Wall. 640 (1873).

In *Asfar v. Blundell*, [1896] 1 Q. B. 123, 127-128 (C. A. 1895), Lord ESHER, M. R., said: "The first point taken on behalf of the defendants, the underwriters, is that there has been no total loss of the dates, and therefore no total loss of the freight on them. The ingenuity of the argument might commend itself to a body of chemists, but not to business men. We are dealing with dates as a subject-matter of commerce; and it is contended that, although these dates were under water for two days, and when brought up were simply a mass of pulpy matter impregnated with sewage and in a state of fermentation, there had been no change in their nature, and they still were dates. There is a perfectly well known test which has for many years been applied to such cases as the present — that test is whether, as a matter of business, the nature of the thing has been altered. The nature of a thing is not necessarily altered because the thing itself has been damaged; wheat or rice may be damaged, but may still remain the things dealt with as wheat or rice in business. But if the nature of the thing is altered, and it becomes for business purposes something else, so that it is not dealt with by business people as the thing which it originally was, the question for determination is whether the thing insured, the original article of commerce, has become a total loss. If it is so changed in its nature by the perils of the sea as to become an unmerchantable thing, which no buyer would buy and no honest seller would sell, then there is a total loss. That test was applied in the present case by the learned judge in the court below, who decided as a fact that the dates had been so deteriorated that they had become something which was not merchantable as dates. If that was so, there was a total loss of the dates. What was the effect of this upon the insurance? If they were totally lost as dates, no freight in respect of them became due from the consignee to the person to whom the bill of lading freight was payable — that is, to the charterers — and there was a total loss of the bill of lading freight on these dates." — Ed.

BRADLIE AND ANOTHER, PLAINTIFFS IN ERROR, v. MARYLAND
INS. CO., DEFENDANTS IN ERROR.SUPREME COURT OF THE UNITED STATES, 1838. 12 Pet. 378.¹

ERROR to the Circuit Court of the United States for the District of Maryland.

The action was upon a policy of insurance, dated November 22, 1832, whereby the defendants caused the plaintiffs, by their agents, William Howell & Son, to be insured \$10,000 on the brig "Gracchus," valued at that sum, at and from Baltimore, for six months. The declaration alleged a total loss by casting ashore in the river Mississippi.

The brig sailed from Baltimore to New Orleans, and on the return voyage went on shore in the river Mississippi on March 24, 1833. A signal was made for a steamboat, which came to the assistance of the brig. The brig was got off, and returned to New Orleans the same day in a leaky condition. On March 25 the master learned that the steamboat intended to libel for a salvage of fifty per cent; and he wrote to one of the plaintiffs to that effect. On March 27 the brig was taken across the river for repairs, and was libelled for the salvage in the District Court of Louisiana. On April 22, William Howell & Co. addressed a letter to the defendants, submitting the letter of March 25, and saying, "In consequence of the damage, together with the detention that must grow out of a lawsuit, . . . the voyage being broken up, we do hereby abandon to you the brig 'Gracchus,' . . . and claim for a total loss." On the same day, the defendants answered, saying, "We cannot accept the abandonment . . . , but expect you to do what is necessary in the case for the safety and relief of the vessel." On May 9, the District Court decreed twenty-five per cent of the value of the vessel and cargo (estimated at \$7,000) as salvage, the brig being valued at \$2,500. On May 14, the master got possession again, the salvage having been paid. On June 3, the brig was repaired and ready for a cargo. The repairs at New Orleans amounted to \$1,690.15; and the share of the brig, at the general average or salvage, amounted to \$1,245.07; and the two items amounted to \$2,935.22. To meet this sum and other expenses, the master borrowed \$3,715.41 from Harrison, Brown & Co., giving a bottomry bond, payable on the safe arrival of the brig at Baltimore. The brig sailed for Baltimore early in July, and arrived in the latter part of that month. The brig was libelled on the bottomry bond, and by the District Court of Maryland was ordered sold. The sale was accordingly made by the marshal for the \$4,750, which sum was paid

¹ The statement has been rewritten. — Ed.

by the purchaser on September 24. On the same day, the underwriters wrote to Howell & Son, offering to pay \$2,409.11 as for general and particular average, including the repairs less a deduction of one-third new for old, and also saying: "If you find any other charge . . . in order to raise the funds on bottomry, we will pay our full proportion . . . upon being made acquainted with the amount." On the same day, Howell & Son refused the offer, saying that in behalf of the owners they claimed a total loss.

After the evidence was closed, the counsel for the defendants moved for instructions that are summarized in the opinion.

The court refused to give the instructions prayed for, and gave to the jury the following instruction: If the jury find from the evidence, that the "Gracchus" was so damaged by the disaster mentioned in the letter of Captain Snow, of March 25, 1833, that she could not be got off and repaired without an expenditure of money to an amount exceeding half her value, at the port of New Orleans, after such repairs were made, then the plaintiffs are entitled to recover for a total loss, under the abandonment made on the 22d day of April, 1833; and in ascertaining the amount of such expenditure, the jury must include the sum for which the brig was liable to the salvors, according to the decree of the District Court of Louisiana, stated in the evidence; but if the jury find that the vessel could have been got off and repaired, without an expenditure of money to the amount of more than half her value, then, upon the evidence offered, the plaintiffs are not entitled to recover for a total loss, on the ground that the voyage was retarded or lost, nor on account of the arrest and detention of the vessel by the admiralty process, issued at the instance of the salvors.

The defendants excepted to the refusal of the court to give the instructions prayed, and also to the opinion actually given by the court in their instructions to the jury. The plaintiffs also excepted to the same opinion given by the court.

The plaintiffs also prayed "the court to direct the jury, that in this cause the insured, by their letter of the 22d April, authorized and required the proper expenditures to be made upon the vessel, for which said underwriters are liable under their policy: that no funds being supplied by them in New Orleans to meet this loss; and the salvage and repairs having been paid for by money raised upon *respondentia* upon the vessel; if the jury shall find that said vessel, under the lien of this bond, came to Baltimore, and the defendants were then apprized of the existence of such *respondentia*, and were also informed of the existence of the proceedings thereupon against said vessel, and they neglected to pay so much thereof as they ought to have paid to relieve said vessel, and omitted to place her in the hands of the owners, discharged of so much of such bottomry as the underwriters were liable for, and in consequence thereof, said vessel was libelled and condemned and sold, and thereby wholly lost to the plaintiffs; then the plaintiffs are entitled to recover for the whole value of the vessel."

The court refused to give this instruction, and the plaintiffs excepted. The jury found a verdict for the plaintiffs for a partial loss, assessing the damages at three thousand four hundred and eighty-nine dollars and twenty-two cents, upon which the court gave a judgment: on this judgment the plaintiffs entered a credit for four hundred and eighty-five dollars and twenty-two cents, the amount of the premium note, and interest. The plaintiffs prosecuted this writ of error.

The case was argued by Mr. *Johnson* for the plaintiffs in error; and by Mr. *Meredith* and Mr. *Stewart* for the defendants.

Mr. Justice *Story* delivered the opinion of the court.¹ . . . Although the prayers for the instructions by the defendants are not before the court for the purpose of direct consideration, as the defendants have brought no writ of error; yet it is impossible completely to understand the nature and extent, and proper construction of the opinion given by the court, without adverting to the propositions contained in them; for to them, and to them only was the opinion of the court given as a response.

The second instruction asked by the defendants, in substance, insisted, that to entitle the plaintiffs to recover for a total loss, the damage to the "Gracchus" from the accident should be more than one-half the sum to which she was valued in the policy; and that in estimating that damage, the costs of the repairs only were to be taken, deducting one-third new for old. In effect, therefore, it excluded all consideration of the salvage in the ascertainment of the loss.

The third instruction was in substance similar to the second, except that it did not insist upon the exclusion of the salvage. In effect, therefore, it insisted upon the valuation in the policy, as the standard by which to ascertain whether the damage was half the value of the "Gracchus," or not.

The fourth instruction insisted, that to entitle the plaintiffs to recover for a total loss, the damage must exceed one-half the value of the "Gracchus" at the time of the accident; and that in estimating the damage, the general and particular averages, as adjusted at New Orleans, were to be taken, deducting one-third new for old. In effect, therefore, it insisted that nothing but these adjustments were to be taken into consideration, in ascertaining the totality of the loss at the time of the abandonment (admitting the abandonment to be sufficient), however imminent might be the dangers, or great the losses then actually impending over the "Gracchus." And all three of these prayers further insisted, that the deduction of one-third new for old, should be made from the amount of the repairs, as in the case of a partial loss, in ascertaining whether there was a right to abandon for a total loss, upon the ground that the damage exceeded a moiety of the value of the vessel.

The instructions of the court actually given in these prayers, involve

¹ After stating the case — Ed.

the following propositions: 1. That if the expenditures in repairing the damage exceeded half the value of the brig at the port of New Orleans, after such repairs were made, including therein the salvage awarded to the salvors; the plaintiffs were entitled to recover for a total loss, under the abandonment made on the 22d of April, 1833. 2. If the expenditures to get off and repair the brig, were less than the half of such value, then the plaintiffs were not entitled to recover for a total loss, upon the ground that the voyage was retarded or lost; nor on account of the arrest and detention of the brig, under the admiralty process, for the salvage.

The question is, whether these instructions were correct. In considering the first, it is material to remark, that by the well settled principles of our law, the state of the facts, and not the state of the information at the time of the abandonment, constitutes the true criterion by which we are to ascertain whether a total loss has occurred or not, for which an abandonment can be made. If the abandonment, when made, is good, the rights of the parties are definitely fixed, and do not become changed by any subsequent events. If, on the other hand, the abandonment, when made, is not good, subsequent circumstances will not affect it, so as, retroactively, to impart to it a validity which it had not at its origin. In some respects, our law on this point differs from that of England; for, by the latter, the right to a total loss vested by an abandonment, may be divested by subsequent events, which change that total loss into a partial loss. It is unnecessary to cite cases on this subject, as the diversity is well known; and the courts in neither country have shown any disposition of late years to recede from their own doctrine. The cases of *Rhineland v. The Insurance Company of Pennsylvania*, 4 Cranch, 29; and *Marshall v. The Delaware Insurance Company*, 4 Cranch, 202, are direct affirmations of our rule: and those of *Bainbridge v. Neilson*, 10 East's Rep. 329; *Patterson v. Ritchie*, 4 M. & Selw. 394; and *M'Iver v. Henderson*, 4 M. & Selw. 584, of the English rule.

In cases where the abandonment is founded upon a supposed technical total loss, by a damage or injury exceeding one-half the value of the vessel, although the fact of such damage or injury must exist at the time, yet it is necessarily open to proofs, to be derived from subsequent events. Thus, for example, if the repairs, when subsequently made, clearly exceed the half value, it is plain that this affords one of the best proofs of the actual damage or injury. On the other hand, if the subsequent repairs are far below the half value, this, so far as it goes, affords an inference the other way. But it is not, and in many cases cannot be decisive of the right to abandon. In many cases of stranding, the state of the vessel at the time may be such, from the imminency of the peril, and the apparent extent of expenditures required to deliver her from it, as to justify an abandonment; although, by some fortunate occurrence, she may be delivered from her peril, without an actual expenditure of one-half of her value after she is in

safety. Under such circumstances, if, in all human probability, the expenditures which must be incurred to deliver her from her peril, are, at the time, so far as any reasonable calculations can be made, in the highest degree of probability, beyond half value; and if her distress and peril be such as would induce a considerate owner, uninsured, and upon the spot, to withhold any attempt to get the vessel off, because of such apparently great expenditures, the abandonment would doubtless be good. It was to such a case that Lord Ellenborough alluded, in *Anderson v. Wallis*, 2 M. & Selw., when he said: "There is not any case, nor principle, which authorizes an abandonment, unless where the loss has been actually a total loss, or in the highest degree probable at the time of the abandonment." Mr. Chancellor Kent, in his learned Commentaries, Vol. III. 321, has laid down the true results of the doctrine of law on this subject. "The right of abandonment [says he] does not depend upon the certainty, but upon the high probability of a total loss, either of the property or of the voyage, or both. The insured is to act, not upon certainties, but upon probabilities; and if the facts present a case of extreme hazard, and of probable expense, exceeding half the value of the ship, the insured may abandon; though it should happen that she was afterwards recovered at a less expense."¹ We have no difficulty, therefore, in acceding to the argument of the counsel for the plaintiffs in error on this point. But its application to the ruling of the court will be considered hereafter.

In respect to the mode of ascertaining the value of the ship, and, of course, whether she is injured to the amount of half her value, it has, upon the fullest consideration, been held by this court, that the true basis of the valuation is the value of the ship at the time of the disaster; and that, if after the damage is or might be repaired, the ship is not, or would not be worth, at the place of the repairs, double the cost of the repairs, it is to be treated as a technical total loss. This was the doctrine asserted in the *Patapsco Insurance Company v. Southgate*, 5 Pet., 604, in which the court below had instructed the jury, that, if the vessel could not have been repaired without an expenditure exceeding half her value at the port of the repairs, after the repairs were made, it constituted a total loss. This court held that instruction to be entirely correct. It follows, from this doctrine, that the valuation of the vessel in the policy,² or the value at the home port, or in the general market of other ports, constitutes no ingredient in ascertaining whether the injury by the disaster is more than one-half the value of the vessel or not. For the like reason, the ordinary deduction in cases of a partial loss of one-third new for old, from the repairs, is

¹ See *Orient Ins. Co. v. Adams*, 123 U. S. 67 (1887); *Spalding v. Alliance Marine and General Assur. Co.*, 10 Hawaii, 190 (1896). — Ed.

² *Acc.* *Peele v. Merchants Ins. Co.*, 3 Mason, 27, 70-73 (1822); *Allen v. Sugrue*, 8 B. & C. 561 (1828), s. c. 3 M. & R. 9; *Irving v. Manning*, 6 C. B. 391 (H. L. 1848), s. c. 1 H. L. C. 287.

Contra: *Deblois v. Ocean Ins. Co.*, 16 Pick. 303, 310-313 (1835). — Ed.

equally inapplicable to cases of a technical total loss,¹ by an injury exceeding one-half of the value of the vessel. That rule supposes the vessel to be repaired and returned to the owner; who receives a correspondent benefit from the repairs beyond his loss, to the amount of the one-third. But in the case of a total loss, the owner receives no such benefit; the vessel never returns to him, but is transferred to the underwriters. If the actual cost of the repairs exceeds one-half of her value after the repairs are made, then the case falls directly within the predicament of the doctrine asserted in the case of 5 Pet. 604. The same limitations of the rule, and the reasons of it, are very accurately laid down by Mr. Chancellor Kent, in his Commentaries, Vol. III. 330; and in *Da Costa v. Newnham*, 2 T. R. 407.

If, with these principles in view, we examine the first instruction given in this case in the Circuit Court, it will be found to be perfectly correct. Indeed, that part of the instruction which declares that if the brig "could not be got off and repaired without an expenditure of money to an amount exceeding half her value at the port of New Orleans, after such repairs were made, then the plaintiffs are entitled to recover for a total loss under the abandonment," is precisely in the terms of the instruction given in *The Patapsco Insurance Company v. Southgate*, 5 Pet. 604. The error, which has been insisted on at the argument by the plaintiffs, is in the additional direction; that "in ascertaining the amount of such expenditure, the jury must include the sum for which the brig was liable to the salvors, according to the decree of the District Court of Louisiana, stated in the evidence;" which, it is contended, removed from the consideration of the jury the right to take into the account the high probability, at the time of the abandonment, of the allowance of a greater salvage, and even to the extent of the fifty per cent then claimed by the salvors. And in support of the argument, it is insisted that the state of the facts, and the high probabilities at the time of the abandonment, constitute the governing rule; and not the ultimate result in the subsequent events. But it appears to us that the argument is founded upon a total misunderstanding of the true import of this part of the instruction. The court did not undertake to say, and did not say, that the jury might not properly take into consideration the high probability of a larger salvage at the time of the abandonment; but simply, that the jury must include in the half value, the amount of the actual salvage decreed, because that was, in truth, a part of the loss. The instruction was, therefore, not a limitation restrictive of the rights and claims of the plaintiffs, but, in fact, a

¹ *Acc.* *Peele v. Merchants Ins. Co.*, 3 Mason, 27, 73-77 (1822); *Wallace v. Thames and Mersey Ins. Co.*, 22 Fed. R. 66 (C. C., E. D. Mich., 1884).

Contra: *Deblois v. Ocean Ins. Co.*, 16 Pick. 303, 313-314 (1835).

In *Heebner v. Eagle Ins. Co.*, 10 Gray, 131, 143 (1859), BIGELOW, J., for the court, said: "By the well settled rule of law in this commonwealth, applicable to policies of insurance, where an injury is sustained by a vessel, the loss is not total unless the expense of repairs exceed fifty per cent of the valuation in the policy, after the deduction of one third new for old. *Deblois v. Ocean Ins. Co.*, 16 Pick. 314." — *Ed.*

direction in favor of their rights and claims, and in support of the abandonment. This is demonstrated by the then actual position of the cause. The defendants had asked an instruction that the cost of the repairs only, exclusive of the salvage, should be taken into consideration in estimating the half value; and also that the one-third new for old, should be deducted from the amount of the cost, in estimating the half value. The court, in effect, negatived both instructions; and in the particulars now objected to, there was a positive direction to the jury not to exclude, but to include the salvage, in the estimate of the loss. In this view of the matter, the instruction was most favorable to the plaintiffs; and, so far from excluding evidence which might show the amount of the actual damage at the time of the abandonment; it resorted, and very properly resorted to the subsequent ascertainment of salvage as positive evidence, that to that extent at least, the actual damage was enhanced beyond the cost of the repairs. We are entirely satisfied with this part of the instruction, in this view, which seems to us to be the true interpretation of it.¹ . . .

Upon the whole, our opinion is that there is no error, in the instructions given or refused by the Circuit Court, and the judgment is therefore affirmed, with costs.

CINCINNATI INS. CO. *v.* DUFFIELD AND OTHERS.

SUPREME COURT OF OHIO, 1856. 6 Ohio St. 200.

PETITION in error to reverse the judgment of the Superior Court of Cincinnati, at general term.

An insurance was effected on the steamboat "Sam Cloon," in four insurance companies; the agreed value of the boat being \$20,000, and amount insured in each office \$3,750, or in all \$15,000. The policy in each case was in the same form and with the same conditions.

The steamboat having been sunk in the Mississippi River, was, by a writing executed for the purpose, abandoned to the insurance companies; who, by means of persons acting for them, raised the boat, and realized from the wreck, after deducting charges and expenses, the sum of \$3,000. An action was brought by the owners, who effected the insurance, to recover one-fourth of that sum, claiming that they still retained, after the abandonment, an interest of one-fourth in the wreck. This claim was resisted by the insurance companies on the ground that by the terms and conditions of the policies the owners were required to abandon not only to the extent of the interest insured, but all interest in the subject-matter insured. The part of the policies supposed to bear on this question was as follows: "And in case of loss or misfortune, as aforesaid, it shall be the duty of the assured, their agents or

¹ The remainder of the opinion dealt with the latter part of the instruction given, and also with the instruction requested by the plaintiffs, but refused. — *Ed.*

assigns, to use every reasonable effort for the safeguard and recovery of the said steamboat, and every part thereof, and if recovered, to cause the same to be forthwith repaired, if practicable; and in case of neglect or refusal on the part of the assured, their agents or assigns, to adopt prompt and sufficient measures for the safeguard and recovery thereof, then said insurers are hereby authorized, and shall have the election to interpose and recover said steamboat, and cause the same to be repaired for account of the assured, to the charges of which the said insurance company will contribute in proportion as the sum herein insured bears to the agreed value in this policy, or to consider such neglect or refusal as an abandonment, and be entitled to recover said steamboat, or any part thereof, at their own expense, and for their own use and benefit; and in no case whatever shall the assured have the right to abandon, until it shall be ascertained that the recovery and repairs of said steamboat are impracticable; nor sell the wreck, or any part thereof, without the consent of this company; *and in all cases of abandonment the assured shall assign, transfer, and set over to said insurance company all their interest in and to the said steamboat, and every part thereof, free of all claims and charges whatever.*"

The action was submitted for trial to the Superior Court of Cincinnati, at special term, and judgment was rendered in favor of the insured for one-fourth of the sum realized from the wreck.

To reverse this judgment, a petition in error was preferred by the insurance company before the Superior Court, at general term, and the judgment at special term was affirmed.

To reverse this judgment of affirmance, the present petition in error is prosecuted in this court.

In argument, counsel confined themselves mainly to this question: Under a form of policy above mentioned, what is the legal effect of the term *abandonment*? Is it to transfer to the underwriter, as and for his own, the entire interest of the insured in the proceeds of the wreck, or only the interest which is covered by the policy?

Coffin and Mitchell, for plaintiff in error.

John S. Nixon, for defendants in error.

SCOTT, J. In order to have a clear apprehension and correct solution of the question made in this case, it is necessary to understand what is meant by an *abandonment*; what are its legal effects, and what would be the legal rights of the parties, independent of the provisions of the policy on the subject of abandonment.

The term *abandonment*, as used in policies of marine insurance, and in the law regulating that subject, is a technical one.

"An abandonment is an act on the part of the assured, by which he relinquishes and transfers to the underwriters his insurable interest, *as far as it is a subject of the policy*, or the proceeds of it, or the claims arising from it." Phil. on Ins. 382.

"The abandonment cannot transfer the interest of the assured any further than that interest is covered by the policy." Arnould, 1159.

“The abandonment, when properly made, operates as a transfer of the property to the underwriter, and gives him a title to it, or what remains of it, as far as it was covered by the policy.” 5 Pet. 622.

Such we understand to be the well-settled legal effect of an abandonment. It operates as a transfer to the underwriter of the property insured, only to the extent of the indemnity contemplated by the policy; and this limitation of its operation is not only sanctioned by the authority of the elementary writers and the general current of decisions, but has its foundation in equity and sound principle.

Upon what principle of equity should the underwriter, in case of abandonment, take the wreck, not only of that which he has insured, and of which his contract binds him to pay the full agreed value, but also of that which he has not insured, and for which he is in no event liable to pay?

It would seem equitable, — and in ordinary cases of insurance such is doubtless the law, — that where an abandonment may be and is legally made, the wreck, or its proceeds, inure to the benefit of those who bear the burden of the loss, — to the underwriters in proportion to the parts by them severally insured, and to the owner in proportion to the part remaining uninsured, and as to which he is virtually his own insurer. The ground upon which the insurer takes the wreck is, that he pays the party assured for a total loss; and to the extent to which his contract binds him thus to pay, to the same extent, and no further, is he entitled to the proceeds of the wreck. His rights originate from his obligations, and cannot be more than co-extensive.

But did the parties intend, by the clause in the policy out of which this controversy arises, materially to change the legal rights of the insurer and the assured, growing out of and incident to an abandonment?

That clause is in these terms: “In all cases of abandonment the assured shall assign, transfer, and set over to said insurance company all their interest in and to the said steamboat, and every part thereof, free of all claims and charges whatever.”

The right of the party assured to “abandon” in a proper case, seems here to be contemplated and strictly recognized; and yet if we adopt the construction claimed by the plaintiff in error, the policy does not permit the making of a legal technical abandonment under any circumstances, but substitutes therefor a transfer, having an effect which the law does not attach to an abandonment.

That the “claims and charges” mentioned in this clause were understood by the parties to refer, not to the interest of the party insured in the boat, but to mortgages or other liens held by other parties against the boat, is satisfactorily shown by the terms of the guaranty taken by the plaintiff in error from the defendants on the payment of the sum insured.

The construction claimed would, in cases of partial insurance, often prevent an abandonment, where the settled rule of law would authorize it, or would defeat that indemnity, which is the very ground and object of all legitimate insurance.

A construction leading to such results, so vitally changing the legal rights of the parties, and working apparent injustice, ought not to be adopted, unless required by clear and explicit language.

We think a different construction may be fairly given to the clause in question — that it was not intended to change the legal effect of an abandonment, which the framer of the policy may be presumed to have understood, but to prescribe the form in which the transfer should be made to the underwriters of the interest which they derive by law from the abandonment, and to point out the mode in which the intention to abandon should be unequivocally expressed.

The elementary writers tell us that “no particular form of abandonment is prescribed, nor is the form material;” “it has not been considered necessary, as a general rule, that it should be made in writing.” Phillips on Ins. 447.

In *Chesapeake Insurance Co. v. Stark*, 6 Cranch, 272, C. J. Marshall, giving the opinion of the court, said: “The informality of the deed of cession is thought unimportant, because, if the abandonment was unexceptionable, the property vested immediately in the underwriters, and the deed was not essential to the rights of either party.”

As no deed of cession, transfer, writing, or particular form is essential to an abandonment, doubts have sometimes arisen as to what will constitute a valid abandonment. To prevent all difficulty or misunderstanding on this point, we may reasonably suppose was the object in requiring that the abandonment should be accompanied and evidenced by a formal assignment and transfer of the property insured. And the clause may have also been intended to provide that the abandonment should be general, embracing the whole subject-matter of the insurance.

Besides, we understand an abandonment to operate as a transfer to the underwriter of the legal title to, and right of disposal of what remains of the thing insured; and the formal assignment provided for in the clause under consideration, may reasonably have been intended simply to facilitate the sale of the wreck by the insurance companies, without discharging them from their legal liability to account to the party assured for his proportion of the proceeds. Such discharge can only be effected by language so clear and explicit as to leave no reasonable ground for misapprehension on the part of the insured.

*Judgment affirmed.*¹

BARTLEY, C. J., and SWAN, BRINKERHOFF, and BOWEN, JJ., concurred.

¹ See *Natchez and New Orleans P. & N. Co. v. Louisville Underwriters*, 44 La. Ann. 714 (1892); *Harvey v. Detroit F. & M. Ins. Co.*, 120 Mich. 601, 610–611 (1899).

On total loss in general, see also:—

Pole v. Fitzgerald, Willes, 641, 644–648 (Ex. Ch. 1752); s. c. *sub nom. Fitzgerald v. Pole*, 4 Bro. P. C. (Toml. ed.) 439, 449 (H. L. 1754);

Parsons v. Scott, 2 Taunt. 362 (1810);

Biays v. Chesapeake Ins. Co., 7 Cranch, 415 (1813);

Falkner v. Ritchie, 2 M. & S. 290 (1814);

Smith v. Robertson, 2 Dow, 474 (1814) ;
Hunt v. Royal Exchange Assurance, 5 M. & S. 47 (1816) ;
Houstman v. Thornton, Holt N. P. 242 (1816) ;
Cambridge v. Anderton, 4 D. & R. 203 (1824) ; s. c. 2 B. & C. 691 ;
Gordon v. Massachusetts F. & M. Ins. Co., 2 Pick. 249 (1824) ;
Humphreys v. Union Ins. Co., 3 Mason, 429 (1824) ;
Patapsco Ins. Co. v. Southgate, 5 Pet. 604 (1831) ;
Sewall v. United States Ins. Co., 11 Pick. 90 (1831) ;
Cincinnati Ins. Co. v. Bakewell, 4 B. Mon. 541 (1844) ;
Moss v. Smith, 9 C. B. 94 (1850) ;
Rosetto v. Gurney, 11 C. B. 176 (1851) ;
Ralli v. Janson, 6 E. & B. 422 (Ex. Ch. 1856) ;
Duff v. Mackenzie, 3 C. B. n. s. 16 (1857) ;
McConochie v. Sun Mut. Ins. Co., 26 N. Y. 477 (1863) ;
Farnworth v. Hyde, L. R. 2 C. P. 204 (Ex. Ch. 1866) ;
Rankin v. Potter, L. R. 6 H. L. 83 (1873) ;
Provincial Ins. Co. v. Leduc, L. R. 6 P. C. 224, 237, 241 (1874) ;
Hubbell v. Great Western Ins. Co., 74 N. Y. 246, 260-261 (1878) ;
Kaltenboch v. Mackenzie, 3 C. P. D. 467 (C. A. 1878) ;
Boardman v. Boston M. Ins. Co., 146 Mass. 442 (1888) ;
Carr v. Security Ins. Co., 109 N. Y. 504 (1888) ;
Mayo v. India Mut. Ins. Co., 152 Mass. 172 (1890) ;
Sailing Ship Blairmore Co. v. Macredie, [1898] A. C. 593 ;
Washburn & Moen Mfg. Co. v. Reliance M. Ins. Co., 179 U. S. 1 (1900).

And on the amount of recovery under a policy procured by the owner of a limited interest, see :—

Stuart v. Columbian Ins. Co., 2 Cranch C. C. 442 (1823), — vendor ;
Irving v. Richardson, 2 B. & Ad. 193 (1831), — mortgagee ;
Lazarus v. Commonwealth Ins. Co., 19 Pick. 81 (1837), — mortgagor ;
Hancox v. Fishing Ins. Co., 3 Sumner, 132 (1837), — lienholder ;
Finney v. Warren Ins. Co., 1 Met. 16 (1840), — part owner ;
Joyce v. Kennard, L. R. 7 Q. B. 78 (1871), — carrier ;
Ebsworth v. Alliance M. Ins. Co., L. R. 8 C. P. 596 (1873) ; s. c. reversed, by arrangement between the parties, 43 L. J. n. s. C. P. 394 (Ex. Ch. 1874), — consignee ;
Knight v. Eureka F. & M. Ins. Co., 26 Ohio St. 664 (1875), — part owner ;
Murdock v. Franklin Ins. Co., 33 W. Va. 407 (1889), — charterer. — Ed.

SECTION II.

Fire Insurance.

(A) GENERAL PRINCIPLES AS TO BOTH OPEN AND VALUED POLICIES.

HARRIS v. EAGLE FIRE COMPANY.

SUPREME COURT OF NEW YORK, 1810. 5 Johns. 368.

THIS was an action of covenant, on a policy of insurance against fire. At the trial of the cause, a verdict was taken for the plaintiff, by consent, for 1,235 dollars and 10 cents, subject to the opinion of the court on a case, containing the following facts:—

The plaintiff resided in Richmond, in Virginia, where he manufactured tobacco, in a particular manner; and procured a policy of insurance to be made by the defendants against fire, upon manufactured and unmanufactured tobacco, utensils, and other property, to the amount of 20,000 dollars, and which was thus described in the policy.

“Ten thousand dollars upon his (the plaintiff’s) merchandise and utensils specified on the back hereof, and contained in his two-story frame building, occupied by the assured, for a tobacco manufactory, the said building being marked No. 1, on a plan filed with the surveyor’s reports, No. 800.

“Ten thousand dollars upon his merchandise and other property, as specified on the back hereof, contained in his one-story wooden building adjoining the aforesaid building, and marked on said plan, No. 2.”

The memorandum on the back of the policy, and referred to in the policy, specifies among other articles insured, in building No. 1, “380 kegs of manufactured tobacco, worth 9,600 dollars.”

The policy was dated 31st October, 1807, and the insurance was to continue for one year from the date.

A fire happened on the 6th March, 1808, which consumed a considerable portion of the property insured, and among it 157 kegs of manufactured tobacco. The plaintiff, it was admitted, was entitled to recover for the loss of the property insured, and had been paid by the defendants for all of it, except the 157 kegs of manufactured tobacco. And the point in controversy between the parties was, as to the mode of estimating the loss on those kegs.

The manufactured tobacco was of the same kind as that which the plaintiff had sold, for several years previous to the fire, and of the same quality as the 380 kegs specified on the back of the policy, as worth 9,600 dollars; and which were estimated under their average value, in reference to the price, at which they would have sold to a *bona fide* purchaser, out of the manufactory; but it was the practice of the plaintiff and his agents (without any warranty for that purpose),

to take back any of the article sold to a purchaser, which proved to be injured in manufacturing, and to return the price, or give other tobacco; and kegs of such tobacco had been sometimes returned in consequence.

The plaintiff claimed to be compensated for the 157 kegs of manufactured tobacco, at the same rate as is specified in the memorandum on the back of the policy, to be the worth of the whole 380 kegs, the 157 kegs being of the same kind and quality.

The defendants insisted that the plaintiff would be indemnified, if he received the first cost of the tobacco, together with the cost of manufacturing it, and a reasonable allowance for his attention, and the use and risk of the capital employed. It was admitted, that if such a mode of calculation was adopted, $12\frac{1}{2}$ per cent on the amount would be such reasonable allowance; and that according to that mode of calculation the plaintiff had been fully paid. It was agreed, that if the court should be of opinion that the loss was to be estimated in the mode insisted on by the plaintiff, the verdict was to stand, otherwise the verdict was to be set aside, and judgment entered for the defendants; and that any mistake in the sum for which the verdict was taken, should be rectified.

Boyd, for the defendants.

T. A. Emmet, contra.

Hoffman, in reply.

THOMPSON, J., delivered the opinion of the court. The rule by which the loss is to be calculated, is the only question arising in this case. The loss was a total destruction of 157 kegs of manufactured tobacco; and the assured claims the price for which they would have sold at his manufactory to a *bona fide* purchaser; being, as he contends, the valuation in the policy. The underwriters contend, that they ought only to pay the first cost of the tobacco, together with the cost of manufacturing the same, and a reasonable allowance for the use and risk of the capital of the manufacturer, and for his attention. Which of these rules ought to govern, must, it appears to me, depend upon the question, whether this is to be deemed an open or valued policy. We find in the books but few cases in which the subject of insurance against loss by fire has come under consideration, and none which throw any light on the present question. The rules applicable to marine insurance, so far as the analogy between the two cases will hold, ought to govern us. And according to those rules, this must, I think, be considered a valued policy, so far as relates to the kegs of tobacco. The case states, that among the articles insured, there were 380 kegs manufactured tobacco, worth 9,600 dollars; this was the rate at which the tobacco was estimated, in making up the 20,000 dollars, the amount of the insurance. The premium was paid according to this valuation; and the 157 kegs which were lost, are expressly stated to be of the same kind and quality as the whole 380 kegs. We have, therefore, an infallible rule by which to estimate the several and distinct value of each keg of tobacco. But it was said on the

argument, that admitting this to be a valued policy, it would make no difference, for it was only in case of a total loss, that there was any distinction between an open and a valued policy; that in case of a partial loss, the like inquiry into the true amount of such loss is to be made, whether the policy be of the one sort or the other. This is undoubtedly true, when ascertaining the extent of damage which the particular subject has sustained, and when there was not an absolute destruction of the subject. But where there is an actual total loss of any article, distinctly valued in the policy, that valuation, I apprehend, must govern in all cases. The valuation in a policy, is in the nature of liquidated damages, to save the necessity of proving them. In case of a total loss of the subject, by allowing the value to be inserted in the policy, the underwriter agrees that it shall be taken as there stated. This valuation is always considered as the fair amount of the prime cost, or at least that which the parties have agreed to adopt as such. (1 Marsh. 199.) If in the valuation of an article manufactured by the assured, he has chosen to estimate his labor and supposed profits, and to pay a premium therefor, I see no objection against it. It furnishes no evidence of a fraudulent intention to overvalue.

In France, where almost all policies are valued, if the goods be of the growth or manufacture of the assured, the current price is always adopted as the value. (2 Marsh. 533.) The effect of a valuation is only fixing conclusively the prime cost; if it be an open policy, the prime cost must be proved; if a valued policy, it is agreed. (2 Burr. 1171.)

In the case of *Lewis v. Rucker*, 2 Burr. 1167, Lord Mansfield, throughout, speaks of the prime cost and valuation, as meaning the same thing. In speaking of the general nature of the contract of insurance, he says, "The insurer engages, so far as the prime cost or value in the policy, that the thing shall come safe. If the goods be totally lost, he must pay the prime cost, that is, the value of the thing he insured at the outset. If part of the cargo, capable of a several and distinct valuation, at the outset, be totally lost, as if there be one hundred hogsheads of sugar, and ten happen to be lost, the insurer must pay the prime cost (or valuation) of those ten hogsheads. But where an entire individual, as one hogshead, happens to be spoiled, no measure can be taken from the prime cost, to ascertain the quantity of such damage."

To apply those rules to the case before us. The parties have agreed, in order to save the necessity of particular proof in case of loss, that the valuation in the policy shall be considered the prime cost of the tobacco. That is, that the prime cost of 380 kegs of tobacco, shall be estimated at 9,600 dollars; each keg is, therefore, capable of a several and distinct valuation. There has been a total loss of 157 kegs of this tobacco, and according to Lord Mansfield's doctrine, the underwriters must pay the prime cost, or valuation, of the 157 kegs. Had the 380 kegs been totally destroyed, would there have been any doubt, but that the defendants must have paid the 9,600 dollars? I see no reason why

a different rule should prevail where there has been a total loss of any number of the kegs, each one being of equal weight and quality. There is much greater certainty and simplicity in this mode of calculation, than to go into an inquiry as to the value of the raw material, and the expense of manufacturing it. There is no pretence that there has been any fraud, or over-valuation.

We are, therefore, of opinion, that the plaintiff is entitled to judgment for the amount of the verdict.

*Judgment for the plaintiff.*¹

NICOLET ET AL. v. INSURANCE COMPANY.

SUPREME COURT OF LOUISIANA, 1832. 3 La. 366.

APPEAL from the court of the first district.

This was a claim for loss under an insurance from fire. The policy stated, "that T. Nicolet & Co. had paid the defendants the sum of one hundred dollars for insurance from loss or damage by fire, according to the tenor of the conditions hereunto annexed, not exceeding in each case the sum or sums hereinafter recited, upon the property herein described, in the place or places herein set forth and not elsewhere (unless allowed by indorsement previously made, as set forth in the margin), viz: on cotton to the amount of twenty thousand dollars, or as may appear to that extent located in their names, in seven named presses, say, twenty thousand dollars." On the same sheet were printed several articles entitled, "Conditions of Insurance." The first of which stated that "each building must be separately valued and a specific sum insured thereon, and in like manner, a separate sum insured on the property contained therein." The eleventh article stated, "that for the further convenience of merchants and others, who have property in two distinct buildings, the same may be insured with the customary average clause."

No average clause was written out, but proof was given of what was the usual average clause, and two witnesses proved that it was usual to insert it in the policies of another office; viz., The Louisiana State Insurance Office, though they stated no instance had occurred of a loss being paid under such circumstances. On the back of the policy was indorsed T. Nicolet & Co., cotton, six months, twenty thousand dollars at one-half per cent, one hundred dollars; and it was proved that from one-third to one-half per cent was the current premium for the risk on a single press.

Hart's press, one of the seven, was burned, and the plaintiffs had therein, at the time, five hundred and fifty-seven bales of cotton, of which four hundred and sixty-three, worth seventeen thousand eight

¹ See *Cushman v. Northwestern Ins. Co.*, 34 Me. 487 (1852). — Ed.

hundred and forty-six dollars, were lost, and ninety-four, the value of which was not shown, were saved.

There was also, at the same time, in the other six presses, four hundred and fifty-seven bales, the value of which was not shown.

To the plaintiff's application for payment, the defendants objected, unless an account was furnished of the amount of cotton at risk in the remaining six presses, which plaintiffs refused to give. Suit was then brought, the defendants paid eight thousand five hundred dollars without prejudice, and it was prosecuted for the balance. There was a verdict and judgment for the plaintiffs, and the defendants appealed.

Strawbridge, for appellants.

Lockett, for appellees.

MATHEWS, J., delivered the opinion of the court.¹ . . .

The sole question presented by the case to be determined is, whether the insurers are bound, according to a just and legal interpretation of their contract, to indemnify the insured to the full extent of their loss, or only *pro rata* on an average estimate of the amount lost, compared with the value of all the cotton stored in the various presses mentioned in the policy.

The counsel for the appellants relies on two principal grounds for a reversal of the judgment rendered by the court below. He insists: 1. That the loss must be averaged according to an express condition of the policy. 2. If such condition be not expressed in such a manner as to bind the insured to submit to average, a legal construction of the contract imposes on them this obligation. The clause of the policy assumed as giving a right to the insurers to claim the benefit of average, is found in the eleventh article of a printed paper attached to the contract of insurance, and headed conditions of insurance. These may be presumed to be the conditions on which insurances can be obtained by applicants to the company. They are twelve in number, and all favorable to the interests of the insurers; but certainly may be waived by the party in whose favor they are stipulated; and if a contract, by which risk is assumed, contain express agreements legally irreconcilable with these printed conditions, the former must prevail. The article relied on is in these words: "For the further convenience of merchants who may have property in two or more distinct buildings, the same may be insured in one sum with the customary average clause." Suppose, however, an insurance be made without this clause, would it be the duty of a court, called on to interpret the contract of the parties, to consider everything as stipulated in it which it might by a grant have contained, in the absence of any clause to that effect? We think not. This article contains an enunciation to the public that the New Orleans Insurance Company will insure property in two or more distinct buildings, in one sum, with the customary average clause, but does not declare that they will not make such insurances without that clause. In the article immediately preceding, it is declared that "no policy for a

¹ A passage stating the case has been omitted. — ED.

shorter period than a year shall be issued to cover other than specific goods identified by marks and numbers." But in the very policy before us we find this company insuring property for six months only, without specification, either by marks or numbers, yet it is not pretended that the contract is void on this account, although directly opposed to the condition stated in the printed articles. The absurdity of such a pretention is perhaps the reason why it has not been urged against the plaintiffs. The difference of absurdity is not easily perceived between insisting on an article which would entirely annul the contract and one which might radically change the nature and extent of the obligations created by it. We are of opinion that the clause relating to average, not being inserted in the body of the policy, may be considered as waived.¹ . . .

Whether the defendants in the present case be bound according to a just and legal interpretation of their contract to indemnify the insured to the full extent of their loss or only by average (leaving out of view the clause of the eleventh article, which might have been inserted) is a question not of easy solution.

The rules which would govern in a case of marine insurance similar to the present, appear to be well settled, and the principle which prevails in the construction of a contract of the former kind, seems to be firmly established and fixed by law and usage in most commercial countries; and has been adopted as a rule of decision in the United States. According to this principle, in the event of a partial loss on vessels or merchandise insured against risks by sea, an average takes place, regulated by a percentage on the whole value of the property insured, whether that value be entirely covered by the policy or not. If the insurance be for less than the whole, the underwriters are responsible only in the proportion which the part of which they have assumed the risk, bears to the whole. Phillips on Ins. p. 372; Park, 137.

The doctrine established in England and the United States, relative to adjustment in cases of partial loss on property covered by marine insurances, seems to prevail in France to the same extent in contracts of insurance against loss and damage by fire, as appears in a new treatise on insurance against fire, written by Boudousquie, and edited in 1829. See this work, pp. 187, 357-8.

How a difference in rules of interpretation of a contract of assurance against loss by fire, and one against loss by sea, can reasonably exist, it is difficult to perceive. The first principles on which any course of reasoning can be fairly pursued are certainly the same in both cases. The intention of the parties to either contract must be sought for in the expressions of the instrument from which these obligations result. Let us examine the policy now under consideration, independent of that general usage which has assumed the force of law, in relation to marine insurances. The plaintiffs procured insurance on cotton to the amount of twenty thousand dollars, located in their names in seven

¹ A passage foreign to the amount of recovery has been omitted. — Ed.

different storehouses, for which they paid a premium of one hundred dollars. In consideration of this premium, the company promised to pay to the assured for all such damage and loss as should happen by fire to the property insured, not to exceed the sum of twenty thousand dollars. It appears by the evidence of the case that the plaintiffs had cotton to the value of thirty-nine thousand and eighty-four dollars (located in the various places as designated in the policy) at the time when part of it, valued at seventeen thousand eight hundred and forty-six dollars, was destroyed by fire by the burning of one of the warehouses in which it was stored. An obligation to pay more than twenty thousand dollars could, in no event, have been imposed on the insurers. If the property at risk had been of a value less than this amount, the assured would have been entitled to no more than an indemnity equivalent to their loss and the sum stipulated in the contract reducible to the actual damage. If the property insured exceeded the amount covered by the policy, the indemnity, in the event of a total loss, could not be enlarged so as to afford full protection. In the first hypothesis the contract is favorable to the insurers, because less was put at risk than an equivalent to the premium; or, if they are obliged to return a part, the premium and risk might be deemed correlatives. In the second, they are clearly so, according to the contract. This correspondence between premium and risk is, perhaps, a fundamental principle of all agreements to indemnify for losses. But in a contract where the obligation to pay on account of loss can in no event surpass the relative premium paid, it would seem that justice ought to require the obligors to make good the full amount of damages sustained by the destruction of any part of the property insured to that amount. The amount insured by the present policy was not sufficient to cover the whole of the property put at risk, and consequently could not protect all the parts. All were, however, in danger, and it may as well be considered as attaching to the part destroyed as that which was saved from the fire. The company bind themselves by the contract to pay, make good and satisfy all such damage or loss as shall happen by fire to the property insured; and it is shown by the evidence that loss has been sustained amounting to seventeen thousand eight hundred and forty-six dollars. Looking alone to this contract, could it be said in truth that its obligation may be discharged by the payment of a sum less than all the damage and loss suffered by the insured? Their intention was evidently to cover the risks on all and every, or any part or parcels of the cotton insured, to the extent of twenty thousand dollars, or under that sum, as loss might happen; and there is nothing on the face of the policy which shows that the insurers did not acquiesce in this intention. A different interpretation would not afford complete indemnity, although such would be required in conformity with rules as laid down in Boudousquie's *Treatise on Insurance against Fire*; but they are not the rules of construction which seem to prevail in the United States; and the latter, we think, may be justly adopted in the decision of the

present case, without entering into any discussion of the weight of arguments which might be urged in opposition.¹ See Phillips on Ins. p. 375, note, and 6 Pickering, p. 186, Reports of Cases in the Supreme Court of Massachusetts.

The verdict and judgment of the District Court is correct, except in allowing interest. The claim was uncertain and unliquidated until that judgment was rendered, and interest should not have been allowed in this respect; it is precisely like the case of *Workman v. Louisiana Insurance Company*, in which interest was refused.

It is, therefore, ordered, adjudged, and decreed, that the judgment of said court be reversed and annulled. And proceeding here to give such judgment as ought there to have been given, it is further ordered, adjudged, and decreed, that the plaintiffs and appellees do recover from the defendants and appellants the sum of nine thousand three hundred and forty-six dollars and eighty-two cents, with costs in the court below; those of the appeal to be borne by the appellees.

WALLACE ET AL. v. INSURANCE COMPANY.

SUPREME COURT OF LOUISIANA, 1832. 4 La. 289.

APPEAL from the court of the First District.

The facts are fully stated in the opinion of the court, delivered by PORTER, J.

This is an action on a policy of insurance against fire. The case presents three questions:

1. Whether the policy was a valued one?
2. Whether, if it was open, the verdict and judgment be supported by evidence?
3. Whether the defendants had not a right to discharge themselves from the payment of money by rebuilding the houses which were burned?

In arguing the question whether the contract on which this litigation has arisen, was what is denominated a valued policy, counsel have gone into the consideration of the legality of such an agreement in a fire insurance.² . . .

Be the law, however, on this question as it may, we do not think there was in this case a valued policy. The contract states the company have insured eight thousand five hundred dollars on one brick house and two wooden ones. The words "valued at" are not inserted, but the former is put down at six thousand seven hundred dollars, the

¹ *Acc.*: *Underhill v. Agawam Mut. F. Ins. Co.*, 6 Cush. 440, 447 (1850); *Mississippi Mut. Ins. Co. v. Ingram*, 34 Miss. 215 (1857). —ED.

² The discussion of this point has been omitted. —ED.

latter at one thousand eight hundred dollars. Then follows this clause, "and the said company do hereby promise, &c. to make good to the said insured, &c. all such loss or damage not exceeding the sum hereby insured. The said loss or damage to be estimated according to the true and actual value of the said property at the time the same shall happen.

The rules which govern the interpretation of other contracts regulate those of insurance, and it is a cardinal rule of construction to give if possible every part of the agreement effect. It is indeed true, as observed from the bar, that the written parts of a policy control those which are printed, but this principle can only receive a proper application in cases where it is not possible to satisfactorily reconcile them. No such difficulty presents itself here. The sums placed opposite the houses respectively may be easily accounted for as indicating an amount beyond which the company would not be responsible. The absence of the terms "valued at," which are invariably used in maritime policies, where the intention of the parties is to make the estimation conclusive, strengthens this construction. We are clear there is no such repugnance between the written and printed clauses as authorizes us to reject one of them. See 2 Washington, C. C. R. 175.

II. We think the evidence supports the judgment below, and that a correct conclusion was drawn by the jury in relation to the value of the property destroyed by fire. Connected with this part of the case is the bill of exceptions to the judge's refusal to permit the jury to take into consideration the amount stated in the policy as insured on each house. Whether this estimation might not properly have formed an element in the calculation the jury was required to make, need not be decided. For if we were of opinion it should have been admitted, we would remand the cause, and we understand the appellee prefers an affirmance of the judgment.

III. On the last point, which is as to the right of the defendants to rebuild, there is no doubt. No usage is found to sanction such a pretension. There is no law which authorizes it. The contract makes no mention of it. On the contrary it stipulates the loss shall be compensated in money. It is true rebuilding might in some cases be an indemnity for the loss. It would perhaps have been so in this instance, but then it was not the indemnity the assured paid for, and we are at a loss to conceive how on policies where such a right is not expressly conferred it could be supposed one of the parties had a right to change the agreement and substitute one mode of performance for another.

It is therefore ordered, adjudged, and decreed that the judgment of the District Court be affirmed, with costs.¹

Pierce, for appellant.

Slidell, for appellees.

¹ On the purpose and construction of the statutes commonly called valued policy laws, see *Reilly v. Franklin Ins. Co.*, 43 Wis. 449 (1877); *Seyk v. Millers' Nat. Ins. Co.*, 74 Wis. 67 (1889); *Insurance Co. v. Leslie*, 47 Ohio St. 409 (1890); *German Ins.*

IN THE MATTER OF ARBITRATION BETWEEN WRIGHT AND POLE.

KING'S BENCH, 1834. 1 Ad. & E. 621.¹

CHARLES WRIGHT, proprietor of the Ship Inn at Dover, effected an insurance, as after-mentioned, with the Sun Fire Office Company. In November, 1832, a fire broke out on the insured premises, and Wright claimed compensation from the company for the loss thereby occasioned. His claim being objected to, the parties, by deed (which was afterwards made a rule of court) referred the dispute to arbitration. It appeared before the arbitrator that, by the policy of insurance, Wright and another (his partner when the policy was signed) had insured, among other things, "on their interest only in the said Ship Inn and offices, £1,000." By virtue of this clause, Wright made the following demand before the arbitrator: "Also such damages as he can satisfy the arbitrator he has sustained under the claim delivered to the Sun Fire Office for his loss in his interest in the said Ship Inn and offices; such damages consisting in rent paid by him to his landlord, J. M. Fector, Esq., the hire of other houses or apartments whilst the apartments damaged in such inn by the fire were undergoing the necessary repairs, and the loss or damage sustained by him by reason of various persons refusing or declining to go to the said Ship Inn whilst the apartments so damaged were undergoing such repair." It was objected that this claim was not maintainable, for that the interest insured could be understood only to mean the interest Wright had in the fabric of the inn and offices, by reason of the improvements and additions proved to have been made thereto by him, and by his father, through whom he derived title to the premises, and that in respect of that interest he had no claim, the inn and offices having been reinstated in pursuance of the policy, as Wright admitted. The arbitrator awarded that £450 was due from Charles Pole, as one of the managers or directors of the Sun Fire Office Company, to the said Charles Wright, "for the loss he has sustained in his business as an innkeeper, by not being able to occupy the said Ship Inn and offices during the time that elapsed between the

Co. v. Eddy, 36 Neb. 461 (1893); *Havens v. Germania F. Ins. Co.*, 123 Mo. 403 (1894); *Royal Ins. Co. v. M'Intyre*, 90 Tex. 170 (1896).

On policies expressly permitting the underwriter to elect to rebuild, see: *Parker v. Eagle F. Ins. Co.*, 9 Gray, 152 (1857); *Brown v. Royal Ins. Co.*, 1 E. & E. 853 (1859); *Morrell v. Irving F. Ins. Co.*, 33 N. Y. 429 (1865); *Beals v. Home Ins. Co.*, 36 N. Y. 522 (1867); *Heilmann v. Westchester F. Ins. Co.*, 75 N. Y. 7 (1878); *Wynkoop v. Niagara F. Ins. Co.*, 91 N. Y. 478 (1883); *Fire Association v. Rosenthal*, 108 Pa. 474 (1885); *Good v. Buckeye Mut. F. Ins. Co.*, 43 Ohio St. 394 (1885); *Platt v. Aetna Ins. Co.*, 153 Ill. 113 (1894); *Phoenix Ins. Co. v. Levy*, 12 Tex. Civ. App. 45 (1895); *McAllaster v. Niagara F. Ins. Co.*, 156 N. Y. 80 (1898); *Elliott v. Merchants and Bankers F. Ins. Co.*, 109 Iowa, 39 (1899). — Ed.

¹ s. c. *sub nom.* In the Matter of Arbitration between the Sun Fire Office Co. and Wright, 3 N. & M. 819. — Ed.

fire and the rebuilding of the said premises." He also awarded a sum for loss on goods. A rule *nisi* having been obtained for setting aside the award,

R. V. Richards now showed cause.¹ The insurance was effected on Wright's "interest in the Ship Inn," and it was for the arbitrator to say what that interest was, and whether there was a loss in respect of it. [LORD DENMAN, C. J. Do you contend, that if he had carried on business at another inn while his own premises were rebuilding, and had gone on there so successfully as to be no loser during that period, he would have had no claim now in respect of interest, but that, if less successful, he might have claimed in proportion?] The question would always have been for the arbitrator, whether there was a loss within the meaning of the policy. The profits of the business were clearly insurable. [LORD DENMAN, C. J. The question is, whether they are covered by the insurance actually effected.] In *Crowley v. Cohen*, 3 B. & Ad. 478, Lord Tenterden said that, in a policy of insurance, "although the subject-matter of the insurance must be properly described, the nature of the interest may in general be left at large." Littledale, J., makes a similar observation; Parke, J., says, "The particular nature of the interest is a matter which only bears on the amount of damages; it is never specially set out in a policy;" and Patteson, J., adds: "It is only necessary to state accurately the subject-matter insured, not the particular interest which the assured has in it." In *Flint v. Flemyng*, 1 B. & Ad. 45, it was held that a shipowner, on an insurance of freight, might recover for the profits which he would have made by carrying his own goods. [TAUNTON, J. The profits were of the same nature, whether he carried his own goods or those of another.]

Kelly, contra, on stating that he should not dispute the award on any point but this, was stopped by the court.

LORD DENMAN, C. J. We all think the case quite clear on this point. The interest in question might have been the subject of insurance, but an arbitrator cannot take into consideration the possible profits of an inn, under the shape of an interest in buildings.

LITTEDALE, J., concurred.

TAUNTON, J. If a party would recover such profits as these, he must insure them *qua* profits. I never heard before of a recovery of profits of a business as an incidental part of the loss under an insurance upon a house or ship.

WILLIAMS, J., concurred.

*Rule absolute for setting aside the disputed part of the award.*²

¹ The award was disputed on more than one ground; but Kelly stating, on behalf of the company, that they were willing the award should stand except as to £450, no decision was given on any other point. — REP.

² See *Leonarda v. Phoenix Assur. Co.*, 2 Rob. (La.) 131 (1842); *Niblo v. North American F. Ins. Co.*, 1 Sandf. 551 (1848). — ED.

HOFFMAN v. WESTERN MARINE AND FIRE INSURANCE CO.

SUPREME COURT OF LOUISIANA, 1846. 1 La. Ann. 216.

APPEAL from the Commercial Court of New Orleans, WATTS, J.

The judgment of the court was pronounced by

SLIDELL, J. This is a suit on a fire policy upon merchandize, bedroom furniture, &c., in a store occupied by plaintiff. The amount claimed is based upon an account annexed to the petition. This account is composed mainly of items exhibiting the sound value of the goods, as appraised in the store after the fire. A few of the items are for goods lost or destroyed at the fire, put down at an appraised value. From the total of these items thus appraised, is deducted the net amount which the goods and furniture produced at an auction, ordered by the plaintiff after the company had refused to pay him, and for the balance — the difference between the appraised value and the auction sales being \$1,231.19, the plaintiff sues, and has obtained a verdict. The evidence at the trial was of the same character. The appraisements of the goods and furniture were offered, and the accounts of the auction sales were also offered. The jury gave their verdict for the precise balance stated in the account annexed to the petition.

The insurers' liability is distinctly defined by the policy, and by well ascertained principles of the law of insurance. If goods are wholly destroyed by fire, the insurer is bound to make indemnity, by paying their value at the time of the loss. If the goods be not destroyed but damaged, the insurer is bound, by the like rule of indemnity, to pay the assured the difference of value between the goods in their sound and in their damaged condition. The idea of a right of abandonment of the goods, which seems to have existed in the plaintiff's mind, and in that of his principal witness, who assisted him in making out the appraisalment, is entirely unsanctioned by the law of fire insurance. Insurance companies sometimes assent to the sale of damaged goods at auction to ascertain the value, but they are under no obligation so to do, without a clause to that effect. When they assent to that course to ascertain the damaged value, the indemnity is the difference between the auction return and their sound value at the date of the fire. Where a sale is thus made with their assent, or, without their assent, yet upon notice to them, it is obvious that they could have an opportunity of being represented at the sale, and of taking measures to prevent an undue sacrifice.

The court below was requested by the defendants' counsel, "to charge the jury that, the difference between the price for which the goods injured by the fire were sold at public auction and the valuation of said goods before they were injured, was not a proper criterion to fix and determine the amount of indemnity for which the defendants were

liable under their contract of insurance, and that the amount of damage or injury sustained by the property insured ought to have been proved by other testimony, or legal evidence; but the court refused to charge the jury as requested, but charged them, on the contrary, that the auction sale and valuation of the property as aforesaid, afforded a proper basis to establish the amount of indemnity to which the plaintiff was entitled." The minds of the jury might have been misled by this refusal, and charge of the court, and it is natural to suppose that they were so, as they have given their verdict for the precise difference between the appraisements and the auction sales.

In our opinion the charge of the court should have been that, one assured in a fire policy is entitled to recover the fair market value, at the date of the fire, of goods totally destroyed, and, as to goods damaged, the difference between the value, at the date of the fire, of goods in their damaged state and like goods undamaged; and that in ascertaining the damaged value, a fair sale at auction made by the assured, in cases where the goods are so much damaged as not to be saleable in the ordinary mode, and upon reasonable notice given to the insurer or with the insurer's knowledge, may be considered by the jury in estimating the extent of damages, and ascertaining the amount of indemnity. But that when an auction sale is made by the assured, without notice to, or knowledge by, the insurer, the mere returns of sale are not of themselves sufficient evidence of the damaged value.

In the present case the insurers were parties to the appraisement, their own agent having acted and signed as one of the appraisers; and as no fraud or mistake in the framing of the appraisement is proved, the company is bound by it, as *prima facie* evidence of the sound value of the goods, both of those lost or destroyed at the fire, and of those which existed at the store, after the fire, in a damaged condition. But there is no satisfactory evidence in addition to the auction sales, to show the extent of the damage.

It is obvious that, by taking the mere auction sale, made without proof of notice or privity of the insurer, a fair measure of indemnity is not given, for goods sold under the hammer as damaged goods, might well be sacrificed. In the present case we are not able to say whether there was a sacrifice as to the merchandize, as the appraisement was single, to wit, of sound value only. But with regard to the furniture, it appears that the appraisers made a double appraisement, estimating the value before the fire at \$231, and the damage by the fire, which was the loss to the plaintiffs, at \$45; thus leaving its value in its damaged condition at \$153.54; whereas it was sold at auction for the gross sum of only \$48.12, and a net sum of \$42.46, which latter amount only is credited to the insurers by the plaintiff's petition and by the finding of the jury. We should not suppose the sacrifice as great in the case of the merchandize, but we are still left in doubt by the evidence as to the extent of the damage, having no guide but the auctioneer's return.

Under these circumstances, and without entering into a consideration of the charges of fraud, we deem it our duty to remand this cause. In doing so, however, it is proper to notice some other questions of law presented in this case.¹ . . .

It is therefore ordered that the judgment of the court below be reversed, and that this cause be remanded to the Fourth District Court of New Orleans, for a new trial; the plaintiff paying the cost of this appeal.²

W. H. and R. Hunt, for the plaintiff.

Maybin and Roselius, for the appellants.

BRINLEY v. NATIONAL INSURANCE CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1847. 11 Met. 195.

ASSUMPSIT on a policy of insurance, dated August 28th, 1844, whereby the defendants caused George Brinley to be insured against loss by fire, for one year, four thousand dollars on a brick building, used as a store, in Dock Square, Boston. This provision was in the policy: "That in case of any loss or damage the said company shall have the right to replace the articles lost or damaged with others of the same kind and equal goodness, at any time within sixty days after notice of the loss."

The trial was before SHAW, C. J., whose report thereof was as follows: There was proof that the store was totally destroyed by fire within the year, and that the policy was assigned by the assured, after the loss to the plaintiff, with the consent of the defendants; and no objection was made to the plaintiff's bringing the action in his own name.

The store having been rebuilt upon a plan different from that of the one destroyed, the cost of the new building could not be the measure of the plaintiff's loss by the destruction of the old one. There was much conflicting evidence, and many varying estimates of the cost of erecting a new building of the same dimensions and materials, and upon the same plan with that of the one burnt; all of which was left to the jury.

The defendants contended that, as a store of similar dimensions and plan with the old one, built of new materials, would be worth more than the old one, a deduction ought to be made from the estimated cost of a new store, for the difference in value between the old store and such new store; analogous to the deduction of new for old in the adjustment of losses on marine policies. This position was not sus-

¹ The omitted passages discussed points foreign to the amount of recovery, and held that as to one of these points the court below had committed error. — ED.

² See *Clement v. British American Assur. Co.*, 141 Mass. 298, 301, 304-305 (1886). — ED.

tained by the judge; but the jury were instructed, that the contract was a contract of indemnity; that, to afford indemnity, the defendants were bound either to replace the building in as good condition as it was in before the fire, or to pay the plaintiff a sum of money sufficient to place the assured, as owner of the building, in as good a situation as if the fire had not happened; that, in doing this, if any materials were left, they might be used, as far as they would go, and as far as they were fit, in rebuilding; but if the building could not be placed in as good a condition as it was in before, without using new materials, and new materials were used, no deduction should be made on that account, although it might be more durable than the old building would have been, and for some purposes more valuable.

The jury returned a verdict for \$3,689, which is to be set aside, and a new trial granted, if the above instruction was wrong; otherwise judgment to be entered on the verdict.

Gardiner & English, for the defendants.

M. S. Clarke, for the plaintiff.

WILDE, J. At the trial, the defendants contended that as a new store of similar dimension and plan with the old one, built of new materials, would be worth more than the old one, a deduction ought to be made from the estimated cost of a new store, for the difference in value between the old store and the new one; analogous to the deduction of new for old in the adjustment of losses on marine policies. This claim of deduction was not sustained by the judge at the trial, and we are not aware of any authority or principle by which it can be supported. The rule, in adjusting marine losses, is arbitrary, and operates in some cases unjustly, giving to the insured more or less than a full indemnity, to which he is entitled by the policy, and to no more. The rule originated from the usages among merchants and underwriters, probably from the great difficulty of ascertaining the actual loss, without first repairing the damage done, or estimating the cost of repairs. The rule is applicable only to cases of a partial or a constructive total loss. It depends on usage, sanctioned by judicial decisions; and in some cases this rule of estimating the loss is expressly provided for by the terms of the policy. Such has been the stipulation in the marine policies in Boston for many years. But the rule has never been adapted to policies of insurance on buildings and other property against fire.

The question then is, what is the rule of damages, if any there be, in cases like the present? The plaintiff's counsel contends that the actual loss is to be ascertained by the expense of restoring the property without any deduction for the difference of value between the new and old materials; and so the rule is laid down by Professor Greenleaf. 2 Greenl. on Ev. § 407. But the only adjudicated case he cites which has any direct bearing on the question is that of *Vance v. Forster*, 1 Irish Circuit Cases, 51, in which Mr. Baron Pennefather laid down a very different rule. He says, as is reported in 3 Stephens N. P. 2,084, that "the jury are to say what state of repair the machinery was in, what it

would cost to replace it by new machinery, and how much better (if at all) the mill " in which the machinery was placed " would be with the new machinery than it was at the time of the fire ; and the difference is to be deducted from the entire expense of placing there such new machinery." This rule, in all cases where the cost of repairs is one of the elements by which the jury are to estimate the actual loss, seems to be founded on the principles of justice, as it will give to the assured a full indemnity, and no more, to which he is entitled by the contract. But by the rule contended for by the plaintiff's counsel, the assured in most cases would recover more than an indemnity ; and much more when the building insured is dilapidated and much out of repair. Such rule is not supported by any principle of justice, nor by the authority of any adjudged case. It is founded on an erroneous construction of the contract. It supposes that the insurers are bound to repair the building, or to pay the expenses of the repairs. But no such obligation is imposed on them by the policy. They have the privilege to make the requisite repairs, if they see fit, to protect themselves against the recovery of excessive damages, or for any other reason. But if they elect not to make the repairs, they are liable only to pay a fair indemnity for the loss. But whatever may be the rule when the building insured is partially injured by the peril insured against, it has no application to cases like the present, where the building is totally destroyed, and is to be replaced by a new one. The rule of damages in cases on marine policies would not apply to a case where the ship had been totally destroyed. In the present case the building was destroyed by fire, and a new building was erected upon a different plan ; so that the cost of a new building could not be certainly ascertained. If the rule laid down in *Vance v. Forster* were applied, the jury must ascertain, by the estimates and opinions of witnesses, the amount of the expenses of a new building, and they must estimate the value of the old building, in order to ascertain the difference, if any there be, between the new and the old. We can perceive no use in requiring this double estimate ; for where the plaintiff is only entitled to recover the amount of the value of the building destroyed, the estimate of the cost of a new building is useless. We are therefore of opinion that there is no rule of damages applicable to the present case, and that in all cases where no rule of damages is established by law, the jury are to decide upon the question, and that to their decision there can be no legal exception.

The instructions were conformable to these principles, except in one particular. The jury were instructed that no deduction was to be made from the expenses of repairing or rebuilding the store insured, although the new building might be more durable than the old building would have been, and for some purposes more valuable. In this respect we think the jury were misdirected, and consequently that the defendants are entitled to a new trial.¹

¹ *Acc. : Guinn v. Phoenix Ins. Co.*, 80 Iowa, 346 (1890) ; *Hilton v. Phoenix Assur. Co.*, 92 Me. 272 (1898). — ED.

COMMONWEALTH INS. CO. v. SENNETT, BARR & CO.

SUPREME COURT OF PENNSYLVANIA, 1860. 37 Pa. 205.

ERROR to the Common Pleas of Erie County.

This was an action of debt, brought in the court below by Pardon Sennett, M. R. Barr, Conrad Brown, and J. J. Finley, partners doing business as Sennett, Barr & Co., against The Commonwealth Insurance Company.

To a *narr.* in debt, the defendants filed a special plea, averring concealments and misrepresentation on the part of the plaintiffs, adding the formal pleas of *non est factum* and *nil debet*. To this a replication and demurrer was filed, which demurrer was afterwards withdrawn. The plaintiffs then replied to and traversed the defendants' plea, and, on the issue thus made up, the parties went to trial.

The plaintiffs below were owners of a number of machines called mowers and reapers, which they had manufactured for sale, and stored in a warehouse at Erie. They were insured against loss or damage by fire by the defendants below, in a policy in the usual form, in the sum of \$3,000. The policy was dated May 25, 1857, and was for the term of six months. On the 25th of November, 1857, the policy was renewed by J. J. Lints, agent of defendants, for a further period of six months. On the night of the 10th of February, 1858, the property insured was totally destroyed by fire.

On the trial, the defendants offered to show, by Matthew Dickson and others, that the kind of machine known as Danforth's reaper and mower, and manufactured by the plaintiffs, and being the same kind of machine insured and destroyed, were of little or no value — were worthless as an agricultural instrument, or for any other use or purpose — and that they had no value, save as mere wood and old iron — and that the machines were worthless both on account of defects in construction, and in the principle of the machines themselves. To this the plaintiffs objected, but the court said: "We will admit evidence to show that the machines could be manufactured at a less price than the plaintiffs' witnesses say they were made and sold for, or that the plaintiffs' knew, when making them, that they were worthless in principle, and that they were defective in workmanship, but not that they were defective in principle, as it was a patented one." To this ruling the defendants excepted.

The policy provided, among other things, as follows: "And the said company do hereby promise and agree to make good unto the said assured, their executors, administrators, or assigns, all such immediate loss or damage not exceeding the sum hereby insured, as shall happen by fire to the property above specified, — the said loss or damage to be estimated according to the true and actual cash value of the said property at the time the same shall happen."

The defendants requested the court to instruct the jury as to the measure of damages, that the jury were not to be confined to the evidence of the cost of manufacturing the machines as given by plaintiffs, but might be governed by the actual cash value, as proved by defendants, without reference to the cost of construction. The court refused so to charge the jury, but instructed them that "the value as estimated in the manufacture of each machine, and before it was tried in the field, would be the standard of valuation." And further on this point, the court said to the jury: "Admitting that many of the machines did not work when they were put to the trial, and this because of a defect in the principle upon which they were got up, and not in the mechanism of them, that would not interfere with the plaintiffs' right to recover according to their estimated or actual value when the insurance was made, unless, as before stated, the plaintiffs were aware of the defect. The asking or selling price would not be the standard of value, for the company would have the option to replace by similar articles or pay the cash, but the cost of construction."

The jury found in favor of the plaintiffs the sum of \$3,262.50, and judgment having been entered thereon, the case was removed into this court by the defendants, who assigned for error the instruction of the court below, as to the measure of damages.

W. A. Galbraith, for plaintiff in error.

Church & Marshall, for defendants in error.

The opinion of the court was delivered, October 25, 1860, by

THOMPSON, J. There is nothing in the policy of the law which abridges the right and power of parties to a contract of insurance from stipulating in regard to the mode and manner of estimating or valuing a loss when it shall occur, or as to the time which shall be the period of the valuation of the property destroyed, or such other matters within the scope of a fair transaction as they may see proper. Insurance is a contract of indemnity, and if the parties stipulate for the manner in which that indemnity shall be made, on the contingency of liability, it is their right to do so, and the law will carry out their contracts as made, if there be no fraud in them, as in other cases. *Trask v. The State Fire and Marine Ins. Co.*, 5 Casey, 198; *North-Western Ins. Co. v. Phoenix Oil and Candle Co.*, 7 Casey, 448.

Mr. Phillips, in his *Treatise on Insurance*, cap. 1, § 3, says: "The indemnity intended in insurance is not the putting the party insured into as good a condition as he would in fact have been if no loss had happened; it means the repayment of the expense incurred, and the payment for as much of the insured subject as is lost, at its market value, or its value as agreed upon in the policy."

The policy in this case was an open one, as contradistinguished from a valued policy, and in it the parties have chosen to fix for themselves the standard of valuation, and have stipulated that it should be the "true actual cash value of the property," and the time for ascertaining such value to be the date of its injury or destruction by fire.

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Now, unless it can be shown that they had not the right so to contract, or have used terms possessing some other than their ordinary meaning and import, this basis for estimating the loss thus established, must control and govern. It is the law of the contract established by the parties themselves. Nothing has or can be shown, we think, to countervail their right so to contract in regard to the subject-matter mentioned, or which controls the ordinary meaning of the terms used by them. This has not and cannot be done. The contract is so plain, that interpretation is not needed to arrive at what was meant. The parties meant only what they have plainly said; and it was a plain mistake to disregard the language used, and construe the contract as if no stipulation existed.

It is usual, in the absence of a stipulation in marine insurance, to value the goods lost and covered by an open policy, as of the time of the commencement of the risk, and this was the nature of the insurance treated of by Mr. Phillips, as cited by the counsel for the defendant in error.

I will not attempt to point out the distinctive differences in this respect between marine and fire insurances, and wherein they consist. If we were dealing with a policy in which no stipulation existed for determining when or how the valuation should be made, and the question were to be determined by principles of law exclusively, we might be required to look more closely to them. But such is not the case here. The parties have made the law of this contract in this particular for themselves, and we must administer it. They have covered the whole ground.

The case of *Niblo v. The North American Ins. Co.*, 1 Sandf. 558, has no possible bearing on the point in question. There the policy contained no stipulation such as we find here, and the court allowed the full value of the tenement insured without regard to the extrinsic circumstance that it was to be removed within fifteen days. They held that peradventure the lease of the ground might be renewed, or the insured might sell it to the owner of the ground, or its value might not be impaired by removing it to an adjacent vacant lot. Intrinsically it was not impaired by the circumstance that the ground lease was soon to end. Such had been the doctrine laid down in *Laurent v. The Chat-ham Fire Ins. Co.*, 1 Hall, 41. Such cases as these are good enough law where they belong, but furnish no rule where the parties have fixed a law for themselves. These views apply as well to the restricted operation of the testimony received, as to the ruling in answer to the defendant's eleventh point. There was error in both.

The option to replace the machinery, if destroyed, was a reservation for the benefit of the company; they were not bound to adopt it. What it would cost to replace it, was, therefore, not to furnish the rule for the damages which the company must pay to make good the loss. If this were to be held, it would be equivalent to enforcing the option as an obligation. It is stated in *Angell on Insurance*, § 269, that in-

surers have the privilege of making repairs or replacing property, if they see fit to do so; but if they elect not to do so, "they are liable only to pay a fair indemnity for the loss." This shows that the estimated cost of a compliance with the option is not to be considered in assessing the amount to be paid on the loss. If it had any weight here, it was wrong.

Nor was the fact that the machines insured were constructed under a patent, of any importance. Patented or unpatented, what they were worth at the happening of the fire, was, by the agreement of the parties, to be the measure of their value; and this must be ascertained by testimony, as is done in every other case, where the value is not fixed.

For these reasons, the judgment is reversed, and a *venire de novo* awarded.

EQUITABLE FIRE INS. CO., APPELLANTS, v. QUINN,
RESPONDENT.

QUEEN'S BENCH, IN APPEAL, DISTRICT OF QUEBEC, 1861. 11 Lower
Canada, 170.

BEFORE Sir L. H. LA FONTAINE, C. J., AYLWIN, DUVAL, MEREDITH,
and MONDELET, JJ.

In this case, the respondent, plaintiff in the court below, obtained judgment against the appellants for the sum of £200, being the amount insured by them on his stock and utensils in trade as a general turner.

The principal matters of fact in the plaintiff's declaration were admitted, including the making of the policy, the amount insured thereby, the renewal thereof, and a loss by fire while the policy was in force; but not admitting the quantity and value of the articles insured by the policy. The quantity and value were, however, established by the respondent's witnesses. By the policy, the appellants agreed to pay or make good to the insured all such loss or damage as the said insured should suffer by fire. The loss and damage which he had suffered, the respondent contended, was the *value* of the blocks in the market. The appellants, on the contrary, contended that they were only liable to the respondent for the cost of the effects, inasmuch as the respondent had not effected insurance upon the profits he expected to make upon his goods. A number of witnesses were produced by the appellants who established the cost of the articles insured at a considerably lower amount than the value proved by the respondent. The appellants, in consequence, tendered the sum of one hundred pounds with interest and costs to the party insured, who refused to accept the offer, and the present appeal was in consequence instituted.

MEREDITH, J. The action in the court below was founded upon a policy of insurance by which the plaintiff, a block-maker by trade, insured his stock in trade, consisting of blocks, for £200. The property insured having been destroyed by fire, the present action was brought for the recovery of the insurance; and the only question between the parties is as to the value of the blocks destroyed. The defendants contend that the plaintiff is not entitled to more than the amount which it cost the plaintiff to manufacture the blocks in question; but this pretension cannot, I think, be maintained. The plaintiff is entitled to what the blocks were worth in the market, at the time they were burned; and I think, according to the evidence, they were worth the amount the plaintiff had insured upon them, namely £200, that being the amount of the judgment in favor of the plaintiff; and therefore that that judgment ought to be confirmed.

DUVAL, J. The judgment of the court below should, in my opinion, be confirmed, inasmuch as both the English and French law, on this point, declare that the amount covered by the insurance is the actual loss, without any reference to the cost price; and this is what the court now grants.

*The judgment of the court below was therefore confirmed.*¹

Lelievre, for appellants.

Stuart and Murphy, for respondent.

¹ In *Mitchell v. St. Paul German F. Ins. Co.*, 92 Mich. 594 (1892), insurance was procured upon lumber. The policy said: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality." The lumber was destroyed by fire. The persons procuring the insurance had manufactured the lumber in their own mill, which was at the yards where the lumber was piled. They were the owners of timber lands from which the destroyed lumber could be replaced, and after the fire they continued to cut from their lands and to operate their mill. It was held that the proper basis for recovery was not cost of reproduction, but market value. LONG, J., for the court, said:—

"We think the word 'then' is significant, and must be given weight in determining the true intent and meaning of the contract. If the defendant's theory of construction be adopted, the word 'then' must be dropped out, and the contract construed as intending to give to the insurance company the benefit of the time it would take the insured to replace it or reproduce it; that is, if the insured had the means of replacing or reproducing the burned lumber, having timber from which to manufacture lumber and the mill to manufacture it with, then an estimate should be made of that cost as the measure of damages, though it might take six months or a year to replace or reproduce it. In this sense the words 'replace' and 'reproduce' would be synonymous; but the contract cannot be construed in that way without doing violence to the language employed. Clearly, it means just what it says, 'what it would then cost the insured to replace it,' and not what it would cost the insured to cut from his own stumpage, manufacture lumber at his own mill, and replace, after the delay of cutting, hauling, sawing, piling in the yards, etc.

"We are unable to agree with the learned counsel for the defendant that the contract is to be construed any differently in this case than though the plaintiffs had no stumpage of their own, and no mill by which they could manufacture lumber. It means that the plaintiffs had the right, on the date of the fire, to recover from the

OGDEN ET AL., RESPONDENTS, v. EAST RIVER INS. CO.,
APPELLANT.

COURT OF APPEALS OF NEW YORK, 1872. 50 N. Y. 388.

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, affirming a judgment in favor of plaintiffs, entered upon a verdict.

The action was brought upon a policy of insurance issued by defendant to plaintiffs for \$3,000 on plaintiffs' stock in trade, "contained in the three-story brick building known as No. 392 Washington Street, in the city of New York." Other insurance was permitted without notice until required.

The policy contained a provision that "in case of loss the insured shall not recover on this policy any greater proportion of the loss or damage sustained to the subject insured than the amount hereby insured shall bear to the whole amount insured on the said property."

The plaintiffs, at the time of the fire, held fourteen other policies, issued by various companies, to the amount of \$47,500, covering said property in No. 392 Washington Street and a large amount of other property owned by plaintiffs. On the 30th November, 1864, all the property insured and covered by said fifteen policies was destroyed by

defendant such an amount of money as it would cost them to replace the lumber, or, in other words, the market value of the lumber at the date of the fire. It cannot be said that, because the lumber was so great in amount, it would have no market value, or that such a large amount could not have been purchased in open market. It is like any other commodity of which constant sales are being made. If it had been flour, it is not contended that, because the insured may have had a farm and could raise the wheat, and a mill where he could manufacture it into flour, he could recover only what it would actually cost to raise the wheat and convert it into flour; but there would be as much reason to hold the contract controlled by such considerations in the one case as in the other. Lumber is a marketable commodity, and it is well known can be purchased in the open market as well as flour. Certain grades have certain prices, and grades of lumber are as well known to the trade as grades of wheat. We know of no reason for saying that fifteen or sixteen million feet of lumber cannot be purchased in open market, or that it has not as certain and fixed market value as a thousand or five thousand bushels of wheat.

"It cannot be said that it was in the contemplation of the parties, at the time the contract was entered into, that it was to have the construction now contended for by counsel for the defendant. Suppose plaintiffs had sold their timber and removed their mill before the fire, which they would have had the right to do. The contingency would then have arisen where they could not have reproduced the lumber. It would then be conceded that the measure of loss-damage would be the cost of replacing it by purchase in the open market. If the contract bore the construction contended for at its execution, under the circumstances above supposed, it would be changed by the change in the situation and surroundings of the insured. It would be construed in one way at its inception, and by a change of circumstances be susceptible of another construction at the time of the fire."

See *Hartford F. Ins. Co. v. Cannon*, 19 Tex. Civ. App. 305 (1898).

Compare *Chippewa Lumber Co. v. Phenix Ins. Co.*, 80 Mich. 116, 123-124 (1890). — Ed.

fire. The value of the entire property so destroyed was \$88,788.83. The value of the property covered by defendant's policy was \$16,305.89.

The court upon trial directed a verdict in favor of plaintiffs for the full amount of the policy and interest, which was rendered accordingly.

Charles Tracy, for the appellant.

William F. Shepard, for the respondents.

RAPALLO, J. The clause, now usual in policies of insurance, which provides for an apportionment of the loss in case of other insurance on the property, is a part of the contract, and must receive a reasonable construction. We have no right to engraft upon it the rules governing suits for contribution among insurers, nor to restrict its operation to cases where such suits could be maintained, but must look at the language of the clause itself and construe it as we would any other stipulation between the insurer and the insured.

We cannot adopt the view taken of this clause in the case of *Howard Ins. Co. v. Scribner*, 5 Hill, 298, where it was held (in analogy to the rule in actions for contribution) that where a specific parcel of property is insured by one policy, and the same property is covered by another policy, which also includes other property, the latter policy is to be thrown wholly out of view, and does not constitute other insurance within the meaning of the clause. Neither can we agree to the doctrine contended for by the counsel for the appellant, that the whole sum insured by the more comprehensive policy is to be considered as so much additional insurance upon the parcel separately insured.

Where several parcels of property are insured together for an entire sum, it is impossible to say as to either of the parcels that there is no insurance upon it. Neither is it reasonable to assume that any of the parcels is insured for more than its value where the whole sum insured is less than the aggregate value of all the parcels covered by the policy. The difficulty lies in determining what part of the whole sum insured is to be deemed applicable to either parcel where the policy itself makes no separation.

If the entire property is destroyed, as in this case, the rule laid down in 2 Phillips on Insurance (p. 56, No. 1263, *a*) and in *Blake v. Exch. Mut. Ins. Co.*, 12 Gray, 265, carries out the intent of the clause and works entire equity between the insurers and the insured, as well as between the several insurers. That rule is, in substance, that for the purpose of apportioning the loss in case of over insurance, where several parcels are insured together by one policy for an entire sum, and one of the parcels is insured separately by another policy, the sum insured by the first mentioned policy is to be distributed among the several parcels in the proportion which the sum insured by that policy bears to the total value of all the parcels. Thus in round numbers the sum insured in this case by the policies, other than the defendant's, on the property, as an entirety, was \$47,000. The total value of the property covered by these policies was \$88,000. In case of a total loss, each parcel should be deemed insured thereby for $\frac{47}{88}$ of its value. The

parcel separately insured by the defendant was worth \$16,000, and was insured by the defendant for \$3,000, which was equal to $\frac{3}{16}$ of its value. It is manifest that there was no over insurance, and that consequently there is no occasion for any apportionment.

Whether this would be the proper rule in case the \$16,000 parcel alone had been destroyed or damaged, it is not now necessary to determine. In that event, if the defendant's policy had not existed, the whole loss would have been recoverable under the \$47,000 insurance. It may be that the rule for ascertaining the amount of insurance upon any particular parcel where insurances are commingled, as in this case, is dependent upon the extent of the loss, and that whatever could be recovered upon the more comprehensive policy without regard to the other is the amount to be deemed insured thereby on the part injured in case of a partial loss, and that on that basis an over insurance to the extent of the separate policy might be established. By insuring several parcels of property for an entire sum the insured obtains the advantage, and the insurer subjects himself to the liability of having so much of the total sum insured as may be necessary to compensate for damage to any part of the property applied to that part, though the sum named in the policy would have been insufficient to cover the loss if the whole had been destroyed. Thus it is left to the result, in case of a partial loss, to determine what sum is insured upon any particular parcel, the only limit being its value. On the other hand, it would be desirable to adopt a general rule applicable to all contingencies. We refrain from expressing an opinion now upon the several phases which might be developed under an insurance of this character in case of partial loss, confining our adjudication to the case before us, which was that of a total loss of the whole subject insured by all the policies.

The judgment should be affirmed, with costs.

All concur.

*Judgment affirmed.*¹

STATE INS. CO. v. TAYLOR.

SUPREME COURT OF COLORADO, 1890. 14 Colo. 499.

APPEAL from District Court of Chaffee County.

On the 30th day of January, 1885, appellant issued to appellee a policy of insurance on his frame house, used as a residence, in the village or town of Hancock, Chaffee County, and its contents, including wearing apparel, family stores and provisions, for the sum of \$1,200, —\$800 being on the building and \$400 on the contents; insuring against fire and lightning for one year for a premium of \$48.² . . .

¹ See *Lucas v. Jefferson Ins. Co.*, 6 Cow. 635 (1827).

Compare *Clarke v. Western Assur. Co.*, 146 Pa. 561 (1892).—Ed.

² In reprinting the statement and the opinion, passages not dealing with the amount of recovery have been omitted.—Ed.

On the 3d day of November of the same year, the house took fire in the upper part (ceiling or roof) from a stove-pipe, and was destroyed, with most of the contents. . . .

In the answer the defendant admitted the making and delivering of the policy, denied that the loss was \$1,200, as shown by proofs of the loss submitted, and said it ought to be not to exceed \$524.62. . . .

The case was, by agreement of parties, tried by the judge of the district court without a jury. He found for the plaintiff in the sum of \$1,045, and judgment was entered for that amount.

Stuart Bros., for appellant.

W. S. Decker and *C. A. Allen*, for appellee.

RED, Commissioner. . . . The only remaining question is as to the rule of damages in arriving at the value of the building destroyed. It is contended that the amount allowed was excessive; that the true value was what the property would have sold for in the market. Counsel do not say whether, in fixing the value, the house is to be considered a chattel, and its value what it would bring severed from the realty, or whether its value was to be estimated in connection with the land on which it stood. The rule contended for cannot be the correct one. If so, — if there was no market demand for the property so it could be sold, — it would have no value, and there would be, consequently, no loss. Another trouble is as above suggested: It would make the value of the house insured to depend upon the marketability of the uninsured land. A farmer might have an insured building of the value of \$5,000 on a large farm, and yet be held to have sustained no loss by its destruction because there was no demand for land in that location, and the farm could not have been sold. While the price for which the property could be sold might be admissible in evidence to assist in arriving at its value, it was not the only, nor a safe, criterion. If not salable at all, it might have a value to the owner as a home for himself and family, or for business purposes. Where, as in this case, the policy was “valued” (amount of insurance fixed), the rule is indemnification to the owner not exceeding the sum insured; the question, not what some one would have paid for the building, but what amount would indemnify the owner for the loss sustained.

The rule of damages is the value of the property lost, and not the cost of replacement. *Steward v. Insurance Co.*, 5 Hun, 261. It is for the jury to determine how much money will make good to the insured his loss. *Brinley v. Insurance Co.*, 11 Metc. 195. “It is for the jury to say what the actual value of the building was, in view of all the facts, and their finding is conclusive.” *Wood, Ins.* § 446.

Counsel seem to have confounded the measure or rule of damage for merchandise or goods destroyed with that for buildings. In the former the value in market is correct. In the latter it must be “the actual value of the property in the condition it was in at the time of loss, taking into consideration its age and condition, and not necessarily what it would cost to erect a new building. The assured should be allowed the value

of his building at the time of loss ; and if, by reason of age or use, it is less valuable than a new building, erected upon the same plan, of similar materials, and of the same dimensions, the insurer should be allowed for such difference arising from deterioration." Wood, Ins. § 446 ; Insurance Co. v. Sennett, 37 Pa. St. 205.

It follows that the original cost of the building, the cost of constructing a like building at the time of trial, on the same land, and the difference in value between the building destroyed, by reason of its age and use, and a new one, were all proper inquiries to assist the court in arriving at a just conclusion in regard to the loss sustained ; and the admission of evidence upon these points was not erroneous, as supposed by appellant. In our view of the case, no serious errors occurred upon the trial, and the judgment should be affirmed.

RICHMOND and PATTISON, C. C., concur.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment is affirmed. *Affirmed.*¹

¹ In *Bardwell v. Conway Mut. F. Ins. Co.*, 122 Mass. 90, 95 (1877), DEVENS, J., for the court, said : "The defendant sought to show what the land sold for after the buildings were destroyed, as affording evidence of the value of the buildings when connected with proof of what both together had been offered for at sale. We cannot say that this was improperly excluded. The relation which the buildings occupy to the land is not necessarily such that their value can approximately be ascertained by such a comparison as was proposed. In some instances they add to the value of the estate more than their own independent value, while, in others, buildings which it would cost much money to renew, do not add sensibly to the amount for which the estate, on which they are situated, could be sold."

On amount of recovery in general, see also : —

Pentz v. Aetna F. Ins. Co., 9 Paige, 568 (1842) ;

Liscom v. Boston Mut. F. Ins. Co., 9 Met. 205 (1845) ;

Crombie v. Portsmouth Mut. F. Ins. Co., 26 N. H. 389 (1853) ;

Cumberland Valley Mut. Protection Co. v. Schell, 29 Pa. 31 (1857) ;

Tuckerman v. Home Ins. Co., 9 R. I. 414 (1870) ;

Woodruff v. Imperial F. Ins. Co., 83 N. Y. 133 (1880). — ED.

SECTION II. (*continued*).

(B) LIMITED INTERESTS.

LAURENT v. CHATHAM FIRE INS. CO.

SUPERIOR COURT OF THE CITY OF NEW YORK, 1828. 1 Hall, 41.¹

THIS was an action of assumpsit on a policy of fire insurance for \$800 upon a building. The plea was the general issue.

At the trial before HOFFMAN, J., it appeared that the building was destroyed by fire on August 15, 1827; that it stood upon ground leased to the plaintiff for a term expiring September 1, 1827; that the lease contained a covenant for renewal, but that the plaintiff had given no notice of a desire to renew; that the building was erected by the plaintiff, was his property, and was capable of removal; that the building cost more than \$1,100, and was intrinsically worth about \$1,000; but that, if it were necessary to remove the building, it would not bring more than \$200.

The counsel for the defendants submitted that, as the plaintiff had no interest in the lot, except for a term of which only fifteen days remained at the time of the fire, and as the value of the building if removed was only \$200, the plaintiff could not be entitled to recover \$800.

But the judge ruled that, as the building had cost upwards of \$1,100 and was worth at least \$1,000, and as there were vacant lots in the immediate vicinity upon which it might have been placed even if the plaintiff did not renew his lease, and as the defendant company must be presumed to have written the policy with knowledge of the circumstances, the plaintiff was entitled to recover the full amount with interest. To this opinion the defendant company excepted.

The jury returned a verdict for \$900. The defendant company now moved for a new trial.

Mr. *Jay*, in support of the motion.

Mr. *Charles Graham*, for the plaintiff, *contra*.

JONES, C. J., delivered the opinion of the court.² . . .

It is certainly true, as a general rule, that the policy of insurance is a contract of indemnity, and that the actual loss upon an open policy is the measure of the indemnity to which the assured is entitled. But will that rule, if applied to this case, sustain this defence? The plaintiff insists that this is not an open policy; and if he is correct in that opinion, and the contract is to be deemed a valued policy, there could be no longer any question of his right to recover to the full amount of his insurance. But I cannot accede to that opinion.³ . . .

¹ The statement has been rewritten. — ED.

² Passages stating the case have been omitted. — ED.

³ The discussion of this point has been omitted. — ED.

This policy contains no such agreement or valuation, and has no feature of a valued policy. The assured cannot recover any greater satisfaction for his loss than the actual value of the building which was destroyed by the fire at the time of its destruction. But his contract would entitle him to recover the full value of that building at the time of the loss, if the full amount was covered by the policy. And if the actual value exceeds the sum insured, he will of course be entitled to the whole amount of the insurance towards his indemnity. This general proposition, as applicable to open policies, is admitted by both parties. They differ upon the rule, or principle of valuation; the insured insisting upon the full intrinsic value of the building as the standard, but the company contending for the relative value of it to the owner, subject to removal from its location at the time of the fire, as the just measure of the indemnity to which he is entitled.

The judge ruled that the intrinsic value of the building at the time was the true measure of the loss within the meaning of the contract of indemnity, and we concur with him in that opinion. The actual value of the premises insured is the standard which the policy obviously contemplated for settling the loss, and adjusting the indemnity. The agreement is to make good the loss or damage to the property by the fire, and the estimate of that loss or damage is to be according to the value of the property at the time the loss occurs; and the conditions annexed, to which the policy refers for the explanation of its meaning, are too clear to admit of any other interpretation. A particular account of the loss or damage is to be given in; and the value of the property, if in question, is to be ascertained by the books of account and vouchers of the claimant, which are to come in aid of the estimate of the value of the property at the time of the loss.

But it is said that the policy is a contract of indemnity, and that the principle of indemnity which pervades the insurance must control the construction of the policy; and upon that principle it is insisted, that the value of the property to the assured at the time of the loss, circumstanced as it may then be, in reference to his use and enjoyment of it, is the loss he sustains by the destruction of it, and must be the measure of his indemnity for the loss. It will at once be seen, that if this principle of indemnity is to be admitted, the extent and value of the recovery will in every case vary with the special and peculiar circumstances of the insured, and the local advantages or disadvantages of the building, and the uses to which it is applied; and the intrinsic value of the building will form no criterion of the loss of the proprietor in case of its destruction. A building, for example, which the necessities of the owner compel him to offer at public sale, for ready money, will be worth to him no more than what it will produce at such a sale; and a building for which there happens to be great competition will command a much larger price than its true value. Are these incidental and collateral circumstances to enter into the estimate of value under the contract of insurance, and give the rule of indemnity to the proprietor

for the loss of the building? Two houses of equal value may, from their local situation, be very unequal in the revenues they produce to the proprietors; would the loss of them, if destroyed by fire, entitle the proprietors to different indemnities in proportion to the rents, or revenues of the tenants? Would the insurers be compelled to pay double the amount of the cost of the profitable stand, because the location of the tenement made it of that value to the owner, and yet be compellable to pay for the loss of the other tenement, the one-half only of its actual cost, because from its unfavorable location, or from some popular prejudice it would sell for no more than one-half of its value? It is the tenement upon which the insurance is made; and the actual value of it as a building is the loss of the insured in case of its destruction by fire. To that measure of indemnity the proprietor is entitled, however unproductive the property may be, and he is entitled to no more, whatever revenue he may have derived from the tenement.

The obligation of the contract, then, is to pay the insured the actual value of the tenement as a building, or a proportion of its value, equal to the sum insured upon it in case of the destruction of it by fire within the term for which the policy protects it, for his indemnity for his loss. The policy in terms refers to the true and actual value of the property at the time of the loss, and makes that value the standard by which to estimate the loss or damage which the insurer is bound to satisfy, and the insured is entitled to claim. This agreement cannot be otherwise understood than as binding the parties to the intrinsic value of the property at the time of its destruction, as the rule by which the indemnity is to be measured, without reference or regard to any special and adventitious circumstances which may enhance or diminish the relative value or importance of it to the insured. It is the true and actual value of the tenement itself at the time, independently of its location, or the insecurity of the title, or terms by which it is held that the insurers agree to make good to the present proprietor in case the loss or damage by fire happens during the continuance of his ownership, and within the term of the insurance. It is of no importance whether the tenement stands upon freehold or upon leasehold ground, or whether the lease is about expiring, or has the full time to run when the fire occurs, or whether it is renewable or not. The condition of the policy is satisfied if the title and ownership are in the insured at the time of the insurance, and at the time of the loss, and the measure of his indemnity is the amount of his interest in the tenement when destroyed by the fire, notwithstanding that the whole interest would have expired the very next day, or soon after the loss occurred. But whether there may not be incidents and special circumstances so intimately connected with the premises, or so permanently attached to them as to affect their intrinsic value, or the insurable interest of the party, who effects the insurance upon them, I am not prepared to say; and it is not material to the decision of the question before us to inquire, for this clearly is not such a case. In this case the tenement belonged exclusively to the

insured, and the lease of the lot upon which it stood had fifteen days to run, and was moreover renewable. The true and actual value of it exceeded the sum insured upon it, and the loss of it by the fire was absolute and total, and took place within the term for which it was insured. The sole ground of objection to the right to recover the full amount of the insurance is that the lease was about expiring, and had not been renewed, and it did not appear that the notice required by the lease to entitle the holder to a renewal had been given; and on these grounds the recovery is sought to be limited to the value of the building as a tenement to be removed from the premises. But if that contingency could in any supposable case be brought into the calculation, and suffered to reduce the insurable interest, or the claim to indemnity for the actual loss of the building by the fire (which, if I am right in my conclusions on the point, would be wholly inadmissible), still it would not follow that in this case such deduction could be made, for it is not reduced to a certainty that the lease would not have been renewed. Application may have been made to the agents for renewal; or if the time limited for the renewal as a matter of right had been suffered to elapse, the lessee might within the remaining fifteen days of the subsisting term have made an arrangement with the landlord for the continuance of the lease, or he might have sold the tenement to his successor or to the landlord; or, the tenement, which from its construction, not having any foundation or fixture attaching it to the soil was capable of removal, might have been removed to one of the vacant lots in its immediate vicinity of which it appears in proof there were several. In any one of these contingencies the tenement which is found to have been worth upwards of \$1,000, might well have produced to the owner of it the sum of \$800 insured upon it by the defendants. The plaintiff, by the total destruction of it by the fire, lost the means of availing himself of the sale, or the removal of it, and may have been compelled by the loss of the building to relinquish the right reserved to him to renew and continue the lease. Besides, if it had been reduced to a certainty that the lease was not to be renewed, and that the building was to be sold or removed, what proof is there that the avails of it if sold, or the value of it if removed to a contiguous lot, would not have been equal to the sum insured upon it? Only one witness has been examined to the point, and he simply testifies that he would not have given more than \$200 for the building, if it had been necessary to remove it; but to give his testimony decisive weight, he should have stated what the probable expense would have been to remove it to the adjoining lot, and what its value in such new location would have been; because, if offered for sale, the owner of the contiguous vacant lot might have competed for the purchase of it for that purpose. But witnesses testifying to the point under the most favorable circumstances could only speak from opinion, and the value they would put upon a tenement so circumstanced could be no more than estimates, which would vary with the opinions and views of the witnesses. The value of the building to

Dodge, the witness who was examined, for example, would be much less than it would be to the new tenant, who should succeed the plaintiff, or the landlord who owned the lot on which it stood, or to the owners of the vacant lots in its immediate vicinity. Are such estimates then a just criterion for the measure of the indemnity of the insured for his loss? He was clearly entitled, even upon the principle the defendants would apply to his case, to the price his building would have sold for. What sum it would have produced on a sale of it cannot now be known; but as the fair value of it to himself, if he had continued in the tenure of the premises, or to the tenant who might succeed him, or to the landlord, exceeded the amount of the insurance, he has a just claim upon that principle to a full recovery.

In another view of it, the rule contended for by the insurers would be unequal and unjust in its operation. The insured pays the premium upon the whole sum, and he insures for the entire risk of the property to that amount, during the whole term of the policy. He has a right, therefore, to claim the amount he thus insures, if he loses property of that value by the peril, during the continuance of the risk; but if other considerations are to enter into the calculations of value, and he is to be paid at a reduced rate, because in certain contingencies the property might fail to produce to him the full value of it as it stood at the time of the loss, he will not have the full benefit of his insurance, for which he has paid the full premium.

These views of the practical results of a speculative calculation of damages on the principles for which the defendants contend, present to us powerful considerations for preferring the true and actual value of the building as the standard of indemnity.

The intrinsic value of the tenement, as a building at the time of the loss, is not a matter of mere estimate, but is susceptible of proof. The ninth condition attached to the policy prescribes the form and substance of the proofs required of the claimant to entitle him to payment, and the true and actual value of the property at the time of the fire, is the rule by which the amount of the loss or damage is to be estimated and settled. The rule is uniform and rational; it is in accordance with the letter and spirit of the contract, and administers equal justice to the parties. It was in my judgment rightly applied to this case, and accordingly the motion for a new trial must be denied.¹

¹ *Acc.*: Washington Mills Emery Mfg. Co. v. Commercial F. Ins. Co., 13 Fed. R. 646 (C. C., D. Mass., 1882); Washington Mills Emery Mfg. Co. v. Weymouth and Braintree Mut. F. Ins. Co., 135 Mass. 503 (1883).

See *Collingridge v. Royal Exchange Assur. Corp.*, 3 Q. B. D. 173 (1877). — *ED.*

STRONG v. MANUFACTURERS' INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1830. 10 Pick. 40.

ASSUMPSIT on a policy of insurance, dated December 29, 1828, whereby the defendants insured for the plaintiff \$1,400 on his dwelling-house in Northampton, against loss by fire.

Upon a case stated it appeared that the house was destroyed by fire on April 23, 1829, and the amount of the loss was \$1,800.

The policy contained a provision, that if the property should be sold or conveyed, in whole or in part, the policy should become void. The plaintiff, upon his application for insurance, stated in writing, in reply to interrogatories on the part of the defendants, that the property was his own; but no inquiry was made and no information communicated as to the state of the title.

In 1825, the plaintiff mortgaged the estate to one Damon to secure the payment of a note for \$300; this note has never been paid. In 1827, the plaintiff again mortgaged it to Damon, to secure him against a note for \$1,100, which he had signed jointly with the plaintiff and others. The plaintiff paid one half of this note in 1827, and a new note for the balance signed by the same persons was given by way of renewal. On July 31, 1828, Damon had assigned both mortgages to one Stebbins. On December 4, 1828, the equity of redemption was seized by virtue of three executions issued in pursuance of judgments recovered against the plaintiff; and on January 7, 1829, it was sold by auction for \$210. This sum was applied in payment of the executions, but was insufficient to discharge the whole amount of them. On January 6, 1829, it was agreed between the plaintiff and Stebbins, that Stebbins should take possession of the mortgaged premises for condition broken, and that the plaintiff should continue to occupy them until May, 1829. Stebbins accordingly took possession and leased the premises to the plaintiff until May 1, 1829, the plaintiff agreeing to pay him \$25 rent, and to give up the premises without further let or hindrance at the expiration of the term. On November 5, 1829, the equity of redemption was reconveyed to the plaintiff by the purchaser.

According as the opinion of the court should be upon the foregoing statement of facts, a default or nonsuit was to be entered.

Strong and Forbes, for the plaintiff.

Dewey, for the defendants.

The case was continued *nisi*, and the opinion of the court was afterward drawn up by

WILDE, J. Upon the facts stated we think there can be no question that the plaintiff had an insurable interest in the house assured, at the time the policy was effected; for although a policy of insurance is a contract of indemnity, and wager policies are not to be countenanced, yet a legal title to the property insured is not necessary to give validity

to such a contract. A mere equitable title, or any qualified property in the thing insured, may be legally protected by insurance; *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25; *Marshall on Ins.* (1st ed.) 91; and it is very clear that the plaintiff not only had an insurable interest, but that his interest was substantially the same as it would have been had the property insured been free from any incumbrance; for he was liable to the mortgagee and the attaching creditor for the whole amount of the debts for which they had obtained liens, and it is well settled that a mortgager may protect his equitable interest at any time until actual foreclosure of the mortgage.

Nor did any of the events subsequent to the insurance wholly divest the plaintiff of his interest, for after the sale of the equity still he had a right to redeem, and this right might constitute a valuable interest. No evidence was offered to show that it was not. The presumption is that it was of some value, for the plaintiff did afterwards actually redeem or purchase the equity; and independently of any circumstance tending to show that a right of redemption is a valuable interest, the law would presume that it was, the contrary not appearing. The plaintiff too might, from local attachment and other circumstances, estimate the property higher than others would, and as the value of property is not to be ascertained by the market price, or by the opinion of witnesses, in a case like this, we think the underwriters have not shown any defence on the ground that the plaintiff had no interest at the time of the loss. The value of the plaintiff's interest in the property insured is not material. If he had an insurable interest at the time the policy was effected, and an interest also at the time of the loss, he is entitled to recover the whole amount of damage to property, not exceeding the sum insured.

But the principal objection on which the defendants' counsel rely is, that the plaintiff did not make a full and fair representation of his interest, and that there was such a concealment as vitiated the policy.¹ . . .

*Judgment for plaintiff on default.*²

ÆTNA FIRE INS. CO. v. TYLER.

COURT OF ERRORS OF NEW YORK, 1836. 16 Wend. 385.³

ERROR from the Supreme Court. Tyler sued the Ætna Fire Insurance Company, on a policy against fire on a dwelling-house. In his

¹ The discussion of this question has been omitted. — Ed.

² See *Borden v. Hingham Mut. F. Ins. Co.*, 18 Pick. 523 (1836); *Buck v. Phoenix Ins. Co.*, 76 Me. 586 (1886). — Ed.

³ In reprinting the statement, passages foreign to the amount of recovery have been omitted. — Ed.

application in writing he stated that he wished to "effect an insurance on my house in which I reside," and the policy itself stated that the plaintiff was insured upon his two story frame dwelling-house. The insurance was to the amount of \$1,500, for the period of one year from 24th August, 1827, and within the year the house was consumed by fire. . . .

The policy in the body thereof contained the following conditions: . . . "And in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the insured shall not, in case of loss or damage, be entitled to demand or recover on this policy, any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said policy." The policy contained the usual clause referring to the conditions attached thereto. . . . The fifth condition is in these words: "Notice of all previous insurances upon property insured by this company shall be given to them and indorsed on this policy . . . at or before the time of their making insurance thereon, otherwise the policy made by this company shall be of no effect. . . .

After the plaintiff had rested, the counsel for the defendants offered to prove that the plaintiff, at the time he effected the insurance, held the property insured only by an executory contract, upon which he had paid but a small sum, for the purpose of showing that the title to the property was not in him; and for the further purpose of showing a fraudulent concealment of the nature and extent of his interest. The evidence was objected to, but the objection was overruled. The defendants then produced in evidence a contract between one F. Shafer and the plaintiff, bearing date 2d July, 1827, whereby Shafer bargains and sells the lot on which the house insured is situate, to the plaintiff, and covenants to convey the premises in fee, on the plaintiff performing the covenants on his part, or on neglect to convey, to pay all damages. The plaintiff, on his part, covenants to pay \$700 in cash by instalments, and \$1,300 in an article for land, which he agrees to assign the next day, and to pay the money due and to grow due upon the article; and when entitled to a deed, to convey the land to Shafer. On the back of the contract were indorsements, by which Shafer acknowledged that the assignment of the article was duly executed on the 3d July, 1827; that on the 2d October, 1827, he had received of the plaintiff \$50, and on the 10th January, 1828, the further sum of \$111; and it was proved that \$500 remained due under the article to the owner of the land. . . . The defendants also offered to prove that Shafer (the bargainor of the plaintiff) had procured an insurance upon the same property, by a policy underwritten by the Merchants' Insurance Company of Albany, on the 30th June, 1825, and that the same had been continued by renewals from year to year, the last renewal having taken place on the 28th May, 1827, continuing the policy until the 28th May, 1828. The plaintiff objected to this evidence, but the judge ruled it to be admissible, and it was accordingly adduced, and the

defendants proved that the plaintiff knew of the existence of such policy at the time that he procured insurance from them.

The counsel for the defendants insisted, . . . 4. That if the plaintiff was entitled to recover, he could recover only the amount of his loss, deducting therefrom a proportionable part of the amount in arrear and unpaid to Shafer. The judge charged the jury that the plaintiff was entitled to recover, if anything, the actual value of the premises insured to the extent of the insurance. 5. They insisted that the plaintiff was entitled to recover only such proportion of the loss as the amount insured by the defendants bore to the whole amount insured by them and the other company. The judge charged that the plaintiff, if entitled to recover any thing, must recover the full value of the premises insured. . . . The defendants' counsel having excepted to the several decisions made by the judge, . . . applied to the Supreme Court for a new trial, which was denied and judgment rendered upon the verdict. . . .

Judgment having been rendered for the plaintiff upon the verdict rendered in his favor, the defendants sued out a writ of error.

I. L. Wendell and *S. Stevens*, for the plaintiffs in error.

M. T. Reynolds and *S. Beardsley* (attorney-general), for the defendant.

The following opinion was delivered :—

By the CHANCELLOR.¹ There is no misdescription in this case of the subject of insurance in the policy. Neither was there any misrepresentation or concealment of any fact on the part of the assured, which was at all material to the risk, in the application for the insurance ; and the jury have negatived all pretence of fraud on the part of Tyler, in not disclosing the true state of his title. It is a fact of public notoriety that a great portion of the property in the eighth senate district, and much in every other part of the State, is held by those who are considered the real owners thereof for most purposes, under contracts, without having paid the whole purchase money, and obtained legal conveyances ; and this court certainly cannot presume that the officers of this or any other insurance company in the State are ignorant of this fact, or that they considered the fact as in any way material to the risk. If they considered it material that the state of the legal title should be disclosed, they would, in their notices to the public specifying the information required from country applicants, have inserted this as a necessary part of that information. Yet this is not required in any conditions which I have seen except in the case of mutual insurance companies, where the true state of the title is material to enable the officers of the company to judge of the security which the insured premises will afford for the payment of the premium note, if an assessment should become necessary. It is also a fact of public notoriety, that in common parlance the person who is in possession of real property as owner, under a valid and subsisting contract for the purchase thereof,

¹ Hon. REUBEN H. WALWORTH. — ED.

whether he has paid the whole of the purchase money, and gotten the legal title or not, is called the owner thereof, and the property is usually called his by others. In equity it is, in fact, his; and the vendor has only a lien thereon for the security of his unpaid purchase money; and I am yet to learn that the person who is in the actual possession of property as the real owner thereof in equity, and who must sustain the whole loss thereof primarily in case of its destruction by the perils insured against, cannot insure it as owner, unless there is something in the terms of the policy, or in the conditions referred to therein, requiring the true state of the legal title to be disclosed. See 10 Pickering's Reports, 40, 542.

The assured in this case had also an insurable interest to the full value of the dwelling-house described in the policy; and the liability of the underwriters to him was neither diminished nor impaired by the previous policy which the person from whom he purchased had obtained from another company. To constitute a double insurance, both policies must be upon the same insurable interests, either in the name of the owner of that interest, or in the name of some other person for his benefit. In this case Tyler could not claim any benefit under the policy of Shafer, as it had not been assigned to him with the assent of the underwriters therein at the time of the loss. It could not, therefore, in any event, protect him against any portion of the loss he might sustain by the destruction of the house insured, or prevent his liability for the payment of the whole of the purchase money due on his contract. Policies against fire are personal contracts with the assured; and they do not pass to an assignee or purchaser of the property insured without the consent of the underwriters. *Lynch v. Dayrell*, 3 Bro. P. C. 497. *The Sadlers' Company v. Badcock*, 2 Atk. 554. If the assured, therefore, sells the property and parts with all his interest therein before the loss happens, there is an end of the policy unless it is assigned to the purchaser with the assent of the company; or if he retains but a partial interest in the property, it will only protect such insurable interest as he had in the property at the time of the loss. In the present case all the insurable interests which Shafer had in the property after his sale to Tyler, was the amount of his unpaid purchase money, so far as the land upon which the house stood was insufficient to protect him from loss; and provided the purchaser was unable to pay the same. Even a recovery by Shafer from the other company would not protect Tyler from any part of the loss sustained by the destruction of the building, as he would still be liable for the whole amount of the purchase money. Shafer, indeed, could not recover that money and retain it for his own benefit after he had been paid by his underwriters; but it could be collected in his name for the benefit of such underwriters, as they are in equity entitled to all his rights and remedies if they pay the amount of his loss. This principle of equitable subrogation or substitution of the underwriters in the place of the assured, is recognized by every writer on the subject of insur-

ance, and is constantly acted upon in courts of law as well as in equity ; so that where the assured has any claim to indemnity for his loss against a third person who is primarily liable for the same, if the assured discharges such third person from his liability before the payment of the loss by the underwriters, he discharges his claim against them for such loss, *pro tanto*. Or if he obtains payment from such third person afterwards, it is in the nature of salvage, which he holds as trustee for the underwriters who had paid his loss.¹ . . . It is evident, therefore, in the case under consideration, that the two insurances, after the sale and when the last insurance was made, were upon two distinct and separate interests. The subject matters thereof were different: the one being upon Tyler's debt to Shafer, which might be lost by the destruction of the house if the vendee was unable to pay, and the other upon the actual loss of the house. The loss of the house must fall upon the holder of the last policy, in any event, as the underwriters in the first policy will be entitled to an assignment of Tyler's contract to pay the purchase money, and may collect the full amount thereof from him if they shall pay to Shafer the full amount of his debt. I am satisfied from this view of the rights of the different parties that there was no prior insurance, within the meaning of the policy, of which the assured was bound to give notice, or which could be resorted to by him to obtain satisfaction for part of his loss.

The clauses in the policy and in the conditions annexed to the same on the same subject, unquestionably were intended to mean the same thing ; and if they differ in any respect, the policy itself must be resorted to to explain the meaning ; as it would then be a case which would be specially provided for in the policy, otherwise than in the conditions annexed. The language of the policy is sufficiently broad to cover any previous insurance on the property in which Tyler had an interest, or which could protect him as the purchaser of the property, provided the previous policy had been assigned to him at the time of his purchase, with the assent of the other company. The terms of the condition are : " If the assured shall have already any other insurance against loss by fire on the property hereby insured," &c., evidently intending to cover not only insurances made by the assured and in his own name, but any others which he had either in the name of another or by assignment for his benefit. But no one can suppose for a moment that these underwriters intended to be so unreasonable as to require a person insuring with them, under a penalty of a forfeiture of his policy, to give notice of every insurance which any former owner of the property might have made thereon, although he had no interest in that insurance, and the rights of the company could not in any way be affected thereby ; that if there was any such insurance, even in those cases where the fact was notified to the underwriters, the person insured with them should only recover a part of his loss from them, although he had no interest in and could not be benefited by the other insurance. To suppose the underwriters in-

¹ The presentation of the authorities has been omitted. — ED.

tended that such a construction should be given to this part of the policy would be to suppose that they intended to entrap those who insured with them. The plain and obvious meaning of the whole clause is, that if the assured has any other policy or insurance upon the property, by assignment or otherwise, by which the interest intended to be insured is already either wholly or partially protected, he shall disclose that fact and have it indorsed on the policy, or the insurance shall be void; and the same where he shall make any subsequent insurance; also, that in case of any such prior or subsequent insurance, although it is notified to the company and indorsed on the policy, the underwriters in the two policies shall contribute ratably to his loss, so that in no event he can recover more than the amount of his actual loss. I am satisfied, therefore, that the policy was valid; that the assured had an insurable interest to the value of the house which was burned; and as the jury have found that value to be the whole amount underwritten in the policy, he was entitled to recover that amount, with the interest thereon, after the sixty days, if the condition as to the proof of loss, &c., has been complied with by him according to the terms of the policy, or has been waived by the underwriters.

The certificate of the magistrate was a part of the preliminary proofs as to the nature, circumstances, and extent of the loss which, by the express terms of the policy, the underwriters had the right to insist upon before any action could be sustained for such loss;¹ . . . I am compelled, upon this point alone, to vote for a reversal of the judgment of the court below. If other members of the court, however, are capable of giving to the certificate the meaning which the counsel for the defendant in error insist it ought to bear, there is very little danger that injustice will be done to the underwriters, as the jury have decided that the loss actually sustained by Tyler upon the property insured was equal to the whole amount of the risk assured by these underwriters.

On the question being put, Shall this judgment be reversed? the members of the court voted as follows: —

In the affirmative — The CHANCELLOR and Senators EDWARDS, HUBBARD, and TRACY — 4.

In the negative — The PRESIDENT of the Senate, and Senators ARMSTRONG, J. BEARDSLEY, L. BEARDSLEY, BECKWITH, GRIFFIN, DOWNING, FOX, GANSEVOORT, HUNTINGTON, H. F. JONES, J. P. JONES, LACEY, LAWYER, LOOMIS, LOUNSBERRY, MACK, MAISON, POWERS, WAGER, WILLIS — 21.

Whereupon the judgment of the Supreme Court was affirmed.²

¹ In the statement and in the opinion, matter as to the sufficiency of the magistrate's certificate has been omitted. — Ed.

² Compare *Davis v. Phoenix Ins. Co.*, 111 Cal. 409 (1896). — Ed.

HONE AND ANOTHER, RECEIVERS, *v.* MUTUAL SAFETY INS. CO.

SUPERIOR COURT OF THE CITY OF NEW YORK, 1847. 1 Sandf. 137.

THIS was an action of assumpsit on a policy of re-insurance, made by the defendants, in favor of The American Mutual Insurance Company. The defendants pleaded the general issue, and gave notice that they would prove on the trial, that by an universal usage among insurers in the city of New York, they were liable only for a sum, which should bear the same proportion to the amount of the property destroyed, as the policy of re-insurance bore to the original policy.

At the trial, in February, 1847, it appeared that the American Mutual Insurance Company, on the third day of May, 1845, executed a policy of insurance to Herckenrath and Van Damme, for one year from May 4, for the sum of \$22,000, against loss or damage by fire, on merchandise, hazardous and not hazardous, their own, or held by them in trust, or on commission, contained in the store No. 42 Broad Street. Of the sum insured, \$500 was to apply to office furniture. The policy was in the usual printed form of the New York fire policies, and the premium paid was forty cents on one hundred dollars.

On the seventh day of May, 1845, the defendants executed a policy to the American Mutual Insurance Company, by which, in consideration of thirty-five dollars, they re-insured the latter, against loss or damage by fire to the amount of \$10,000, on merchandise, hazardous and not hazardous, the property of Herckenrath and Van Damme, or held by them in trust or on commission, contained in the building No. 42 Broad Street, for one year from the fourth day of May.

By this policy, the defendants promised and agreed to make good to the American Mutual Insurance Company, all such loss or damage, not exceeding in amount the sum so insured, as should happen by fire to the property therein specified, during the year stipulated. The policy of re-insurance was in the usual printed form of a fire policy, with no change, except the insertion in writing of the prefix *re-*, before the word insure, in the commencement of the instrument. In the great fire in the city of New York, on the 19th day of July, 1845, the store 42 Broad Street, was consumed, and the property of Herckenrath and Van Damme, contained in the store and covered by their policy before described, was destroyed by the fire, to the extent of \$14,373.36. Due and sufficient proofs of their loss were furnished by the primitive insured, to the American Mutual Insurance Company, who became liable to the former for the payment of such loss. On the first day of August, 1845, the preliminary proofs of the loss were presented to the defendants, by the American Mutual Insurance Company, in a manner which was conceded to be sufficient.

Their losses by the fire of July, 1845, made the latter company insolvent, so that their assets were not sufficient to pay more than fifty

cents on the dollar of their debts. The corporation was dissolved by an order of the Court of Chancery, and the plaintiffs were appointed receivers of its property and effects.

The receivers had made one dividend amongst its creditors, amounting to twenty-five cents on the dollar. This was on the 22d day of April, 1846, on which occasion, Herckenrath and Van Damme received the sum of \$3,593.34, an account of their loss.¹ . . .

A verdict for \$10,962.11 was taken for the plaintiffs, subject to the opinion of the court.

B. D. Silliman, for the plaintiffs.

T. Sedgwick, for the defendants.

O. Hoffman, in reply.

By the court, SANDFORD, J.² . . . The remaining question in the cause arises upon the defendant's objection, that the plaintiffs were bound to pay the loss, before they could maintain a suit, and that in no event can they recover more than the assets of the American Mutual Insurance Company will pay to the primitive insured.

The latter proposition is surely unsound. The fact that the insurers were a corporation, does not affect the point. Their claim upon the re-assurers rests upon the liability to pay the loss to the insured, not on their greater or less ability to pay it in full. If the liability of the re-assurer depend upon the solvency or bankruptcy of the first insurer, in many cases he will not become chargeable at all, or but to a nominal amount, according to the extent of the first insurer's insolvency.

As to the other branch of the objection. It is true, the contract is one of indemnity. That is, the insurer is to be protected by the re-assurer, to the extent of his loss. But when the loss is incurred, the re-assurer, by the positive terms of the contract, is to pay the amount to the insurer within sixty days after the same is ascertained and proved. The re-assurer has nothing to do with the payment by the insurer. In the French policies, both to relieve the insurer from the trouble of going through all the proofs on a trial, and to save costs to the re-assurer, it has become customary to insert a provision, that the re-assurer shall pay, on proof of payment by the insurer. And it is to this provision, that M. de Alauzet refers in his treatise cited by the defendants. But in France, when there is no such clause; and uniformly here, where it is as yet unknown; the insurer may at once resort to his action against the re-assurer; taking upon himself the burthen of making out his claim with the same precision that the first insured would be required to do, in an action against him; or he may await a suit by the first insured, give notice of it to his re-assurer, and on being subjected to the loss, recover it, with the costs of the litigation against the latter. There is no authority for saying that he must pay the loss in the one instance, or the judgment against him in the

¹ Passages on the usage among insurers have been omitted. — ED.

² After stating the case, discussing the general nature of re-insurance, and deciding that evidence of the usage was inadmissible. — ED.

other, before enforcing his demand against the re-insurer. In *Hastie v. De Peyster*, 3 Caines, 190, cited to this point, by the defendants, the insurer had stood out a suit against him by the first insured, and it is inferable from the points raised, that he had paid the recovery; but no such fact is stated, it is not discussed by the counsel, and the language of Chief Justice Kent, as well as Judge Livingston's, is unequivocal, that he may recover, not what he has paid, but all that he ought to pay, or has become liable to pay.

The decisions in France, cited by Emerigon and Boulay Paty, fully sustain the principles laid down by those distinguished authors, which we have already noticed incidentally, in speaking of the extent of the re-assurer's liability. In one case, adjudged in 1748, the re-assured became bankrupt, and was discharged, having paid the first insured sixty per cent of the loss. Nevertheless, the re-assurer, who thought he ought to pay only the same sixty per cent, was condemned to pay the bankrupt the entire sum re-assured.

The other case was in 1780, in which the first insured claimed they ought to receive the amount of the loss from the re-assurer; instead of permitting it to go into the hands of the assignees of the insurer, who had become bankrupt. The claim of the first insured was overruled, and the re-assurers required to pay the whole sum to the assignees.

Alauzet concurs with Emerigon, and cites a similar judgment in the court of Rennes.

So in *Marshall*, it is laid down, that if the original insurer fail, so that his insured receive only a dividend, however small, the re-insurer can gain nothing by this, but must pay the full amount of the loss to the first insurer. And thus, he adds, stands the law in most of the maritime states of Europe. (1 *Marsh. on Ins.* 143.)

To the same effect is *Park on Insurance*, and 3 *Kent's Commentaries*, 278.

The interest and importance of the questions involved, have induced us to give our views more at large than is our custom; and nothing remains but to say that we entertain no doubt on the subject, and that the plaintiffs are entitled to judgment for the whole amount of the re-insurance, with interest.¹

¹ Affirmed, *sub nom.* *Mutual Safety Ins. Co. v. Hone*, 2 N. Y. 235 (1849).

See *Eagle Ins. Co. v. Lafayette Ins. Co.*, 9 Ind. 443 (1857); *Cashau v. Northwestern National Ins. Co.*, 5 Biss. 476 (U. S. C. C., E. D. Wis., 1873); *Blackstone v. Allemania Ins. Co.*, 56 N. Y. 104 (1874); *Consolidated Real Estate and Fire Ins. Co.*, 41 Md. 59, 74 (1874); *In re Eddystone M. Ins. Co.*, [1892] 2 Ch. 423 (a marine policy). — ED.

INSURANCE COMPANY v. UPDEGRAFF.

SUPREME COURT OF PENNSYLVANIA, 1853. 21 Pa. 513.

ERROR to the Common Pleas of Lycoming County.

This was an action of assumpsit to December Term, 1851, by Abraham Updegraff for the use of A. A. Winegardner v. The State Mutual Fire Insurance Company. The plea was non-assumpsit, and payment with leave, &c.

The action was brought upon a policy of insurance No. 549, by which the said company, "For and in consideration of the sum of ten dollars, and of the premium note of twenty dollars, by the said company received, do insure Abraham Updegraff of Williamsport, in the county of Lycoming, and State of Pennsylvania, against loss or damage by fire, to the amount of one thousand dollars, on the following property, as described in application and survey No. 549, viz.: on his wooden block, \$1,000."

"And the said company do hereby promise and agree, to and with the said insured, to make good unto him, his executors, administrators, and assigns, all such loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property as above specified, during the term of two years from the seventh day of August, one thousand eight hundred and fifty, at 12 o'clock at noon, unto the seventh day of August, one thousand eight hundred and fifty-two, at 12 o'clock at noon; the said loss or damage to be estimated according to the true and actual value of the said property, at the time the same shall happen, &c."

In the application by Updegraff, the plaintiff, which was given in evidence on the part of the plaintiff, on the trial, in answer to the questions: "Is it (the property) encumbered? If so, to what amount?" Updegraff answered, "Sold to Winegardner under contract to convey title when the purchase-money is paid, to be paid in annual instalments of \$500 — \$500 paid on it."

The premium note, dated August 7, 1850, for \$20, was given by Updegraff.

From a copy of articles of agreement between Abraham Updegraff and Abraham A. Winegardner, dated 15th October, 1849, given in evidence, it appeared, that on that day Updegraff entered into an agreement with Winegardner for the sale of the property insured, for the sum of \$2,800; \$500 to be paid on the 1st April, 1850, when possession is to be given, and \$500 on the 1st of each succeeding April, until \$2,500 are paid, and \$300 on the next April, which will be the last payment."

By the same agreement, Winegardner agreed to rent a part of the premises to Updegraff, then occupied by said Updegraff as a store, for

two years from the time he, Winegardner, got possession, for \$100 per annum.

The premises insured were entirely consumed by fire, on the 16th July, 1851. It was testified that the loss of the house was total.

After the insurance, and before the fire, as appeared by indorsements on the articles of agreement above mentioned, Updegraff had received from Winegardner, on the purchase-money, \$1,108, making the whole payment on account of it \$1,618.

One of the conditions of the policy of insurance was in the following words: "The interest of the insured in this policy is not assignable, unless the assignee, before any loss happens, shall give notice in writing of the assignment, in pursuance of the by-laws of this company, and have the same indorsed on, or annexed to this policy."

Article 19, of extracts from the by-laws annexed to and printed on the same sheet with the policy, is as follows: —

"Article 19. In all cases when the policy is to be assigned, the assignee must sign the premium note—give a new note, or give security for the payment of the same. The assignment should be made out on the back of the policy, and sent to the secretary, or a true copy, with fifty cents recording fees, to be approved by a director, and recorded on the policy assigned."

It did not appear from the evidence in the case, that the policy on which suit was brought, had ever been assigned by Updegraff to Winegardner.

On the part of the defendant it was proposed to ask a witness whether he knew how Updegraff held the property, whether as owner or tenant?

The proposed evidence was overruled. First bill.

Offer was also made to prove the value of the lot, after the building was burned. This was offered in order to show that Updegraff had not sustained any loss. Objected to because the lot was not insured, and as irrelevant. Objection sustained. Excepted to. Second bill.

On the part of the plaintiff, it was testified under exception, by C. Lloyd, that he acted as agent of the company in effecting the insurance. He further testified: "I went to Updegraff, and told him I thought the application should be made in his name; that he was legal owner of the property. He said he had no objection to put his name to the note; I should do as I thought best. I told Updegraff I would send an application in his name, stating in the application precisely how the property was situated; if it was not right the company would return it to me for correction; if they approved of the application they would issue a policy, and it would be all right. I accordingly made out the application, which has been given in evidence here. I forwarded the application to the company; the policy issued on it to Updegraff; can't recollect if it was sent to me or Updegraff. Updegraff disclosed to me all the facts."

This was the third bill.

The defendant's counsel submitted points as follows :

1. That if the jury believe the value of the lot, after the destruction of the buildings, was sufficient to pay and satisfy Updegraff the balance of the purchase-money due him at the time of the fire, then the said Updegraff had no insurable interest at the time of the fire, and sustained no loss, and cannot recover in this action.

2. That to entitle the plaintiff to recover, he must satisfy the jury he had an interest at the time of the insurance, and at the time the fire happened ; and that, as the policy is strictly a contract of indemnity, he can only recover the value of his beneficial interest at the time of the fire, if any, in the property destroyed.

3. That if the plaintiff, Updegraff, is entitled to recover the loss which he has sustained, if any, then the company have a right to be subrogated to all his securities as against his vendee, Winegardner.

4. That Winegardner having paid to Updegraff, subsequent to the insurance, the sum of \$1,108, on the article of agreement for the sale of the premises, such payment reduces the liability of the company *pro tanto*.

5. That under all the circumstances in this case the plaintiff is not entitled to recover.

JORDAN, J., answered the foregoing points in the negative, and instructed the jury that the plaintiff was entitled to recover.

May 12, 1853, verdict for plaintiff, for \$1,089.50.

Error was assigned to the action of the court relative to the evidence offered, as stated in the three bills of exception ; and to the answers to the points, and the charge.

Scates, with whom was *Pollock*, for plaintiff in error.

Maynard and *Armstrong*, for defendant in error.

The opinion was delivered, September 15, by

LEWIS, J. This was an action on a policy of insurance effected by the vendor after articles for the sale of the property and before conveyance. The sum due to the vendor, at the time of the insurance, was \$2,300, which was reduced by payments afterwards, so that the sum due to him at the time of the loss was only \$1,192. The verdict was in his favor for the sum of \$1,080.50 ; a sum not sufficient to cover the whole extent of his interest. The house was destroyed by fire. The defence was that the lot is sufficient security for the unpaid purchase-money, and that the insured has no insurable interest beyond.

It is sometimes stated, in general terms, that by the contract of sale the purchaser of real estate becomes in equity the owner ; but this rule applies only as between the parties to the contract, and cannot be extended so as to affect the interests of others. The purchaser before the contract is carried into effect, cannot, against strangers to the contract, enforce equities attaching to the property. *Dart's Vend. & Purch.* 115 ; 3 *Mylne & Craig*, 70. A stranger cannot set up the equitable title of the vendee to defeat an ejectment brought by the vendor against the clear equitable title of the vendee. At law the

vendor, before payment of the purchase-money and delivery of the conveyance, is, to all intents and purposes, the owner of the estate. It is true that he is a trustee for the vendee, who, as between the parties to the contract, is bound to take the estate subject to every loss which may happen to it without the fault of the vendor, and is consequently entitled to every benefit accruing to it after the agreement. *Paine v. Meller*, 6 Ves. Jun. 349; *Sugden*, 199. The right to the benefits of the purchase fix him with the losses which may happen to it; but the latter branch of the proposition has not been established without reluctance, because there is a hardship in compelling payment after the consideration fails. The vendee's liability to pay for a house which was burnt down after the contract, and before the time appointed for payment of the purchase-money, was at one time doubted: *Stent v. Baily*, 2 P. Wms. 220; at another time his liability was placed upon the special ground that he had been "infest before the burning." *Hunter v. Wilsons*, and *Atchison v. Dickson*, *Sugden on Vend.* 200, n. 1. At another time it was held that, in the case of a sale before the master, he was not liable for a loss which happened after the report had been confirmed *nisi*: 11 Ves. Jun. 559; and a lessee was relieved because the fire happened before the time appointed for the commencement of the term, although after the date of the contract. *Wood v. Hubbel*, 6 Month. Law Rep. 237. These cases show that, notwithstanding the rule, the hardship of the case secures for the vendee the favorable consideration of the court, and that slight circumstances will be laid hold of for his relief. Following the spirit of these decisions, the courts will make no presumptions, in the case of an insurance by the vendor, that it was his intention, in the event of a loss, that the vendee should bear not only the measure of it which fell upon him by the accident, but that he should also indemnify the insurance company. On the contrary, as the vendor is a trustee for the vendee, every act of his in relation to the estate will be presumed to be for the benefit of the vendee, subject of course to the prior claims of the vendor himself. This is reasonable, because, as the vendee must suffer the losses which may happen to the property, it is just that he should have the advantage of any benefits which accrue to it; and, next to the security of his own interest, a trustee will be presumed to have in view the interest of the *cestui que trust*. Although the vendor is not bound to insure, or even to continue an insurance already made, he may, like any other trustee having the legal title, insure if he thinks proper, to the full value of the property. 1 Arn. 259, 2 B. & P. N. R. 324. It is true that in the case of a mortgagee of a ship he can only recover to the extent of his mortgage debt, unless it appears that in effecting the insurance he intended to cover, not his own interest only, but that of the mortgagor also. 2 B. & Ad. 193, 1 Moody & Rob. 153. If he intended to cover the whole interest, both legal and equitable, he may recover the whole amount of the insurance, under a trust, as to the surplus, to hold it for the mortgagor. *Carothers v. Shedden*, 6 Taunt.

17, 1 Arn. 252. The same rule applies to the case of an insurance by a vendor. There is this difference, however, that as the whole estate is at law in the vendor, and the vendee has only a title to go into equity, the insurance company cannot assert the rights of the latter, or go into equity in respect to them, except upon principles of equity and good conscience. An insurance upon a house, effected by the vendor, is *prima facie* an insurance upon the whole legal and equitable estate, and not upon the balance of the purchase-money. Where the form of the policy shows it to be upon the house, and not upon the debt secured by it, the burthen of showing that the insurance was upon the latter and not upon the former, rests upon the underwriters. There is no hardship in this. The premium paid, as compared with that usually charged where the insurance is upon houses, and not upon debts secured by them, is generally decisive of the question, and the rates of insurance are peculiarly within the knowledge of the insurance company. If the insurance was upon the whole estate, the premium would be according to the usual rates for houses of that description and location; if it was only upon the debt due to the vendor, there would be a large reduction, on account of the responsibility of the vendee, and the value of the lot of ground included in the sale, because both of these would, in that case, stand as indemnities to the underwriters. They would be entitled to a cession of the vendor's claims, from which an ample indemnity might be recovered. If the lot was worth the balance of the purchase-money, there would be no risk whatever, and the premium would be quite insignificant. If the intention was to insure only the debt due to the vendor, and a full premium was charged, without deduction for the securities which the underwriters knew he held, a portion of the premium should have been returned, upon the principles which require a return of premium for short interest, for over insurance, and for double insurance. 11 Pick. 85, 1 Met. 16, 2 Arn. 1226.

But there was no evidence tending to prove that the premium was less than the usual rates for houses of the description set forth in the policy, where the whole estate is insured. Nor was there any offer to return any portion of the premium. On the contrary, all the evidence tended to show that the insurance company was fairly informed of all material facts — that its agent advised the insurance to be taken in the name of the vendor, because the latter were “the legal owners,” and that the vendor replied that he had “no objection to sign the premium note.” Unless the intention was to cover both interests, there was no ground for question, or for taking or giving advice in regard to which name should be used, or for the vendor's consideration whether he had or had not any objection to signing the premium note.

The instrument before us is an open policy of limited extent. The underwriters agree to make good to the insured, not all his loss, but all such loss or damage, not exceeding the sum stated, as shall happen by fire to the property — the loss or damage to be estimated, not according

to the balance of purchase-money which may remain unpaid at the time of the damage, nor according to the probabilities of recovering such balance from the vendee, or from the lot, but "according to the true and actual value of the said property." The policy is in form an insurance upon the house, and not upon the debt; and no evidence whatever was given to change its character, or to show that anything more or less was intended by the parties. It follows that the plaintiff below was entitled to recover, under a trust, as to the surplus, for the benefit of the vendee. The underwriters have shown no equitable right to intermeddle between the vendor and the vendee. Under such circumstances they must be content to respond to the party with whom they made the contract of insurance.

In *Smith v. Columbia Ins. Co.*, 5 Harris, 353, the insurance expressly included the lot, and was stated to be to cover a mortgage. As the insurance company, on such a policy, would have been entitled to a cession of the mortgage, upon payment of the amount, it was properly held that the concealment of prior encumbrances which made it worthless, and would, if known, have enhanced the premium, was a good defence. But here the insurance is upon the building alone—it is not expressed to be to cover a debt—and the lot is not included. The underwriters are therefore not entitled to a cession of the vendor's title to the lot, or of his claim upon the vendee. The cession of a part of the house, according to the proportion of its value insured, would be all that could be demanded under such an insurance. But even this has become impossible by reason of its entire destruction. The testimony is, that it was a total loss—not a mere technical total loss, but an actual total loss—that it was entirely burnt down; that "not one stick was left upon another." Where there is no vestige of the property left, or (which is the same thing) where it has been finally condemned as lawful prize by the court of the last resort, the cession has nothing to operate upon. There is neither property nor *spes recuperandi*, and the cession in such case would be an idle ceremony. 4 Bin. 462, 8 Johns. 245, 1 Pet. 215.

The court was therefore correct in the instruction that the plaintiff was entitled to recover.

We see no error whatever in the proceedings, and the judgment is therefore affirmed.

*Judgment affirmed.*¹

¹ See *Fire and Marine Ins. Co. of Wheeling v. Morrison*, 11 Leigh (Va.), 354 (1840); *Trumbull v. Portage County Mut. Ins. Co.*, 12 Ohio, 305 (1843); *Boston & Salem Ice Co. v. Royal Ins. Co.*, 12 Allen, 381 (1866); *Waring v. Indemnity F. Ins. Co.*, 45 N. Y. 606 (1871); *Wood v. North Western Ins. Co.*, 46 N. Y. 421 (1871); *Collingridge v. Royal Exchange Assur. Corp.*, 3 Q. B. D. 173 (1877); *Burson v. Fire Assn.*, 136 Pa. 267 (1890).

In *Keefer v. Phoenix Ins. Co.*, 26 Ontario App. 277 (1899), the plaintiff, the owner of buildings, procured from the defendant company a policy for \$2,000, whereby the company agreed "to indemnify and make good unto the said assured, his heirs or assigns, all such direct loss or damage (not exceeding in amount the sum or sums insured as specified, nor the interests of the assured in the property herein described),

WATERS AND ANOTHER v. MONARCH FIRE AND LIFE INS. CO.

QUEEN'S BENCH, 1856. 5 E. & B. 870.¹

THIS was an action upon policies of fire insurance issued to the plaintiffs by the defendant company. The defence was that the plaintiffs were not, before or at the time of the loss, interested in the property in the policies described beyond sums that were paid into court. The plaintiffs took the sums paid into court out of court, and on the trial, before Lord CAMPBELL, C. J., at the Guildhall sittings, a verdict was found for the plaintiffs, subject to the opinion of the court on a case stating that the plaintiffs were flour merchants, warehousemen, and wharfingers; that they did not receive goods on consignment or commission; that one policy described the plaintiffs as corn and flour factors and insured them against loss or damage by fire not exceeding "£3,000 on stock in trade and utensils in their warehouse, . . . £400 on goods in trust or on commission therein," and other sums on other items; that the other policy was in similar form and insured "£2,000 on corn and flour, the property of the assured or held by them in trust or on commission, on or in all of the public wharfs, quays, warehouses, . . . situate within five miles of the Royal Exchange;" that while the policies were in force the plaintiffs' warehouse was de-

the amount of loss or damage to be estimated according to the actual cash value of the property." The loss was made payable to the Quebec Bank. The plaintiff had already entered into a written contract to sell the premises to one Cloy for \$2,000, had made simultaneously an oral agreement to keep the premises insured to the extent of \$2,000 until the purchase-money was fully paid, and had received \$800 on account. The plaintiff did not disclose to the company any part of his contract with Cloy, nor did the company have any knowledge of such contract until the day before the fire. Within the term of the policy the premises were damaged by fire to the extent of \$1,740. Before the fire, \$1,300 had been paid under the contract of sale. The defendant company tendered \$700 to the plaintiff before action, and paid that sum into court. In the High Court of Justice for Ontario, upon written admissions of fact signed by counsel, judgment was given for the plaintiffs for \$1,740, with interest and costs. 29 Ontario, 394 (1898). In the Court of Appeal of Ontario, four of the five justices concurred in reversing this judgment and confining it to \$700. BURTON, C. J., one of the majority, said:—

"It is clear that a person having a limited interest in property may insure, nevertheless, on the total value of the subject-matter of the insurance, and that he may recover the whole value, subject to this, that the form of the policy must be such as to enable him to recover the total value, and that it must have been the intention at the time, both of himself and the insurers, to insure the whole value. . .

"The judgment below should be reversed and confined to the sum of \$700, which, having been tendered before action, entitles the defendants to judgment in their favor with costs.

"The case of *Insurance Company v. Updegraff* (1853), 21 Pa. 513, has caused me to hesitate a good deal before finally coming to this conclusion, but on the whole I think that the inference cannot properly be drawn that the insurance company intended to insure anything beyond the owner's interest in the property. See *Castellain v. Preston* (1883), 11 Q. B. D. 380."—ED.

¹ The statement has been rewritten. — ED.

stroyed by an accidental fire, with all the goods therein; that the warehouse, besides large quantities of goods belonging to the plaintiffs, contained flour belonging to the plaintiffs' customers, which had been deposited with the plaintiffs as wharfingers and warehousemen for safe custody; that the plaintiffs made no charge for insurance; that the plaintiffs had no authority from their customers to insure, except as might be inferred from the fact that long before the fire they had told one of their customers, who had flour in their warehouse at the time of the fire, that they carried insurance on the goods of their customers; and that the sums paid into court were sufficient to cover the plaintiffs' own goods and the plaintiffs' charges with reference to the goods deposited by their customers, to wit, charges for landing, wharfage, and cartage.

Mellish, for the plaintiffs.

Lush, *contra*.¹

LORD CAMPBELL, C. J. After hearing the argument, I have come to the conclusion that the plaintiffs are entitled to judgment. The first question is whether, upon the construction of the contract, these goods were intended to be covered by the policy. I think in either policy the description is such as to include them. What is meant in those policies by the words "goods in trust"? I think that means goods with which the assured were intrusted; not goods held in trust in the strict technical sense, so held that there was only an equitable obligation on the assured enforceable by a subpœna in Chancery, but goods with which they were intrusted in the ordinary sense of the word. They were so intrusted with the goods deposited on their wharfs; I cannot doubt the policy was intended to protect such goods; and it would be very inconvenient if wharfingers could not protect such goods by a floating policy. Then, this being the meaning of the policy, is there anything illegal in it? It cannot now be disputed that it would be legal at common law; and Mr. Lush properly admits that it is not prohibited by the terms of any statute. And I think that a person intrusted with goods can insure them with orders from the owner, and even without informing him that there was such a policy. It would be most inconvenient in business if a wharfinger could not, at his own

¹ In the course of this argument, LORD CAMPBELL, C. J., said: "In mercantile usage merchants are likely to have in their custody goods on commission. Those are insured by name, and also goods in trust. What goods are those which in mercantile usage merchants are likely to have, not being on commission, which can be called in trust, if the present are not?" CROMPTON, J., said: "In the Factors' Acts (Stat. 4 G. IV. c. 83, Stat. 6 G. IV, c. 94, and Stat. 5 & 6 Vict. c. 39) the phrase, 'agents intrusted with goods,' is used, and certainly not confined to cases where the remedy is by a subpœna in Chancery." WIGHTMAN, J., said: "But, if the money is paid to the plaintiffs, it will inure to the benefit of the owners of the goods." And again LORD CAMPBELL, C. J., said: "It was not intended to limit the policy to the personal interest of the plaintiffs; for in this and all other floating policies the promise is to make good the damage to the goods. Such a contract was valid at common law. *Dalby v. India and London L. Assur. Co.*, 15 C. B. 365. What statute do you rely upon as making it illegal?" — ED.

cost, keep up a floating policy, for the benefit of all who might become his customers. The last point that arises is, to what extent does the policy protect those goods? The defendants say that it was only the plaintiffs' personal interest. But the policies are in terms contracts to make good "all such damage and loss as may happen by fire to the property hereinbefore mentioned." That is a valid contract; and, as the property is wholly destroyed, the value of the whole must be made good, not merely the particular interest of the plaintiffs. They will be entitled to apply so much to cover their own interest, and will be trustees for the owners as to the rest. The authorities are clear that an assurance made without orders may be ratified by the owners of the property, and then the assurers become trustees for them.

(COLERIDGE, J., was absent.)

WIGHTMAN, J. There are two questions. The first, Whether the goods destroyed were covered at all by the policies. The policies are on various descriptions of goods; and, amongst others, on goods "in trust." It seems clear to me that the goods in question were in trust. The plaintiffs are warehousemen and wharfingers; and the goods were in their warehouse; they had a lien on them, subject to which they were accountable to the owners who had intrusted them with the goods. So the goods lost were goods in trust. Then comes the question, Can the plaintiffs recover their value? It seems to me that they may, unless there be something making it illegal to insure more than the plaintiffs' own interest. Mr. Lush does not contend that any statute applies. It has been decided that, if no statute applies, a person insured may recover the amount contracted for: and, that being so, I think the plaintiffs entitled to recover the whole value.

CROMPTON, J. I cannot entertain the least doubt that in these policies the words "in trust" are used without any reference to a subpoena in Chancery. The parties meant to insure those goods with which the plaintiffs were intrusted, and in every part of which they had an interest, both in respect to their lien and in respect of their bailors. What the surplus after satisfying their own claim might be, could only be ascertained after the loss, when the amount of their lien at that time was determined; but they were persons interested in every particle of the goods.

*Judgment for the plaintiffs.*¹

¹ See *De Forest v. Fulton F. Ins. Co.*, 1 Hall, 84 (1828); *Rafel v. Nashville M. & F. Ins. Co.*, 7 La. Ann. 244 (1852); *Ætna Ins. Co. v. Jackson*, 16 B. Mon. 242 (1855); *London & Northwestern Ry. Co. v. Glyn*, 1 E. & E. 652 (1859); *Stillwell v. Staples*, 19 N. Y. 401 (1859); *Waring v. Indemnity F. Ins. Co.*, 45 N. Y. 606 (1871); *North British and Mercantile Ins. Co. v. Moffatt*, L. R. 7 C. P. 25 (1871); *Hough v. People's F. Ins. Co.*, 36 Md. 398 (1872); *Ebsworth v. Alliance M. Ins. Co.*, L. R. 8 C. P. 596 (1873); s. c. reversed, by arrangement between the parties, 43 L. J. N. S. C. P. 394 (Ex. Ch., 1874), (a marine policy); *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527 (1876); *North British and Mercantile Ins. Co. v. L. & G. Ins. Co.*, 5 Ch. D. 569 (C. A., 1877); *Martineau v. Kitching*, L. R. 7 Q. B. 436 (1878); *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387 (1890).

In *Stillwell v. Staples*, *supra*, manufacturers procured insurance upon goods, "the property of the insured, or held by them in trust or on commission, or sold but not

ILLINOIS MUT. F. INS. CO. v. ANDES INS. CO.

SUPREME COURT OF ILLINOIS, 1873. 67 Ill. 362.

WRIT of error to the City Court of Alton; the Hon. HENRY S. BAKER, judge, presiding.

Mr. *Charles P. Wise*, for the plaintiff in error.

Messrs. *Stuart, Edwards & Brown*, and Mr. *J. H. Yager*, for the defendant in error.

Mr. Justice SHELDON delivered the opinion of the court.

The only question here presented for decision is, as to the amount of the recovery.

The original insurer became liable to pay to the first assured the sum of \$6,000 in consequence of the loss of the subject-matter of the first insurance; but it actually paid only \$600 in full discharge of the liability. The amount of the reinsurance was \$2,000. Shall the reinsured recover the full \$2,000, or only \$600, or a *pro rata* part of the latter sum?

So far as we are aware, the contract of insurance, or of reinsurance, against loss by fire, has uniformly been held to be a contract of indemnity not exceeding the sum insured.

In the case of an ordinary policy of insurance, and a loss, the sum insured is the extent of the insurer's liability, not the measure of the assured's claim. The contract being one of indemnity, he is entitled only to that, and the actual loss sustained by the assured is the measure of indemnity to which he is entitled where it is less than the sum insured. So, if the assured has parted with all his interest in the sub-

delivered." When a fire occurred, the manufacturers collected the whole insurance, which was not enough to cover their own loss. There had been no agreement with customers to insure, but one of the manufacturers' customers, discovering the form of the insurance after the settlement had been made thereunder, attempted — by way of counterclaim in an action brought by the manufacturers to recover a balance for manufacturing — to set up a right to a proportionate part of the insurance. The attempt ultimately failed. SELDEN, J., for the court, said: —

"In order to support the judgment in this case, it must appear, either that the defendant had elected to adopt the policy, before its force as an insurance upon his goods had been in any degree impaired, by any act of the plaintiffs; or that the latter had actually received money from the insurance company on account of the defendant's goods . . .

"At the time when the plaintiffs presented their claim to and settled with the insurance companies, the defendant had acquired no interest whatever in the policies. He had not then, so far as appears, ratified or adopted them. The plaintiffs, therefore, were at liberty to cancel or modify them at pleasure. It seems they presented no claim against the insurance companies for any loss upon the defendant's goods. The loss upon their own goods greatly exceeded the amount of all the policies, and they very naturally elected to claim for their own loss alone. This was equivalent to an election to cancel so much of the policy as purported to insure goods held by them in trust, which, as they were under no objection to insert that clause, and as their act in doing so had not been adopted, they were, as we have seen, at entire liberty to do." — ED.

ject insured before the loss happens, he cannot recover, for the reason that the contract is regarded as one for an indemnity, and he has sustained no loss or damage.

Although the original insurer here did become liable to pay the sum of \$6,000, that did not turn out to be the amount of its actual loss. The actual loss and damage which it sustained was \$600, the sum which it paid in full discharge of its liability. That sum, given to the reinsured, would make good the loss sustained by reason of the original insurance; whereas, to allow a recovery of \$2,000, would enable it to realize a gain of \$1,400 over and above the actual damage it has sustained. It is difficult to see how this can be done consistently with principle, under a contract which, we apprehend, this must be admitted to be, to indemnify the reassured against the loss it might sustain from the risk it had incurred in consequence of its prior insurance.¹ . . .

The precise point here involved is quite barren of the authority of adjudged cases. As the contract of reinsurance was virtually prohibited in England more than a century ago — it having been there forbidden except where the insurer shall be insolvent, become bankrupt or die, by the statute (19 Geo. II. ch. 37, sect. 4) — that may account for the absence of the authority in the English reports upon the point.

What little authority is to be found, it must be confessed, is in support of the view that, where the first insurer becomes insolvent, and, on a compromise with his creditors, pays only a certain percentage of the loss sustained by the insured, the reinsurer is, nevertheless, bound to pay the reinsured the full amount of the reinsurance. Such was the decision of a French court of admiralty at Marseilles, made in 1748.

In *Howe v. Mutual Safety Insurance Co.*, 1 Sandf. 137, this subject is quite elaborately considered, and the authorities bearing upon it adduced, and the doctrine laid down by the above French decision is recognized and adopted as the true rule of law which governs the extent of the liability of a reinsurer.

There are treatises on insurance where the same doctrine may be found to be laid down, but so far as they have, for its support, the authority of adjudications, they seem to depend upon the two cases above cited.

In *Eagle Insurance Co. v. The Lafayette Insurance Co.*, 9 Ind. 443, the case in 1 Sandf. is, with seeming reluctance, barely recognized as authority.

This comprises the sum of the authority of adjudged cases to which we have been referred, or which have been brought to our notice in support of this doctrine of the reinsurer's liability for the full amount reinsured, as contended for by the appellee.

¹ Here followed quotations from *Bainbridge v. Neilson*, 10 East, 329, 347 (1808), to the effect that a policy of insurance is a contract of indemnity, and from *Bainbridge v. Neilson*, 10 East, 329, 347 (1808), *per* BAYLEY, J., and from *Hamilton v. Mendes*, *ante*, pp. 829, 831 (1761), *per* Lord MANSFIELD, C. J. — ED.

We can understand how the reinsured party, where the amount of his liability has been ascertained, may be admitted to recover to the full extent of the liability so long as the liability to pay continues, although he may not have made payment, or may be insolvent and unable to pay. But where the liability has become actually discharged by the payment of a sum less in amount, it is difficult to perceive, on principle, why the sum paid in discharge of the liability should not be taken as the amount of damage sustained and as the measure of indemnity to be recovered under a contract which is confessedly one of indemnity.

Notwithstanding, then, the adverse authority that is to be found, we are disposed to hold, on principle, as we regard it, that \$600, the sum paid by the reinsured company in discharge of its liability for \$6,000, was the actual loss it sustained and the extent of the recovery which should be had. And in view of the following special clause in this policy of reinsurance, we are of opinion that the recovery in this case should be reduced even below that sum. The clause is this: "Loss, if any, payable *pro rata*, at the same time and in the same manner as the reinsured company."

The only construction we can well put on this clause and give it practical effect is this: that the Andes Insurance Company, the reinsurer, was only to pay at the same rate as the Illinois Mutual Fire Insurance Company, the reinsured, should pay; and as the latter company paid only ten cents on the dollar of its insurance, the former company is only liable to pay at the same rate, that is, ten cents on the dollar of the amount of its reinsurance, which would be \$200.

Appellee's counsel suggest that the clause has reference only to cases of double insurance. There is no warrant in the language of the clause for giving it such a reference.

The policy of reinsurance is not before us. The case comes before us as a certified question of law, and this clause is the only portion of the policy which is put into the case, so that we have nothing, aside from the language itself, of the clause, to aid in its construction.

We are of opinion the judgment should have been for \$200 instead of \$2,000.

The judgment is reversed and the cause remanded.

Judgment reversed.

EXCELSIOR FIRE INSURANCE CO. ET AL., RESPONDENTS, v.
ROYAL INS. CO., APPELLANTS.COURT OF APPEALS OF NEW YORK, 1873. 55 N. Y. 343.¹

APPEAL from a judgment of the General Term of the Supreme Court in the fourth judicial district, affirming a judgment entered upon a verdict in favor of the plaintiffs.

On May 7, 1862, and August 1, 1865, James Connelly, then being the owner of the property, mortgaged it to David Dows and others by two mortgages for \$10,000 each. On July 23, 1870, Mary L. Connelly, the wife of the mortgagor, entered into a contract with the mortgagees, whereby, in consideration of \$15,000 paid and agreed to be paid, the mortgagees agreed to assign to her the mortgages. Under this contract Mrs. Connelly paid \$7,500.

On December 7, 1870, Mrs. Connelly, through her husband, procured a policy in the Excelsior Fire Insurance Company upon her mortgage interest to the amount of \$3,750, of which \$1,250 was on the building, and \$2,500 on the machinery and fixtures therein, and also a like policy in the Commonwealth Insurance Company. These companies wished these policies to be cancelled, but what actually happened was that there was procured, on December 20, 1870, in Mrs. Connelly's behalf, a third policy, dated December 7, 1870, for \$7,500, namely "\$2,500 on her mortgage interest in the three-story stone flour mill, . . . and \$5,000 on the machinery and fixtures therein."

The property was destroyed by fire on December 22, 1870.

On April 13, 1871, Mrs. Connelly assigned to the plaintiffs — the Excelsior and the Commonwealth — her claim against the defendant — the Royal.

In addition to the question as to the proper amount of recovery, there were questions not indicated by this statement.

Amasa J. Parker, for the appellant.

W. F. Cogswell, for the respondent.

FOLGER, J. This case comes up on exceptions to a refusal of motion for a nonsuit of the plaintiffs, made first at the rest of the plaintiffs' case, and again at the close of all the proofs.

The defendant, by making this motion, concedes that the court may pass upon the facts; indeed, that there is no dispute as to the facts, and nothing therefore to be submitted to the jury. *Winchell v. Hicks*, 18 N. Y. 558. That they have presented in this court questions not made at circuit, cannot alter this rule. . . .

Again, we are of the opinion that Mrs. Connelly had an interest as mortgagee in the property insured by the defendant to the full amount,

¹ The statement has been rewritten. In making the statement and in reprinting the opinion, matters foreign to the amount of a mortgagee's recovery have been omitted. — ED.

at least, of their policy. Though the language of the description in the policy is involved, it must be taken to describe her mortgage interest not only in the mill but also in the machinery and fixtures, which, in legal contemplation, were included in the mortgage. *Biglin v. N. Y. Cent. Ins. Co.*, 20 Barb. 635; *House v. House*, 10 Paige, 158; *Snedeker v. Warring*, 2 Kernan, 170. And though the risk was divided upon the building and upon the machinery, etc., the loss upon each was greater than the amount named in this policy. She had, it is true, paid but a portion of the amount she had agreed to give in purchase of the mortgages, but she was entitled to seek indemnity, not only to the extent to which she had paid, but the extent of the interest for which she had bargained and agreed to pay. This was the full amount secured and unpaid upon the mortgages.

The defendants further claim that Mrs. Connelly having been insured upon her mortgage interest, the loss sustained by her thereon, for which a recovery can be had, can be no more than that which the mortgaged property shall fail to secure of her debt; and that, as it was proven that the mortgaged property after the fire was sold for \$11,000, which was more than the amount she had paid on her contract to buy the mortgages, she suffered no loss, and therefore has no claim against the defendants.

We have already stated our opinion that her insurable mortgage interest, and hence the amount which she might lose, was not limited to the amount actually paid by her on that contract, but that it equalled the whole amount secured and unpaid upon the mortgages for which she was bound to pay. As there was due and unpaid upon the mortgages a sum of over \$19,000, even if the premises had been available to her, at the price at which they sold after the fire, there was still a deficiency of more than the amount of the defendants' policy.

To this the defendant says that if the plaintiffs' policies are available to Mrs. Connelly for one purpose, as she claims, they are available to the defendant for another. They then insist that those policies should share in the payment of the loss, if any there is; and then, that if the insured must first exhaust her remedy against the mortgaged premises, the amount for the defendant to pay will be much less than the amount adjudged against them. If the premises of the defendants' argument are sound, they are right that such consequence would follow. Without deciding whether the policies of the plaintiffs are in existence, so as to be available to Mrs. Connelly and also to the defendants for the purpose of this argument, we will dispose of the point upon the other branch of it.

And this raises the question whether a mortgagee, who has insured his mortgage interest in buildings and fixtures and machinery at his own expense and for his own indemnity, with no agreement or understanding with the mortgagor, must first exhaust his remedy on his mortgage before he can call upon the insurer to make good any part of the damage by fire to the property. The learned counsel

for the defendant cites, for the affirmation of this position, Flanders on Insurance (p. 360) and Angell on Insurance (§ 59). Flanders says of an insurance by a mortgagee: "It is not the specific property which is insured, but its capacity to pay the mortgaged debt." Angell says: "It is but an insurance of his debt; and if his debt is afterward paid or extinguished, the policy from that time ceases to have any operation. And even if the premises are after that destroyed by fire he has no right to recover for the loss, for he has sustained no damage thereby." These texts do not, in terms, sustain the propositions of the defendants; and it is only as a corollary, if at all, that it can be deduced from them. If it is the debt only which is insured, it may be said that until the debt, or some part of it, is lost, there is no loss upon the policy, and that the debt nor any part of it is lost until the mortgagee fails to obtain it from an enforcement of his mortgage. Neither of these writers cites any decision which sustains the proposition of the defendants, except perhaps one. There are *dicta* in several cases which will be referred to. The one case is *Smith v. Col. Ins. Co.*, 17 Penn. St., 253.¹ . . . It is apparent that if it is the debt only of the mortgagee which is insured, and that he has no claim against the insurer until the mortgaged property is exhausted, that the same rule will apply as to the obligation of the mortgage debtor, and that the remedy against him must also be first exhausted. Yet this proposition does not seem to receive sanction.² . . . In the absence of direct authority, how is the reason of this matter? Can it be said, in any strict or legal sense, that the defendants have contracted to indemnify Mrs. Connelly for a loss of her mortgaged debt? Whence is their power to guarantee the payment or collection of a debt? Fire underwriters in these days, in this State, are the creatures of statute, and have no rights, save such as the State gives to them. They may agree that they will pay such loss or damage as happens by fire to property. They are limited to this. It was not readily that it was first held that they could agree, with a mortgagee or lienor of property, to reimburse to him the loss caused to him by fire. He is not the owner of it; how, then, can he insure it, was the query. And the effort was not to enlarge the power of the insurer so that it might insure a debt, but to bring the lienor within the scope of that power, so that the property might be insured for his benefit. And it was done by holding that, as his security did depend upon the safety of the property, he had an interest in its preservation, and so had such interest as that he might take out a policy upon it against loss by fire without meeting the objection that it was a wagering policy. The policy did not, therefore, become one upon the debt, and for indemnification against its loss, but still remained one

¹ Here *Smith v. Columbia Ins. Co.*, 17 Pa. 253 (1851), was quoted and discussed; and various *dicta* were cited. — Ed.

² Here were cited *Hancox v. Fishing Ins. Co.*, 3 Sumner, 132 (1837); *Russell v. Union Ins. Co.*, 1 Wash. C. C. 409 (1806), s. c. 4 Dallas, 421; and *Godin v. London Assur. Co.*, 1 Burr. 489 (1758). — Ed.

upon the property and against loss or damage to it. It is, doubtless, true, as is said by Gibson, J., in 17 Penn. (*supra*), that in effect it is the debt which is insured. It is only as an effect, however; an effect resulting from the primary act of insurance of the property which is the security for the debt. It is the interest in the property which gives the right to obtain insurance, and the ownership of the debt, a lien upon the property creates that interest. The agreement is usually, as it is in fact, in this case, for insuring from loss or damage by fire the property. The interest of the mortgagor is in the whole property, just as it exists, undamaged by fire at the date of the policy. If that property is consumed in part, though what there be left of it is equal in value to the amount of the mortgage debt, the mortgage interest is affected. It is not so great, or so safe, or so valuable as it was before. It was for indemnity against this very detriment, this very decrease in value, that the mortgagee sought insurance and paid his premium.

To say that it is the debt which is insured against loss, is to give to most, if not all, fire insurance companies a power to do a kind of business which the law and their charter do not confer. They are privileged to insure property against loss or damage by fire. They are not privileged to guarantee the collection of debts. If they are, they may insure against the insolvency of the debtor. No one will contend this: and, it will be said, it is not by a guaranty of the debt, but an indemnity is given against the loss of the debt by an insurance against the perils to the property by fire. This is but coming to our position, that it is the property which is insured against the loss by fire, and the protection to the debt is the sequence thereof. As the property it is which is insured against loss, it is the loss which occurs to it which the insurer contracts to pay, and for such loss he is to pay within the limits of his liability, irrespective of the value of the property undestroyed. So as to the remark, that it is the capacity of the property to pay the debt which is insured. This is true in a certain sense; but it is as a result and not as a primary undertaking. The undertaking is that the property shall not suffer loss by fire; that is, in effect, that its capacity to pay the mortgaged debt shall not be diminished. When an appreciable loss has occurred to the property from fire, its capacity to pay the mortgaged debt has been affected; it is not so well able to pay the debt which is upon it. The mortgage interest, the insurable interest, is lessened in value, and the mortgagee, the insuree, is affected, and may call upon the insurer to make him as good again as he was when he effected his insurance.

Another consideration: It is settled that when a mortgagee, or one in like position toward property, is insured thereon at his own expense, upon his own motion and for his sole benefit, and a loss happens to it, the insurer, on making compensation, is entitled to an assignment of the rights of the insured. This is put upon the analogy of the situation of the insurer to that of a surety. If this analogy be made complete,

then has the insurer no more right to refuse payment of the loss so long as the insured has other remedy for his debt, than has the surety. One as well as the other, as soon as the creditor's right to make demand is fixed, must respond to it and seek his reimbursement through his right of subrogation; and, indeed, the application of this equitable right of subrogation makes our view of this subject harmonious and consistent with all the rights and interests of all the parties. . . .

The judgment should, therefore, be affirmed.

All concur except CHURCH, C. J., not voting.

*Judgment affirmed.*¹

¹ In *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495, 501 (1842), STORY, J., for the court, said:—

“No doubt can exist that the mortgagor and the mortgagee may each separately insure his own distinct interest in the property. But there is this important distinction between the cases, that where the mortgagee insures solely on his own account, it is but an insurance of his debt; and if his debt is afterwards paid or extinguished, the policy ceases from that time to have any operation; and even if the premises insured are subsequently destroyed by fire, he has no right to recover for the loss, for he sustains no damage thereby; neither can the mortgagor take advantage of the policy, for he has no interest whatsoever therein. On the other hand, if the premises are destroyed by fire before any payment or extinguishment of the mortgage, the underwriters are bound to pay the amount of the debt to the mortgagee, if it does not exceed the insurance. But then, upon such payment the underwriters are entitled to an assignment of the debt from the mortgagee, and may recover the same amount from the mortgagor, either at law or in equity, according to circumstances; for the payment of the insurance by the underwriters does not, in such a case, discharge the mortgagor from the debt but only changes the creditor.

“Far different is the case where an insurance is made by the mortgagor on the premises on his own account; for, notwithstanding any mortgage or other encumbrance upon the premises, he will be entitled to recover the full amount of his loss not exceeding the insurance; since the whole loss is his own, and he remains personally liable to the mortgagee or other encumbrancer for the full amount of the debt or encumbrance.”

In *Kernochan v. New York Bowery F. Ins. Co.*, 5 Duer, 1, 4-5 (1855), DUER, J., for the court, said:—

“It is needless to cite authorities to prove that, by our law, a mortgagee has an insurable interest, corresponding in its amount with that of the debt which the mortgage was intended to secure; and we apprehend it to be equally certain that, in the event of a total loss, he is entitled to recover the whole amount insured, provided it does not exceed that which at the time of the loss was due upon the mortgage. We do not believe, and certainly have not been able to discover, that there is any adjudged case in which evidence has been admitted to show that the mortgaged premises, notwithstanding the loss, were still an ample security for the debt; and we think ourselves warranted to affirm that in no text-writer, foreign or domestic, is any intimation to be found that such evidence can be received to defeat or diminish the recovery of the assured. Hence, were there no other defence in this case than that the plaintiff has not been damnified, we should have no difficulty in holding that he is entitled to retain the judgment that has been rendered.

“It is indeed true, as was insisted by the counsel for the defendants, that in this State, since wager policies have been abolished, the assured, whether in a marine or fire policy, can never be permitted to recover more than a full indemnity for the loss which it is proved that he sustained; but it is a mistake to suppose that this salutary rule is violated by permitting the assured, when a mortgagee, to recover the sum insured, when it is proved that such was the amount of his debt and of the loss upon the property insured. Although his recovery under these conditions is allowed, there

MERRETT v. FARMERS' INS. CO.

SUPREME COURT OF IOWA, 1875. 42 Iowa, 11.

APPEAL from Johnson District Court.

Action upon a policy of insurance. The cause was tried to the court without a jury, and a judgment rendered for plaintiff. Defendant appeals.

Fairall & Bonorden, for appellant.

Clark & Haddock, for appellee.

BECK, J. The policy of insurance upon which suit is brought is against loss by fire and covers a dwelling and barn, and certain enu-

is no case in which he will recover more than an indemnity for his actual loss, since, according to the nature of the contract and the intention of the parties the sum which he receives under the policy must either be applied to the satisfaction of the mortgage or its payment by the insurers will operate as a transfer to them of his own interest in the debt and its securities. There is no case in which, after the payment of a loss, he will be allowed to enforce for his own benefit the payment of the debt. He can never recover from the mortgagor for his own benefit the sum which has been paid to him by his insurers."

On the affirmance of *Kernochan v. New York Bowery F. Ins. Co.*, *supra*, in the Court of Appeals, 17 N. Y. 428, 435-436 (1858), STRONG, J., for a majority of the court, said:—

"The contract in terms expresses that the defendants insure the plaintiff, 'as mortgagee, against loss or damage by fire,' to the amount and on the buildings specified; and agree to make good to the plaintiff 'all such loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property as above specified,' during one year; 'the loss to be estimated according to the true and actual value of the property.' The loss against which the plaintiff is insured is, by the very language of the contract, 'to the property insured;' the destruction in whole or in part of the value of the property by the total or partial burning of the property. In case of such loss it is stated that it is 'to be paid within sixty days after due notice and proof thereof by the insured,' in conformity to the policy. Whether the loss, by diminishing the mortgage security, endangers the collection of the debt, or the security remains ample, is not by the contract made of any importance; in either case it is insured against, and the amount of it is to be paid. Nothing is said in the policy in regard to the mortgage debt, nor is any allusion made to it further than by the statement that the plaintiff is insured as mortgagee. I think it apparent, therefore, on the face of the policy, that the contract is in its nature an insurance of the property mortgaged, and not of the debt of the plaintiff. The debt is important to an interest of the plaintiff in the property; without an interest in the property the policy would be invalid, and the insurance is limited to that interest. The insurance thus has respect to the debt; the mortgage lien is the basis and extent of the right of the plaintiff to insure; but the insurance is upon the property, the subject of the lien.

"If the insurance was of the debt, there should, to warrant a recovery, be a loss as to the debt, which has not occurred and cannot take place, as the mortgaged property still far exceeds in value the sum unpaid, and the debtors are solvent. Regarding the insurance as of the debt, no risk has been insured by the defendants; the policy was not only of no possible benefit, but worse, it has been a constant source of expense."

On the amount of recovery by a mortgagee, see also *Sussex County Mut. Ins. Co. v. Woodruff*, 26 N. J. L. (2 Dutch.) 541, 548-551 (1857); *Harris v. Gaspee F. & M. Ins. Co.*, 9 R. I. 207 (1869); *De Wolf v. Capital City Ins. Co.*, 16 Hun, 116 (1878).—Ed.

merated articles of personal property. The dwelling and a part of the personal property were destroyed by fire, and, to recover the loss, this action is brought. The first question presented in the case is this: Was plaintiff's interest in the house burned, insurable?

The house was occupied by plaintiff and his wife as a homestead. It was built by the wife upon land in which she held a life estate and was occupied by her as a dwelling. Subsequently she married plaintiff, and thereafter the house was occupied by them and their family. The title, then, of the real property is in the wife, her interest therein was a life estate, and it was occupied by plaintiff and wife as a homestead. It may be stated, besides these facts, that plaintiff made certain additions and improvements to the house. The policy was issued upon the application of plaintiff and in his name.

I. What is an insurable interest? An interest, to be insurable, does not depend upon title or ownership of the property; it may be a special or limited interest, disconnected from title, lien, or possession. If the holder of an interest in property will suffer loss by its destruction he may indemnify himself therefrom by a contract of insurance.

The interest must be of such a character that the destruction of the property will have a direct effect upon it, not a remote or consequential effect. If, by the loss, the holder of the interest is deprived of the possession, enjoyment, or profits of the property, or of a security or lien resting thereon, or other certain benefits growing out of, or depending upon it, he holds an insurable interest. 1 Phillips on Insurance, §§ 175, 342, 346; Flanders on Insurance, p. 342; Warren *et al.* v. The Davenport Fire Ins. Co., 31 Iowa, 464.

II. The plaintiff held a homestead interest in the property, and was entitled to occupy it independent of the will of his wife. This right could only be terminated by her death. Whatever benefits flowed from such occupation, he enjoyed on account of his interest in the property, and he could not be deprived of them except by his own act. Code §§ 1988, 2215. The destruction of the house deprived him of these benefits growing out of his interest in the property. His interest then is clearly within the definition of an insurable interest above stated.

III. It is insisted that the amount of the judgment is excessive; it is the sum insured upon the property, not exceeding two-thirds of its value. The judgment, it is claimed, should have been for the value of plaintiff's interest. It has been held in like cases that the right of recovery extends "to the amount of damages to the property not exceeding the sum insured, without regard to the value of the assured's interest in the property." Franklin Ins. Co. v. Drake, 2 B. Mon. 47; Strong v. Manufacturers' Ins. Co., 10 Pick. 40; Insurance Co. v. Chase, 5 Wal. 509.

IV. This question, it seems to us, is determined by the language of the policy which binds the defendant to pay "the amount of the loss or damage, to be estimated according to the actual cash value of the

property at the time of the loss," and to make good the loss or damage of assured, not exceeding in amount the sum insured. The loss or damage is determined by the contract, which provides that it shall be estimated upon the value of the property, not upon the value of insured's interest, to the extent of the sum insured.

The value of the property insured and the sum insured thereon, mark out the limits of recovery in all actions upon policies. If the policy holder has an insurable interest, no inquiry is made as to the value of that interest. All insurable interests, of those who may be called owners of property, are regarded alike by the law which will not permit an inquiry into values to limit the obligation of the underwriter. The rule may be different in the case of mortgagees or lien holders.

V. It is difficult to see how a sum less than the value of the property would compensate plaintiff for the loss sustained. The house was occupied as a homestead. Its destruction deprived him of the benefits which were derived from the possession of a homestead of that value. He ought to recover as compensation the sum that will enable him to regain the benefits he lost, to the extent they were covered by the insurance. Nothing less than an estimate based upon the value of the house will do this.

VI. The court, against defendant's objection, permitted plaintiff to prove that the policy was issued at the request of his wife. It is now insisted that this was error. It is not necessary that we should pass upon the question. If the evidence had been excluded, the finding of the court could not have been different, and a judgment for defendant upon the other evidence would have been set aside as in conflict with the proof. No prejudice was, therefore, wrought defendant by the admission of the evidence, should it be held incompetent. The foregoing discussion disposes of all questions in the case. *Affirmed.*¹

¹ See Franklin M. & F. Ins. Co. v. Drake, 2 B. Mon. 47, 50 (1841).

In Trade Ins. Co. v. Barraciff, 45 N. J. L. (16 Vroom) 543, 545-546, 552-553 (1883), Dixon, J., for the Court of Errors and Appeals, said:—

"The fourth exception is to the charge of the judge, that the plaintiff had an insurable interest in the property and could recover for the whole damage occasioned by the fire, not exceeding the amount of the insurance.

"The property insured consisted of the buildings and stock upon a farm whereon the plaintiff with his family resided. The title of the property, both real and personal, was vested in his wife, but he had the possession and enjoyment of it as the head of his household. The plaintiff and his wife had had living offspring of their marriage. The insurance was effected by the plaintiff with the authority of his wife, and the agent of the company who made the contract knew that the wife was the owner, at least of the realty. . . .

"Having thus, then, concluded that the plaintiff had an insurable interest at the making of the contract and at the time of the loss, the next question is as to the amount of recovery. And, on this point, it will not be necessary to go so far as some of the cases already cited, and to say that no inquiry into the interest of the assured will be permitted; but I think this principle may be justly laid down that the amount to be recovered will depend, not on the loss happening to the individual interest of the assured, but on the damage accruing to whatever interests are covered by the policy, so far as the assured represents those interests, whether as his own or by the precedent

authority or subsequent ratification of others. On this notion rest all the cases enforcing insurance effected by consignees, factors, and other bailees and agents, to the full amount of the loss. It supports, too, the judgments in most of the cases already cited. . . .

"In the case before us there is no doubt that the plaintiff represented his wife's interest as well as his own, and that he intended to effect this insurance on behalf of both, and that such intention was known to the underwriters. This fact of representation is not, indeed, expressly stated in the policy, but it is no part of the law either of contracts or of evidence that the principal shall be disclosed on the face of the writing. . . .

"The policy now under consideration clearly indicates a design to have the insurance cover the entire ownership. This would be inferred, at least for the purpose of supporting the contract, from the fact that no particular interest is mentioned as the subject-matter of the insurance, but it more expressly appears in the clause which provides for estimating the amount of loss or damage, according to the actual value of the insured property at the time of the fire, in that which requires the proof of loss to set forth the value of the property insured and the interest of the assured therein, and in that which gives to the company an option of replacing the property burned with other of the same kind and goodness. These expressions show that the property insured was not necessarily the interest of the assured alone. *Waters v. Monarch F. & L. Assur. Co.*, 5 E. & B. 870; *Merrett v. Farmers' Ins. Co.*, 42 Iowa, 11."

In *Welsh v. London Assur. Corp.*, 151 Pa. 607, 616-618 (1892), *MITCHELL, J.*, for the court, said:—

"The substantial defence was upon the admitted fact that the insurance was on the full value of the fee in the land, while the plaintiff's interest was only a life estate. Unexplained this was a solid defence on the merits, and the burden of explanation was on the plaintiff. It was testified by Neeley that he wrote the application for insurance for the plaintiff at her request, and that her interest in the house was correctly stated therein as 'a life lease.' This application was sent or given by Neeley to Barbour, who by his own testimony had authority to write up the policy by inserting the description of the insured interest in the land, and did so in this case. . . . Upon the evidence, therefore, it was plain that the defendant had issued the policy with knowledge of the actual condition of the title, and the mistake in the description was that of its own agent which it could not set up as a defence. *Burson v. Fire Assn.*, 136 Pa. 267; *Columbia Co. v. Cooper*, 50 Pa. 331; *Ins. Co. v. Webster*, 59 Pa. 227; *Meadowcraft v. Ins. Co.*, 61 Pa. 91; *Eilenberger v. Ins. Co.*, 89 Pa. 464. . . .

"The question of the measure of damages is not free from difficulty, owing to the meagreness of its presentation by both parties. Undoubtedly the general rule that the insured cannot recover more than his actual loss, or the value of his interest, would, without more, limit the recovery of a life tenant as of a lessee, to the value of his unexpired term. See *Wood on Fire Ins.* 481. But it is equally true that a carrier, or custodian, or agent may insure in his own name, and recover the entire loss, standing as a trustee for all the amount recovered in excess of his interest. *Wood on Fire Ins.* 617, 632, 1121, and cases cited. . . . In the present case Neeley testified that there was some talk with plaintiff as to the name in which the insurance should be taken, she saying that some one thought it had better be in the name of the executor or administrator, but she thought as she had control of it it had better be in her name. This, in connection with the fact that the full premium was paid and the policy issued for the full value of the fee, may fairly be taken to indicate the real intent of the parties to insure the whole for the benefit not only of the plaintiff as life tenant, but also of the remaindermen. The company is in no position to contest this intent. . . . On the other hand, the plaintiff, by suing for and recovering on this evidence the full value of the fee, has put herself in the position of trustee for the remaindermen as to the excess of the judgment over the value of her life interest."

In *Harrison v. Pepper*, 166 Mass. 288 (1896), a bill in equity was filed to compel the defendant to place the proceeds of insurance, on premises of which she was life tenant, in trust for the plaintiff, as remainderman, until the decease of the defendant,

INSURANCE COMPANY *v.* STINSON.

SUPREME COURT OF THE UNITED STATES, 1880. 103 U. S. 25.

ERROR to the Circuit Court of the United States for the District of Massachusetts.

The facts are stated in the opinion of the court.

Mr. *Charles T. Russell* and Mr. *Charles T. Russell, Jr.*, for the plaintiff in error.

Mr. *Robert D. Smith*, *contra*.

Mr. Justice BRADLEY delivered the opinion of the court.

This was an action on a policy of insurance against loss or damage by fire. Stinson, the plaintiff below, had a contract to build a hotel to

with income payable to the defendant for life. In holding the bill demurrable for want of equity, *MORTON, J.*, for the court, said:—

“If the amount received by the defendant did not exceed the value of her interest, then it is clear that the plaintiff has no right in equity to any portion of it. *Reitenbach v. Johnson*, 129 Mass. 316; *Martineau v. Kitching*, L. R. 7 Q. B. 436; *Stillwell v. Staples*, 19 N. Y. 401.

“But if we assume that the sum paid is equal to the total value of the dwelling-house, and exceeds the value of the defendant's interest, and that the bill fairly alleges this, still we do not think that the plaintiff is entitled to recover. . . .

“In the absence of anything that requires it in the instrument creating the estate, or of any agreement to that effect on the part of the life tenant, we think that the life tenant is not bound to keep the premises insured for the benefit of the remainderman. Each can insure his own interest, but, in the absence of any stipulation or agreement, neither has any claim upon the proceeds of the other's policy, any more than in the case of mortgagor and mortgagee, or lessor and lessee, or vendor and vendee. *Suffolk Ins. Co. v. Boyden*, 9 Allen, 123; *International Trust Co. v. Boardman*, 149 Mass. 158; *Burlingame v. Goodspeed*, 153 Mass. 24; *Warwicker v. Bretnall*, 23 Ch. D. 188; *Leeds v. Cheetham*, 1 Sim. 146; *Rayner v. Preston*, 18 Ch. D. 1; *Kearney v. Kearney*, 2 C. E. Green, 59, 71. The contract of insurance is a personal contract, and inures to the benefit of the party with whom it is made, and by whom the premiums are paid. It is a contract of indemnity against loss. The sum paid ‘is in no proper or just sense the proceeds of the property.’ *King v. State Ins. Co.*, 7 Cush. 1; *Wilson v. Hill*, 3 Met. 66; *Suffolk Ins. Co. v. Boyden*, 9 Allen, 123; *Lerow v. Wilmarth*, 9 Allen, 382, 385; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507, 512.

“It is not averred, and does not appear, that the defendant intended to make a present of the proceeds of the policy to the plaintiff, or was insuring for her benefit. Whether the amount of indemnity received by the defendant for her loss was more or less than the value of her interest cannot affect the plaintiff. Nor can the defendant be converted into a trustee for the plaintiff by the mere fact that the amount which she received was equal to the full value of the house. It was paid to and received by her as indemnity for the loss which she had sustained, and, as already observed, does not stand in the place of the property insured. . . .

“The plaintiff argues that sound public policy requires that money received by a life tenant on a total loss by fire should be used in rebuilding, or should go to the remainderman, reserving the interest to the life tenant for life. This argument proceeds on the assumption that the proceeds of the insurance take the place of the property insured,—a view which, as we have seen, is contrary to our own and other decisions.”

For the view opposed to *Harrison v. Pepper*, *supra*, see *Green v. Green*, 50 S. Car. 514, 532-536 (1897).—ED.

be called the Webster House, at Marshfield, Plymouth County, Massachusetts, for the sum of \$25,000, and had nearly completed it; but, failing to get his payments from the owner, he stopped work and took the necessary steps for securing a mechanic's lien on the building. For this purpose he filed the required statement with the town clerk, and commenced an action to enforce his lien within the period prescribed by law. Whilst that action was pending, in July, 1875, he procured the policy in question from the plaintiffs in error, the defendants below, insuring him for three months against loss or damage by fire to the amount of \$5,000 on the building, — the policy stating his interest to be that of contractor and builder. The loss occurred during the continuance of the policy, and due notice was given. After the fire the plaintiff did not further prosecute his action to enforce the lien; but commenced the present action for the amount of his insurance. When the building contract was entered into, and until the loss occurred, the property on which the building was erected was subject to a mortgage for a debt of \$17,000 being the purchase-money which the owner had agreed to pay to the former owner; and which is conceded to have been a lien on the whole property prior to that of the plaintiff. Two defences were made by the insurance company to the action: first, the failure of the plaintiff to prosecute his suit for enforcing his lien; secondly, want of insurable interest, from the alleged fact that the property, at the time of the loss, was not worth more than the amount of the prior mortgage. The court overruled these defences, and charged the jury substantially as follows, namely: that if the plaintiff had a valid builder's lien when the policy was effected, which could have been enforced by the decree of the appropriate court against the equity of redemption of the property, and if it was a valid and subsisting lien at the time of the loss, it was immaterial whether he did or did not subsequently perform those acts, the non-performance of which as conditions subsequent might have dissolved the lien.

The court further instructed the jury in substance that if the plaintiff had such builder's lien when the policy was effected, which could have been enforced by the decree of the appropriate court, and by virtue of which he could have recovered the equity of redemption on that property, then he was entitled to recover, without regard to the question what his equity of redemption might or might not have realized at an auction sale; that if a party has a valid and subsisting second security for a given amount, and he enters into a contract of indemnity against the destruction of that security, and a loss by fire occurs, both parties having full knowledge of the state of the property and the title when the contract is entered into, such insurance would cover that second security, although by the subsequent course of events the older and prior security might have swept away the value of the second; and that if the jury found in this case that this plaintiff had a valid claim for a given amount subsisting at the time of the loss, and which he had done everything that was required of him to enforce up to the time of

the loss, and that it was such a claim, for instance, as he could have recovered a judgment for \$5,000 or \$6,000 or \$8,000, and a judgment against that equity of redemption on that property, that was, for the purposes of this trial, an insurable interest, and an interest which he had on that property, whether by any course of events that property might have been by subsequent events more or less affected; and for the purposes of this trial the court instructed the jury to so consider it.

To this charge, and to the refusal to give instructions to the contrary, the defendants took a bill of exceptions.

We think that the instructions were correct. As to the first point, based on the abandonment by the plaintiff, after the destruction of the building, of the proceedings to enforce his lien, it is apparent from the evidence adduced by the defendants themselves that it could not have injured them. But, aside from this consideration, if the plaintiff had an insurable interest at the time of issuing the policy and at the time of the loss, equal to the amount insured, he had a complete and absolute cause of action against the defendants; and it was no concern of theirs whether he farther prosecuted his lien or not unless they desired to be subrogated to his rights, and gave him notice to that effect. Whether, if they had done this, and had offered to indemnify him against all costs and expenses, a refusal on his part to continue the proceedings would have been a defence to this action, it is unnecessary to inquire. No such course was taken by the defendants. We may remark, however, that where a creditor effects insurance on property mortgaged or pledged to him as security for the payment of his debt, the insurers do not become sureties of the debt, nor do they acquire all the rights of such sureties. They are insurers of the particular property only, and so long as that property is liable for the debt, so long its destruction by fire would be a loss to the creditor within the terms of the policy. A surety of the debt might complain if the creditors should surrender to the debtor collateral securities; but an insurer of property for the benefit of the mortgagee would have no just ground of complaint. True, after a loss has occurred and the insurance has been paid, sufficient to discharge the debt, the insurers may be entitled to be subrogated to the rights of the creditor against the debtor, and to any collateral securities which the creditor may then hold and which are primarily liable for the debt before the insurers. But even then we do not think that the creditor is bound to take any active steps to realize the fruits of a collateral, or to keep it from expiring, unless the insurance be first paid and notice be given to him of a desire on the part of the insurers to be subrogated to his rights, with a tender of indemnity against expenses. We are aware that views somewhat differing from these have been held by respectable authority; but we think without any sound reason. See *May on Insurance*, § 457; *Insurance Company v. Woodruff*, 2 Dutch. (N. J.) 541. To impose such restrictions and obligations upon the

creditor would be to add to the contract of insurance conditions never contemplated by the parties, making of it a mere shadow of security, and increasing the avenues of escape from obligation to pay, already too numerous and oppressive. When a building is insured in the interest of a mortgagee, the insurance company does not inquire what other collaterals he holds, and never reduces its premium on any such consideration.

As to the other question, relating to the insurable interest of the plaintiff, we think that the charge given was equally free from exception. There is no doubt that the owner of the property had an insurable interest to the extent of the value of the building notwithstanding the existence of a mortgage on the property of sufficient amount to absorb it. Leading authorities on the point may be found cited in *May on Insurance*, §§ 81, 82. The remarks of Mr. Chief Justice Marshall, in delivering the opinion of the court in *Columbian Insurance Co. v. Lawrence*, 2 Pet. 25, are apposite and illustrative. The assured in that case, though in possession, had only a contract for a purchase of the property, subject to a condition which had not been complied with, but of which the vendor had taken no advantage at the time of effecting the insurance, or at the time of the loss. The Chief Justice says: "That an equitable interest may be insured is admitted. We can perceive no reason which excludes an interest held under an executory contract. While the contract subsists, the person claiming under it has undoubtedly a substantial interest in the property. If it be destroyed, the loss in contemplation of law is his. If the purchase-money be paid, it is his in fact. If he owes the purchase-money the property is its equivalent, and is still valuable to him. The embarrassment of his affairs may be such that his debts may absorb all his property; but this circumstance has never been considered as proving a want of interest in it. The destruction of the property is a real loss to the person in possession, who claims title under an executory contract, and the contingency that his title may be defeated by subsequent events does not prevent this loss."

The principle asserted in these remarks, as well as the reason of the thing, leads to the conclusion, that the owner of an equity of redemption has an insurable interest equal to the value of the insurable property embraced therein, whether he is personally liable for the mortgage debt or not. His interest arises from his ownership, carrying with it the incidental right of redeeming the property from the incumbrances on it. If he is also personally liable for such incumbrances, it only makes his interest more direct and exacting.

Such being the insurable interest of the owner of the equity of redemption, it follows that one who has a mechanic's lien on the property by virtue of a contract with such owner, has an equal insurable interest, limited only by the value of the property and the amount of his claim. In the present case it is admitted that the value of the building insured exceeded the amount of the plaintiff's claim; and that the latter was

equal to the amount insured. The insurable interest of the lienholder arises from the nature of the lien, which is a *jus ad rem*. All the owner's rights in the property are potentially his. They are under hypothecation to him for his security, and he can reduce them to possession if the debt be not paid. He is, therefore, directly interested in the property to the extent of his demand, whatever other security he may hold; and is entitled to insure to that extent; and, if a loss occurs, to recover the full amount of his insurance, or so much thereof as may be necessary to satisfy his debt.

We think that there is no error in the record.

Judgment affirmed.

FOLEY ET AL., RESPONDENTS, v. MANUFACTURERS AND BUILDERS' FIRE INS. CO., APPELLANTS.

COURT OF APPEALS OF NEW YORK, 1897. 152 N. Y. 131. \

APPEAL from a judgment of the General Term of the Supreme Court in the fourth judicial department, entered November 30, 1894, which affirmed a judgment in favor of plaintiffs entered upon a verdict.

This action was brought by plaintiffs upon a policy of insurance, to recover damages alleged to have been caused by fire to three dwelling-houses in process of construction for them.

The facts, so far as material, are stated in the opinion.

Frank Hiscock, for appellant.

William P. Goodelle, for respondents.

ANDREWS, C. J. The sole question in this case is whether the plaintiffs had an insurable interest equal to the full value of the incomplete buildings in course of construction on their lot when the fire occurred. It is the contention on the part of the defendant that, as the houses were being constructed under a contract by which the contractors were to furnish the materials and build the houses (above the foundations), and to complete them by a time specified, which had not expired at the time of the fire, for a specified sum to be paid within ten days after their completion, the plaintiffs had no interest to protect in the structures while in their incomplete state, since their destruction by fire would be the loss of the contractors and not of the owners, whose obligation to build and complete the houses, as the condition of payment, would continue after as before the fire. It may be admitted that the contractors would remain bound by the contract, notwithstanding the destruction of the buildings by fire, and that the owners would not be bound to pay for the work done or materials supplied up to the time of the fire. *Tompkins v. Dudley*, 25 N. Y. 272. The contention of the defendant rests upon a misconception of the insurer's contract and as to the insurable interest of the plaintiffs in the structures. The

defendant, by its contract, undertook to insure the plaintiffs against loss by fire, not exceeding the sum specified to the "described property," the loss or damage to be ascertained "according to the actual cash value" of the property at the time of the fire. The parties by this contract made the value of the property insured, within the limit, the measure of the insurer's liability. It is an undoubted principle in fire insurance that there must be an insurable interest in the insured, or an insurable interest which he represents in the subject of insurance, existing at the time of the happening of the event insured against to enable him to maintain an action on a fire policy. This flows from the nature of the contract of fire insurance, which is a contract of indemnity; and where there is no interest there is no room for indemnity. The plaintiffs had an interest in the subject of insurance both at the inception of the contract and at the time of the fire. They owned the land upon which the structures were being erected. They themselves had constructed the foundations of the buildings, and in describing the property insured the foundations were specifically named. They were in possession of the premises, and the ownership of the fee of the land on which the contractors were erecting the buildings carried with it the ownership of the structures as they progressed, which, according to the general rule of law, became part of the realty by annexation. It is not claimed, nor could it upon the evidence be claimed, that there was any intention either on the part of the owners or the contractors to sever the ownership of the structures from the ownership of the land while the work was in progress or that the contractors should retain title to the materials put into the buildings upon their completion. The defendant is compelled to admit that the loss sued for is within the exact terms of the policy. It is conceded that the recovery does not exceed the property loss occasioned by the fire, and if counsel can be deemed to have denied that the legal ownership of the structures was in the owners of the land at the time of the fire, the denial is very indistinct and certainly is not justified by the facts or the law. The defence comes to this: That as the plaintiffs, by their contract with third persons, have imposed upon them the risk and expense of furnishing complete structures, and have assumed no liability until the structures are completed, they had no insurable interest and have sustained no loss. But the contract relations between the plaintiffs and the contractors is a matter in which the defendant has no concern. When the policy was issued it could not be known whether the contractors would perform their contract. If they abandoned it the owners would derive such advantage as would accrue from the partial construction of the buildings prior to such abandonment. It is possible that if the defendant is compelled to pay the policy the plaintiffs may, if they insist upon their rights against the contractors, get double compensation unless they should be adjudged to hold the fund recovered for the contractors. But, however this may be, the owners had an insurable interest to the whole value of the buildings on their land, and the de-

fendants neither can compel the plaintiffs to put the loss on the contractors, nor can they resort to the terms of the building contract to diminish the liability for an actual loss within the terms of the policy.

The fact that improvements on land may have cost the owner nothing, or that if destroyed by fire he may compel another person to replace them without expense to him, or that he may recoup his loss by resort to a contract liability of a third person, in no way affects the liability of an insurer, in the absence of any exemption in the policy. See *Clover v. Greenwich Ins. Co.*, 101 N. Y. 277; *Kernochan v. N. Y. Bowery F. Ins. Co.*, 17 N. Y. 428; *Riggs v. C. M. Ins. Co.*, 125 N. Y. 7; *International Trust Co. v. Boardman*, 149 Mass. 158.

The judgment should be affirmed.

All concur, except MARTIN and VANN, JJ., not sitting.

*Judgment affirmed.*¹

¹ For marine cases on limited interests, see *ante*, p. 857, n. — Ed.

SECTION III.

Life Insurance.

GODSALL AND OTHERS v. BOLDERO AND OTHERS.

KING'S BENCH, 1807. 9 East, 72.

THIS was an action of debt on a policy of insurance made the 29th of November, 1803, under seal of the defendants, as three of the directors of the Pelican Life Insurance Company, on behalf of the company, which recited that the plaintiffs, coachmakers in Long-acre, being interested in the life of the Right Hon. William Pitt, and desirous of making an insurance thereon for seven years, had subscribed and delivered into the office of the company the usual declaration setting forth his health and age, etc., and having paid the premium of £15 15s. as a consideration for the assurance of £500 for one year from the 28th of November, 1803, it was agreed that in case Mr. Pitt should happen to die at any time within one year, etc., the funds of the company should be liable to pay and make good to the plaintiffs, their executors, etc., within three months after his demise should have been duly certified to the trustees, etc., the sum of £500. And further, that that policy might be continued in force from year to year until the expiration of the term of seven years, provided the annual premium should be duly paid on or before the 28th of November in each year. The plaintiffs then averred that at the time of the making of the said assurance, and from thence until the death of Mr. Pitt, they were interested in his life to the amount of the sum insured; and that they duly paid the annual premium of £15 15s. before the 28th of November, 1804, and the further sum of £15 15s. before the 28th of November, 1805; and that after that day and while the assurance was in force, and before the exhibiting the bill of the plaintiffs; viz., on the 23d of February, 1806, Mr. Pitt died; that his demise was afterwards duly certified to the trustees, etc.; since when more than three months have elapsed before the commencement of this suit, etc.: but that the £500 has not been paid or made good to the plaintiffs. There were also counts for so much money had and received by the defendants to the plaintiffs' use, and upon an account stated. To this the defendants pleaded: first, *nil debent*; secondly, that the plaintiffs, at the time of making the assurance, and from thence until the death of Mr. Pitt, were not interested in his life in manner and form as they have complained, etc.; thirdly, as to the first count, that the interest of the plaintiffs in the policy, and thereby intended to be covered, was a certain debt of £500 at the time of making the policy, due from Mr. Pitt to the plaintiffs, and no other; and that the said debt afterwards, and

after the death of Mr. Pitt, and before the exhibiting of the plaintiffs' bill; to wit, on the 6th of March, 1806, was fully paid to the plaintiffs by the Earl of Chatham and the Lord Bishop of Lincoln, executors of the will of Mr. Pitt. Issues were taken on the two first pleas; and as to the last, the plaintiffs, protesting that their interest in the policy thereby intended to be covered was not the said debt mentioned in that plea to be due to them from Mr. Pitt, and no other; replied, that the said debt was not afterwards, and after the death of Mr. Pitt, and before the exhibiting of their bill, fully paid to them by the Earl of Chatham and the Lord Bishop of Lincoln, executors of Mr. Pitt, in manner and form as alleged, etc.: on which also issue was joined.

The defendants paid £31 into court upon the first count; and on the trial of the cause before Lord ELLENBOROUGH, C. J., at Guildhall, it was agreed that a verdict should be entered on the several issues, according to the direction of the court, on the following case reserved.

The policy mentioned in the declaration was duly executed, and the premiums thereon were regularly paid. Mr. Pitt, mentioned in the policy, died on the 23d of January, 1806, which event was duly certified in February, 1806, to the trustees of the Pelican Life Insurance Company. The defendants, before Trinity Term last, were served with process issued in this cause on the 3d of June, 1806. Mr. Pitt was indebted to the plaintiffs at the time of the execution of the policy, and from thence up to and at the time of his death above £500, and died insolvent. On the 6th of March, 1806, the executors of Mr. Pitt paid to the plaintiffs out of the money granted by Parliament for the payment of Mr. Pitt's debts, £1,109 11s. 6d. as in full for the debt due to them from Mr. Pitt. The case was argued in the last term by

Dampier, for the plaintiffs.

Marryat, *contra*.

Cur. adv. vult.

Lord ELLENBOROUGH, C. J., now delivered the judgment of the court.

This was an action of debt on a policy of insurance on the life of the late Mr. Pitt, effected by the plaintiffs, who were creditors of Mr. Pitt for the sum of £500. The defendants were directors of the Pelican Life Insurance Company, with whom that insurance was effected. [His lordship, after stating the pleadings and the case, proceeded —] This assurance, as every other to which the law gives effect (with the exceptions only which are contained in the 2d and 3d sections of the Stat. 19 Geo. II. c. 27), is in its nature a contract of indemnity, as distinguished from a contract by way of gaming or wagering. The interest which the plaintiffs had in the life of Mr. Pitt was that of creditors; a description of interest which has been held in several late cases to be an insurable one, and not within the prohibition of the Stat. 14 Geo. III. c. 48. § 1. That interest depended upon the life of Mr. Pitt, in respect of the means, and of the probability, of payment which the continuance of his life afforded to such creditors, and the probability of loss which

resulted from his death. The event against which the indemnity was sought by this insurance, was substantially the expected consequence of his death as effecting the interests of these individuals assured in the loss of their debt. This action is, in point of law, founded upon a supposed damnification of the plaintiffs, occasioned by his death, existing and continuing to exist at the time of the action brought; and being so founded, it follows of course, that if, before the action was brought, the damage, which was at first supposed likely to result to the creditors from the death of Mr. Pitt, were wholly obviated and prevented by the payment of his debt to them, the foundation of any action on their part, on the ground of such insurance, fails. And it is no objection to this answer that the fund out of which their debt was paid did not (as was the case in the present instance) originally belong to the executors as a part of the assets of the deceased; for though it were derived to them *aliunde*, the debt of the testator was equally satisfied by them thereout; and the damnification of the creditors, in respect of which their action upon the assurance contract is alone maintainable, was fully obviated before their action was brought. This is agreeably to the doctrine of Lord Mansfield in *Hamilton v. Mendes*, 2 Burr. 1210. The words of Lord Mansfield are: "The plaintiff's demand is for an indemnity: his action then must be founded upon the nature of the damnification as it really is at the time the action is brought. It is repugnant, upon a contract for indemnity, to recover as for a total loss when the event has decided that the damnification in truth is an average, or perhaps no loss at all. . . . Whatever undoes the damnification in the whole, or in part, must operate upon the indemnity in the same degree. It is a contradiction in terms to bring an action for indemnity where, upon the whole event, no damage has been sustained." Upon this ground, therefore, that the plaintiffs had in this case no subsisting cause of action in point of law, in respect of their contract, regarding it as a contract of indemnity, at the time of the action brought, we are of opinion that a verdict must be entered for the defendants on the first and third pleas, notwithstanding the finding in favor of the plaintiffs on the second plea.

BEVIN v. CONNECTICUT MUTUAL LIFE INS. CO.

SUPREME COURT OF CONNECTICUT, 1854. 23 Conn. 244.¹

THIS was an action of assumpsit upon a policy of insurance in favor of the plaintiff on the life of George Barstow, for \$1,000. The plaintiff had paid, for four annual premiums and certain permits, \$192.80. Before procuring the policy, the plaintiff had paid to Barstow \$350 as consideration for an agreement that Barstow should go to California,

¹ The statement has been rewritten, and matter foreign to the amount of recovery has been omitted. — Ed.

engage in mining for gold, and divide equally with the plaintiff the proceeds, less expenses, until Barstow should return home, which should be at least one year. After the issue of the policy, the plaintiff advanced to Barstow personal property to the amount of \$19. Barstow proceeded to California, for three years and upwards engaged in mining, in accordance with the agreement, and then died.

There were questions in the case as to Barstow's proceeding to California by a prohibited route, and as to waiver.

The court made a finding of facts and reserved, for the advice of this court, the question what judgment ought to be rendered.

Bulkeley, for the plaintiff.

W. D. Shipman, for the defendants.

ELLSWORTH, J. Several questions of some practical importance are presented for our decision in this case. We have occasion to decide only some of them, in order to make an end of this case, and shall, therefore, allude to such only with particularity.

It is said, first, that the plaintiff had no interest in the life of Barstow, when the policy was obtained, and if any, not the \$1,000 stated in the policy. In marine and fire insurances the questions and rules for ascertaining interest are, in general, well settled and of every-day occurrence. In them the rule is that the contract of insurance is one of indemnity only, recognizing policies being held to be illegal and void. The same is true, we suppose, in insurance on lives. In England the statutes of George II. and George III. declare all policies of insurance without interest to be null and void, and although the phraseology of the statute of George III. has given rise to distinctions there, in this country we hold the English statutes to be in affirmance of the principle of the common law, that policies of insurance are contracts of indemnity only.

Without deciding what is an insurable interest in the life of another, in every case — whether it must be one of a pecuniary value, or property, which the law recognizes as property, or may be something less or different, as the interest in one's relative, or in the life of another person — in this case we have no doubt there was an insurable interest, and one which the parties could well value, to the extent it was valued in the policy. The plaintiff had advanced to Barstow the sum of \$300, besides articles of personal property, to enable him to go to California and there labor, for at least one year, and to account to the plaintiff for one half of his gains in that business. He was the plaintiff's debtor and partner, giving to the plaintiff an interest in the continuance of his life, as by that means, through his skill and efforts, the plaintiff might expect not only to get back what he had advanced, but to acquire great gains and profits in the enterprise. All the books hold this to be a sufficient interest to sustain a policy of insurance. As to the value of this interest, we think it must be held to be what the parties agreed to consider it in the policy. This was the sum asked for by the plaintiff, and which the defendants agreed to pay in case of death, and for

which they were paid in the premiums given by the insured. The policy must, we think, be held to be a valued policy. If otherwise, and the question of interest is open for proof on the trial, to be determined by the estimate which jurors may put upon the value of Barstow's life, under the circumstances, the policy may afford an inadequate and precarious security. Who can tell what the plaintiff would have gained if Barstow had lived and labored under his contract in California? The plaintiff declared in the policy that he had an interest in the life of Barstow of \$1,000; the defendants received this declaration as true, and made it the basis of the insurance and of their premium; now, without deciding that such a declaration is, in all cases, conclusive, as to the interest or damage, we hold that in cases like the present, where there is not a definite and specific interest, and much is to depend upon the character and continuance of the enterprise, such declaration, if honestly made, is the agreed value of interest. The defendants knew what was claimed to be the interest of the insured; what the damages were estimated to be in case of death, and what amount the plaintiff wanted to secure, and the defendants agreed to this sum. It would be against good faith and against the meaning of the parties for the defendants now to refuse to pay as they agreed. In marine insurance policies on profits always are, and must be of necessity, valued. *Mumford v. Hallet*, 1 Johns. 433.

In *Lord v. Dall*, 12 Mass. 115, a sister obtained an insurance on her brother's life, about going to sea, on whose generosity and assistance she was dependent for support. She recovered the whole sum; no question seems to have been made as to the amount, but only whether it was an interest which the law would recognize. So, in every case where a person, on his own account, insures the life of a relative, if the sum named in the policy is not to be the rule of damages, we inquire, what is? The impossibility of satisfactorily going into the question, in most cases, and especially where there is nothing to guide the inquiry and everything is uncertain, would lead us to hold that a policy like this is a valued policy, as most consistent with the understanding of the parties and the principles of law. 2 Phil. Ev. 52; *Bury on Ins.* 24; 3 Kent's Com. 219; *Ang. Life Ins.* 321; 12 Mass. 118.¹ . . .

We advise judgment for the plaintiff.

In this opinion the other judges concurred.

Judgment for the plaintiff.

¹ Passages foreign to the amount of recovery have been omitted. — ED.

DALBY v. INDIA AND LONDON LIFE ASSURANCE CO.

EXCHEQUER CHAMBER, 1854. 15 C. B. 365.

FOR a statement and part of the opinion, see *ante*, p. 108.

PARKE, B.¹ . . . The question arises on the third clause. It is as follows: "And be it further enacted that, in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the assured in such life or lives, or other event or events."

Now, what is the meaning of this provision?

On the part of the plaintiff, it is said, it means only that in all cases in which the party insuring has an interest when he effects the policy, his right to recover and receive is to be limited to that amount; otherwise, under color of a small interest, a wagering policy might be made to a large amount, — as it might if the first clause stood alone. The right to recover, therefore, is limited to the amount of the interest at the time of effecting the policy. Upon that value the assured must have the amount of premium calculated; if he states it truly, no difficulty can occur; he pays in the annuity for life the fair value of the sum payable at death. If he misrepresents, by over-rating the value of the interest, it is his own fault, in paying more in the way of annuity than he ought; and he can recover only the true value of the interest in respect of which he effected the policy; but that value he can recover. Thus the liability of the assurer becomes constant and uniform, to pay an unvarying sum on the death of the *cestui que vie*, in consideration of an unvarying and uniform premium paid by the assured. The bargain is fixed as to the amount on both sides.

This construction is effected by reading the word "hath" as referring to the time of effecting the policy. By the first section the assured is prohibited from effecting an insurance on a life or on an event wherein he "shall have" no interest, — that is, at the time of assuring; and then the third section requires that he shall cover only the interest that he "hath." If he has an interest when the policy is made he is not wagering or gaming, and the prohibition of the statute does not apply to his case. Had the third section provided that no more than the amount or value of the interest should be insured, a question might have been raised, whether, if the insurance had been for a larger amount, the whole would not have been void; but the prohibition to recover or receive more than that amount obviates any difficulty on that head.

On the other hand, the defendants contend that the meaning of this clause is, that the assured shall recover no more than the value of the

¹ The immediately preceding parts of the opinion have been reprinted *ante*, pp. 109–111. — ED.

interest which he has at the time of the recovery, or receive more than its value at the time of the receipt.

The words must be altered materially to limit the sum to be recovered to the value at the time of the death, or (if payable at a time after death) when the cause of action accrues.

But there is the most serious objection to any of these constructions. It is, that the written contract, which, for the reasons given before, is not a wagering contract, but a valid one, permitted by the statute, and very clear in its language, is by this mode of construction completely altered in its terms and effect. It is no longer a contract to pay a certain sum as the value of a then-existing interest, in the event of death, in consideration of a fixed annuity calculated with reference to that sum; but a contract to pay, contrary to its express words, a varying sum, according to the alteration of the value of that interest at the time of the death, or the accrual of the cause of action, or the time of the verdict, or execution; and yet the price, or the premium to be paid, is fixed, calculated on the original fixed value, and is unvarying; so that the assured is obliged to pay a certain premium every year, calculated on the value of his interest at the time of the policy, in order to have a right to recover an uncertain sum, viz., that which happens to be the value of the interest at the time of the death, or afterwards, or at the time of the verdict. He has not, therefore, a sum certain, which he stipulated for and bought with a certain annuity; but it may be a much less sum, or even none at all.

This seems to us so contrary to justice and fair dealing and common honesty that this construction cannot, we think, be put upon this section. We should, therefore, have no hesitation, if the question were *res integra*, in putting the much more reasonable construction on the statute, that if there is an interest at the time of the policy, it is not a wagering policy, and that the true value of that interest may be recovered, in exact conformity with the words of the contract itself.

The only effect of the statute is to make the assured value his interest at its true amount when he makes the contract.

But it is said that the case of *Godsall v. Boldero*, 9 East, 72, has concluded this question.

Upon considering this case, it is certain that Lord Ellenborough decided it upon the assumption that a life-policy was in its nature a contract of indemnity, as policies on marine risks, and against fire, undoubtedly are, and that the action was, in point of law, founded on the supposed damnification, occasioned by the death of the debtor, existing at the time of the action brought; and his Lordship relied upon the decision of Lord Mansfield in *Hamilton v. Mendes*, 2 Burr. 1270, that the plaintiff's demand was for an indemnity only. Lord Mansfield was speaking of a policy against marine risks, which is in its terms a contract for indemnity only. But that is not of the nature of what is termed an assurance for life: it really is what it is on the face of it, — a contract to pay a certain sum in the event of death. It is valid at

common law ; and if it is made by a person having an interest in the duration of the life, it is not prohibited by the statute 14 G. III. c. 48.

But, though we are quite satisfied that the case of *Godsall v. Boldero* was founded on a mistaken analogy and wrong, we should hesitate to overrule it, though sitting in a court of error, if it had been constantly approved and followed, and not questioned, though many opportunities had been offered to question it. It was stated that it had not been disputed in practice, and had been cited by several eminent judges as established law. The judgment itself was not, and could not be, questioned in a court of error ; for one of the issues, *nil debet*, was found for the defendant.

Since that case we know practically, and that circumstance is mentioned by some of the judges in the cases hereinafter referred to, that the insurance offices, generally speaking, have not availed themselves of the decision, as they found it very injurious to their interest to do so. They have therefore, generally speaking, paid the amount of their life-insurances, so that the number of cases in which it could be questioned is probably very small indeed. And it may truly be said that, instead of the decision in *Godsall v. Boldero* being uniformly acquiesced in, and acted upon, it has been uniformly disregarded.

Then as to the cases. There is no case at law, except that of *Barber v. Morris*, 1 M. & Rob. 62, in which the case of *Godsall v. Boldero* was incidentally noticed as proving it to be necessary that the interest should continue till the death of the *cestui que vie*. Is was proved in that case to be the practice of the particular office in which that assurance was made, to pay the sums assured, without inquiry as to the existence of an insurable interest ; and on that account it was held that the policy, though in that case the interest had ceased, was a valuable policy, and the plaintiff could not recover, on the ground that the defendant, the vendor of it, was guilty of fraudulent concealment in not disclosing that the interest had ceased. This was the point of the case ; and though there was a dictum of Lord Tenterden that the payment of the sum insured could not be enforced, it was not at all necessary to the decision of the case.

The other cases cited on the argument in this case were cases in equity, where the propriety of the decision of *Godsall v. Boldero* did not come in question.

The questions arose as to the right of the creditor and debtor, *inter se*, where the offices have paid the value of a policy, in *Humphrey v. Arabin*, 2 Lloyd & G. 318, *Henson v. Blackwell*, 4 Hare, 434, cor. Sir J. Wigram, V. C., *Phillips v. Eastwood*, 1 Lloyd & G. (Cas. temp. Sugden) 281, where the point decided was that a life policy, as a security for a debt, passed under a will bequeathing debts, the Lord Chancellor stating that the offices found it not for their benefit to act on the rigid rule of *Godsall v. Boldero*. In these cases the different judges concerned in them do not dispute. — some, indeed, appear to approve of, — the case of *Godsall v. Boldero* ; but it was not material in any to

controvert it; and the questions to be decided were quite independent of the authority of that case.

We do not think we ought to feel ourselves bound, sitting in a court of error, by the authority of this case, which itself could not be questioned by writ of error; and as so few, if any, subsequent cases have arisen in which the soundness of the principle there relied upon could be made the subject of judicial inquiry, and, as in practice, it may be said that it has been constantly disregarded.

*Judgment reversed, and venire de novo.*¹

¹ In *Law v. London Indisputable L. Policy Co.*, 1 K. & J. 223 (1855), s. c. 3 Eq. 338, the plaintiff was entitled by purchase from his son to a legacy of £3,000, which had been bequeathed to the son at the age of thirty and was contingent upon his attaining that age; and when the son lacked twenty months of thirty years the plaintiff procured insurance for £2,999 on his son's life for two years. The plaintiff paid two annual premiums of £39 each. The son died after attaining the age of thirty years, but before the expiration of the policy. The plaintiff received the legacy in full, and it was held that he was entitled to recover £2,999 from the insurance company. *Wood, V. C.*, said: "Policies of insurance against fire or marine risk are contracts to recoup the loss which parties may sustain from particular causes. When such loss is made good *aliunde*, the companies are not liable for a loss which has not occurred; but in a life policy there is no such provision. The policy never refers to the reason for effecting it. It is simply a contract that, in consideration of a certain annual payment, the company will pay at a future time a fixed sum, calculated by them with reference to the value of the premiums which are to be paid, in order to purchase the postponed payment. Whatever event may happen meanwhile is a matter of indifference to the company. They do not found their calculations upon that, but simply upon the probabilities of human life, and they get paid the full value of that calculation. On what principle can it be said that, if some one else satisfies the risk, on account of which the policy may have been effected, the company should be released from their contract? The company would be in the same position whether the object of the insured were accomplished or not; whether he were in a better or worse position, that could have no effect upon the contract with the company, which was simply calculated upon the value of the life which they had to insure."

In *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457 (1876), s. c. in part, *ante*, p. 110, n., husband and wife procured a policy on their joint lives, payable to the survivor. The parties were divorced, and alimony was decreed and paid to the wife. Each party married again. After the death of one of the parties, the other, who had paid the premium that became due after the divorce, brought action upon the policy, and recovered. *BRADLEY, J.*, for the court, said:—

"The policy in question might, in our opinion, be sustained as a joint insurance, without reference to any other interest, or to the question whether the cessation of interest avoids a policy good at its inception. We do not hesitate to say, however, that a policy taken out in good faith, and valid at its inception, is not avoided by the cessation of the insured's interest, unless such be the necessary effect of the provisions of the policy itself. Of course, a colorable or merely temporary interest would present circumstances from which want of good faith and an intent to evade the rule might be inferred. And in cases where the insurance is effected merely by way of indemnity, as where a creditor insures the life of his debtor for the purpose of securing his debt, the amount of insurable interest is the amount of the debt.

"But supposing a fair and proper insurable interest, of whatever kind, to exist at the time of taking out the policy, and that it be taken out in good faith, the object and purpose of the rule which condemns wager policies is sufficiently attained; and there is then no good reason why the contract should not be carried out according to its terms. This is more manifest where the consideration is liquidated by a single premium paid in advance than where it is distributed in annual payments during the

insured life. But, in any case, it would be very difficult, after the policy had continued for any considerable time, for the courts, without the aid of legislation, to attempt an adjustment of equities arising from a cessation of interest in the insured life. A right to receive the equitable value of the policy would probably come as near to a proper adjustment as any that could be devised. But if the parties themselves do not provide for the contingency, the courts cannot do it for them."

And see *Trenton Mut. L. & F. Ins. Co. v. Johnson*, 24 N. J. L. (4 Zab.) 576, 582-583, 586-587 (1854), s. c. in part, *ante*, p. 22, n.; *Sides v. Knickerbocker L. Ins. Co.*, 16 Fed. R. 650 (C. C., W. D. Tenn., 1883). — ED.

CHAPTER IX.

SUBROGATION.

SECTION I.

Marine Insurance.

RANDAL v. COCKRAN.

CHANCERY, 1748. 1 Ves. Sr. 98.

THE king having granted general letters of reprisal on the Spaniards for the benefit of his subjects, in consideration of the losses they sustained by unjust captures, the commissioners would not suffer the insurers to make claim to part of the prizes, but the owners only,¹ although they were already satisfied for their loss by the insurers; who thereupon brought the present bill.

LORD CHANCELLOR² was of opinion that the plaintiffs had the plainest equity that could be. The person originally sustaining the loss was the owner, but after satisfaction made to him, the insurer. No doubt but from that time, as to the goods themselves, if restored *in specie*, or compensation made for them, the assured stands as a trustee for the insurer, in proportion for what he paid; although the commissioners did right in avoiding being intangled in accounts, and in adjusting the proportion between them. Their commission was limited in time; they see who was owner; nor was it material to them to whom he assigned his interest, as it was in effect after satisfaction made.³

¹ See *post*, p. 950, n. — ED.

² LORD HARDWICKE. — ED.

³ *Acc.* Blaauwpot v. DaCosta, 1 Eden, 130 (1758), where Lord Keeper HENLEY said: —

“I am of opinion that upon the policy, and the peril happening, and the payment of the money by the underwriters, the whole rights of the assured vested in them. The assured had this right of restitution vested in them against the Spanish captors, which was afterwards prosecuted by the Crown by reprisals. Satisfaction having been made in consequence of that capture, I think the plaintiffs are entitled to that benefit, and that it was received by the executors of Elias DePaz [one of the persons insured] in trust for them.”

And see *Comegys v. Vasse*, 1 Pet. 193, 213–217 (1828). — ED.

ATLANTIC INS. CO. *v.* STORROW AND BOYD.

COURT OF CHANCERY OF NEW YORK, 1835. 5 Paige, 285.

THIS was an appeal from a decree of the Vice Chancellor of the First Circuit. The facts of the case, as they appeared from the bill and answer, were as follows: In February, 1831, the complainants insured the defendant Storrow upon a box of specie, laden on board the "Charles Carroll," from New York to Havre, for which specie a bill of lading in the usual form had been signed by the master of the vessel. A day or two after the underwriting of the policy, but after the commencement of the risk, the specie was stolen from the ship while she lay at the wharf in New York, in the absence of the master and ship's crew, whereby Storrow claimed a total loss. On the 9th of March, 1831, he abandoned to the underwriters, who being advised that they were not liable for a loss accruing at the place of lading, declined paying the same. Storrow thereupon commenced a suit upon the policy, in the Superior Court of the city of New York, in May term of the same year. In the progress of the suit, and before the trial, the complainants obtained an order from the Superior Court against the plaintiff and his assignee, for a discovery on oath, of all receipts, instruments of assignment and of compromise relating to the specie insured, and to the claim of the plaintiff in that suit. Under that order the plaintiff and John I. Boyd, his assignee, produced the original bill of lading, and an absolute assignment from Storrow to Boyd, of the policy of insurance, and of sums of money, interest, benefit, and advantage then due, or thereafter to rise. The assignment appeared to be for the sole benefit of Boyd, and was without date. Storrow and Boyd also accompanied these documents by their affidavit, sworn on the 14th of July, 1831, that these were all the papers relating to the insurance and the transfer of the plaintiff's interest therein. Shortly after this the complainants wrote to Storrow, that being unable, in the suit conducted in his name, to ascertain and establish the fact that he had transferred his right to the bill of lading and recourse against the shipowners, they should, in case of a recovery against the company in that suit, expect to receive, on his abandonment, every necessary document to enable the company to enforce their remedy against the shipowners in his name; and should hold him responsible therefor, if the company was made liable for the loss. To this letter Storrow answered, that upon being reimbursed the amount of specie shipped on board the "Charles Carroll," he assigned to the owners all claims against the company; in consequence of which assignment he had no longer any interest in the matter, nor had he any document which could aid in the suit which the company might bring against the shipowners. On the day after the receipt of this answer, the company again wrote to Storrow: "It is necessary that you should fully understand the situation in which we stand as to the specie by the

'Charles Carroll.' If you have, either before or after the abandonment, received from the owners of the vessel the amount of the subject insured, we shall look to you, in case of our being subjected to pay a loss on the policy to you or your assignee, for full reimbursement. We have not as yet been able to procure proof of the owners' having paid the claim to you, and therefore are unable to protect ourselves from recovery on that ground, although we hope to do so upon others." After a recovery was had against the company in the suit prosecuted in the name of Storrow, the complainants wrote to him and the attorney in that suit, stating their readiness to pay the amount of such recovery, provided the bill of lading of the specie should be assigned to them, with suitable covenants that the remedy against the ship master or ship owners was not impaired; and that unless that should be done, the complainants would be compelled to seek relief in this court; and in that case would claim the costs to which they should necessarily be subjected. In reply, the attorney in the suit informed the complainants that the bill of lading had "long since been delivered up by Storrow to the master of the 'Charles Carroll,' to be cancelled." And Storrow also referred the complainants to the attorney in the suit, for an answer. The complainants alleged, in their bill, that until the receipt of those answers, they were ignorant that the bill of lading had been cancelled, or otherwise discharged, but supposed it was still outstanding, and assigned to Boyd. By the answer of the defendants, it appeared that the bill of lading was in the hands of Boyd, the assignee of the policy, at the commencement of the suit; and that the same was delivered up to the master of the ship and cancelled, after the judgment was rendered in that suit.

The Vice Chancellor decided that the underwriters were, by the loss and by the abandonment, entitled to be subrogated to the rights of the assured, if they paid the loss. And he made a decree that the complainants be allowed the amount which the master or shipowners would have been liable for, and that the judgment should only be enforced for the residue, if anything. He also charged the defendants with the costs of the suit in this court. From the whole of this decree the defendants Boyd and Storrow entered a joint appeal.

J. Anthon, for the appellants.

D. Lord, Jr., for the respondents.

The CHANCELLOR.¹ . . . It is insisted, however, on the part of the respondents, that, although they have succeeded in satisfying the Superior Court that this was a loss for which the underwriters were liable on this policy, it was a case in which the underwriters and shipowners were equally liable, and that the equities of both were equal as to the assured. Even if this were so, it does not follow that the assured had a right to receive the amount of the loss from either, and assign over to the one from whom it was received the right to claim the full amount

¹ HON. REUBEN H. WALWORTH.

A passage on loss by theft has been omitted. — Ed.

from the other party. It would rather present a case of equitable contribution, in which each should contribute a moiety towards the loss, as in the case of a double insurance. The insurers, however, are not liable to contribute for a loss, for which the master or ship owners are also liable to the assured. The contract of insurance is a mere contract of indemnity to the assured against such losses as he may actually sustain by reason of any of the perils assured against. And upon an abandonment and payment, or upon a recovery, as for a total loss, the underwriters are entitled to subrogation, at least in equity, to all the rights and remedies which the assured has to the property which is not actually destroyed, including the *spes recuperandi* from any other source; unless the underwriters have relinquished that right by a stipulation in the policy. On this question, I fully concur with the Vice Chancellor in the conclusion at which he arrived, and also as to the reasons and weight of authority upon which his decision was based. If it had appeared upon the trial of the suit at law that the assured had received a compensation for his loss from the shipowners, or the master, and that the assignment was made for their benefit merely, to enable them to recover back the amount of the insurance from the underwriters on the policy, there can be no reasonable doubt that it would have been a good defence at law, at least to the amount thus received. And the result would have been the same, if it had appeared that Boyd, the assignee, had received such compensation after the assignment of the policy to him. The defence would have been equally available, if the underwriters could have shown that Storrow, or his assignee, had cancelled the bill of lading, or otherwise discharged his claim against the master and shipowners.

The particular manner in which the matter has been managed, probably with a view to defraud the underwriters of their remedy over against the shipowners or master, cannot, in this court, vary the rights and equities of these parties. It was stated, in the letter of Storrow to the underwriters, in the latter part of July previous to the trial, that he assigned to the ship owners all claims against the company, upon being reimbursed by them the amount of the specie shipped on board the "Charles Carroll." But before that time the complainants had been furnished with his affidavit, and a copy of the assignment; by which it appeared that he had assigned the policy absolutely to Boyd, and in his own right. The letter of the nominal plaintiff could not, therefore, have been used as evidence on the trial to defeat the rights acquired by the assignee, under the previous assignment. Neither could Storrow himself have been a witness to prove the facts stated in his letter; as he was the nominal plaintiff in the suit. Even if the facts stated in that letter were true, therefore, I do not see how the complainants could have availed themselves of them, as a defence on the trial at law.

Whether Boyd was in fact a *bona fide* assignee of the policy, or only took the assignment under a fraudulent arrangement entered into be-

tween the shipowners and Storrow, for the purpose of depriving the underwriters of legal and equitable right of subrogation, does not appear from the pleadings in this suit. The complainants do not pretend to know how the fact really was; and the defendants are entirely silent on the subject. They simply admit the writing of the letters referred to in the bill; but without saying whether the information contained therein was true or otherwise. In the absence of all proof on this subject, I must therefore presume, from the assignment itself, notwithstanding what was stated in the letters, that there was a *bona fide* assignment to Boyd, who had a legal right to recover upon the policy, by being substituted in the place of the assignor. But by giving up the bill of lading to the master to be cancelled, after the judgment was obtained, the complainants were deprived of their remedy over against the shipowners; and standing merely in the character of sureties, to indemnify the assured against actual loss, the judgment must, in equity, be considered as satisfied *pro tanto*. The Vice Chancellor has therefore very properly directed that the amount which the master and shipowners would have been liable for upon the bill of lading, should be deducted from the amount of the judgment, instead of decreeing a perpetual injunction against the collection of the whole debt and costs.¹ . . .

AMAZON INS. CO. v. STEAMBOAT IRON MOUNTAIN ET AL.

CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, 1876. 1 Flippin, 616.

THE facts are fully stated in the opinion of the court.

Moulton, Johnson & Levy, for libellant.

Hoadly, Johnson & Colston, for respondents.

SWING, J. The libel filed in this case seeks to recover for the value of one hundred and twenty-five barrels of flour alleged to have been lost through the negligence or wrongful act of respondents, as owners of the steamboat "Iron Mountain" and barge "Ironsides No. 3," on which flour libellant had insured the owner, to whom it paid the insurance; he having abandoned to it the property upon the happening of the accident entailing the loss. The bill of lading contracted to carry the flour from the port of Mt. Vernon, Ind., at which port it was shipped, to the port of New Orleans, La., and the insurance by libellant was upon the flour in transit between these points, to be transported by the boat and barge named, against the usual risks of river navigation, excepting, however, such losses for which the carrier would be liable to the owner of the insured property. The respondents — owners of the

¹ A passage on costs has been omitted. — Ed.

boat and barge — file exceptions to the libel, claiming, first, that the action should have been brought in the name of the owner of the flour; and, second, that the libel cannot be maintained by the insurance company in its own name.

The exceptions cannot be sustained. In *Propeller Monticello v. Mollison*, 17 How. 152, the Supreme Court say: "It is true that in courts of common law the injured party alone can sue for a trespass, as the damages are not legally assignable, and if there be an equitable claimant, he can sue only in the name of the injured party, whereas in Admiralty, the person equitably entitled may sue in his own name." In the case of *The Manistee*, 5 Biss. 381, the libel was filed by the insurance company in its own name in an action similar to the present, and it seems to have been conceded that it was properly brought. To the same effect, see *Insurance Co. v. The C. D. Jr.*, 1 Woods, 72.

The second exception to the libel is, that, inasmuch as the loss happened during an unlawful deviation on the part of the carrier, or was caused by improper conduct of the master, the insurance company was not legally liable to the insured for the loss, and the payment by it of the insurance was but voluntary; hence, subrogation to his rights to recover from the carrier did not arise, and consequently libellant has no remedy over against the owners of the boat and barge for the loss. The same objection was made, and the question expressly raised, in the case of *The C. D. Jr.*, above cited, where Judge Woods summarily disposed of it in the following brief sentences: "Respondents further claim, that, having shown by the testimony, as they allege, that the insurance company was not legally bound to indemnify the insured for the loss the latter sustained by the collision, therefore the libellants have no cause of action against the respondents, although they have paid the loss. But I am of opinion that the authorities are adverse to this claim, and adopt the conclusion of the district judge, and refer to the case of *Monticello v. Mollison*, 17 How. 152."

Respondents' solicitors, however, suggest that perhaps the point was not fully considered by Judge Woods; but it appears to me that the contrary inference can only be drawn from the report, as the learned judge states his opinion as the "result of the authorities," which must have been cited *pro* and *con* by the counsel for the respective parties. Besides, it is evident that the question had been fully argued before the district judge, who had decided it in the same way, and the counsel for the respondents, in the case before me, have failed to cite any authority to sustain the opposite view, and I have not been able to find any which gives it support. In *Monticello v. Mollison*, *ubi supra*, it was held that, while in courts of Admiralty, in contradistinction to those at common law, "the person equitably entitled may sue in his own name, yet that the same reasons why the wrong doer cannot be allowed to set up as a defence the equities between the insurer and the insured, equally apply to both courts." "The respondent," the court proceed to say, "is not presumed to know or bound to inquire as to

the relative equities of parties claiming the damages. He is bound to make satisfaction for the injury he has done. When he has once made it to the injured party, he cannot be made liable to another suit at the instance of any merely equitable claimant. If notified of such a claim before payment, he may compel the claimants to interplead; otherwise, in making reparation for a wrong done, he need look no further than to the party injured." Again, the same court, in *Hall et al. v. Railroad Company*, 13 Wall. 367, pertinently say: "It is too well settled by the authorities to admit of question, that, as between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods, and the risk incident thereto, the owner and the insurer are considered as one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract, or for non-performance of his legal duty. Standing thus, as the insurer does, practically in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner." In the case of *The Manistee*, *ubi supra*, it was contended on behalf of the carrier, "that the insurance policy was void, because it was issued in disregard of the requirements of the laws of the State." But the learned judge held that, "in his opinion, the carrier should not be permitted to make that defence," adding, "that the shipper might have brought a libel for the use of the company (the underwriter), and if the use were not expressed in the record, the court would protect the company even after a decree in favor of the libellant." The result from these principles and authorities seems plainly to be that the carrier in this class of cases cannot set up any different defence against the underwriter than he could have against the owner of the goods lost, were the action brought by the latter. Substantially the action is to be considered and treated as though prosecuted by and in the name of the insured owner or shipper for the use of the underwriter, to be defended on the same grounds, and determined by the observance of the same rules, and the application of the same legal principles. It would be an anomaly indeed, if, in a case where it was admitted, the owner could recover against the carrier for the use of the underwriter, the latter having paid the loss, and suing directly in his own name in Admiralty, as he may, thus standing, as we have seen, substantially in the place of the owner, could not recover. Such a result would be extremely inconsistent and illogical. The carrier has all the privileges

and immunities, to which he is justly entitled when he is allowed to interpose the same defences against the underwriter which he could against the owner, no more nor less, however. No privity of contract existing, as has been shown, he cannot be permitted to inquire into the equities which may have existed between the underwriter and the owner, and thus divert the issue to be tried from the question of his unlawful acts or negligence to that of the liability or non-liability of the underwriter to the owner. What he must negative, is his liability to the owner, not that of the insurer to the owner.¹

The exceptions will be overruled.

SIMPSON & CO. ET AL., APPELLANTS, v. THOMSON, BURRELL
ET AL., RESPONDENTS.

HOUSE OF LORDS (SCOTCH), 1877. 3 App. Cas. 279.²

THE steamship "Dunluce Castle" was run down by the steamship "Fitzmaurice," owing to the negligence of those in charge of the latter. Both vessels belonged to Burrell. The underwriters on the "Dunluce Castle," paid Burrell £6,000 as for a total loss. Burrell petitioned the court under the Mercantile Shipping Acts, 17 & 18 Vict. c. 104, § 514, and 25 & 26 Vict. c. 63, § 54, to limit to £3,590, being the value of the ship in fault at £8 per ton, his liability, as owner of the "Fitzmaurice," to those who had suffered from the collision, including Simpson & Co., owners of the cargo lost with the "Dunluce Castle." In the same suit, Thomson and the other underwriters on the "Dunluce Castle" claimed to rank with Simpson & Co. and the other claimants upon the fund of £3,590. The First Division of the Court of Session pronounced an interlocutor, allowing this claim of the underwriters; and the interlocutor was confirmed, the court repelling the objection of Simpson & Co., that the underwriters were not entitled to rank *pari passu* with them. 4 Session Cases, Fourth Series, 177 and 1133.

On appeal to the House : —

Mr. *Watkin Williams*, Q. C., and Mr. *J. C. Mathew*, for the appellants.

Mr. *Benjamin*, Q. C., and Mr. *E. Clarkson*, for the respondents.

THE LORD CHANCELLOR,³ . . . I know of no foundation for the right of underwriters, except the well-known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by

¹ *Acc.* : *Pearse v. Quebec Steamship Co.*, 24 Fed. R. 285 (D. C., S. D. N. Y., 1885). — ED.

² The statement has been rewritten, and only a small part of each opinion has been reprinted. — ED.

³ LORD CAIRNS. — REP.

which the person indemnified might have protected himself against or reimbursed himself for the loss. It is on this principle that the underwriters of a ship that has been lost are entitled to the ship in specie if they can find and recover it; and it is on the same principle that they can assert any right which the owner of the ship might have asserted against a wrong-doer for damage for the act which has caused the loss. But this right of action for damages they must assert, not in their own name, but in the name of the person insured, and if the person insured be the person who has caused the damage, I am unable to see how the right can be asserted at all. . . .

The right of the underwriters is merely to make such claim for damages as the insured himself could have made, and it is for this reason that (according to the English mode of procedure) they would have to make it in his name; and if this is so, it cannot of course be made against the insured himself. . . .

LORD PENZANCE. . . . In answer to this objection it seems to have been considered by the Court below that by the payment of a total loss and the cession or transfer to the underwriters of the vessel (or whatever might remain of her) which followed thereupon by operation of law; some new right of action sprung up, or was created, against the owner of the wrong-doing ship in favor of the underwriters.

I say "new" right of action, because the right of action contemplated is something different from, and other than, the right of action which resided in the owner of the injured ship, the benefit of which could only be made available to the underwriters by transference from that owner, and consequently could only be insured in his name.

My Lords, I entirely agree with the reasoning of the Lord Chancellor upon this head, and am of opinion that there is no warrant to be found in the existing decisions for such a proposition. . . .

LORD BLACKBURN. . . . In England, the action must be in the name of the shipowner, not of the underwriters. I think this material, as showing that it is the personal right of action of the shipowner, the benefit of which is transferred to the underwriters. In other systems of jurisprudence, or it may be in our own as altered hereafter, the assignee of such a right may be able to sue in his own name. The important question will still remain: Is it a transfer of a right of action, which cannot be transferred unless it already exists; or a fresh right created? The whole reasoning of the court below is applicable to the case of a total loss, and of a total loss only. It would not be applicable to the case of a partial loss of 99 per cent or even more. I think, however, the reason of the law is not more applicable to those who have indemnified for a total loss than to those who have indemnified for a partial one. . . .

LORD GORDON. . . . The view which I take of the case is a very short one, and it is this: I think the case must be looked at as if the owner of the "Dunluce Castle" had not been insured. His having effected insurances was a very proper and prudent act, but he did it

for his own benefit, and the underwriters cannot complain that they have had to meet the risk against which they insured. Now I think it is clear that if the owner of the "Dunluce Castle" had not been insured, he could have had no claim against himself as the owner of the "Fitzmaurice," which caused the injury to the "Dunluce Castle." The injury to that ship was substantially caused by its own owner, and he could not be liable to himself for the damage so caused. And if he could not be liable to himself, he could not assign any right, either expressly or by implication of law, to any third person, as he had none to convey. No doubt the rights of underwriters are well established, and it is one of these that on payment of the risk as for a total loss they are entitled to all the rights in the injured ship which belonged to its owner; but they are not entitled to more. And if the owner of the "Dunluce Castle" had no right to sue the owner of the "Fitzmaurice," neither can the underwriters on the "Dunluce Castle," whose rights were derived from the owner of that vessel. . . .

*Declared, That the objections . . . ought not to have been repelled; and . . . Ordered, That the cause be remitted back.*¹ . . .

BURNAND (ON BEHALF OF HIMSELF AND ALL OTHER THE UNDERWRITERS UPON THE POLICIES OF INSURANCE ON TOBACCO PER "LAMPLIGHTER" EFFECTED BY THE DEFENDANTS), APPELLANT, v. RODOCANACHI SONS & CO., RESPONDENTS.

HOUSE OF LORDS, 1882. 7 App. Cas. 333.

APPEAL from a judgment of the Court of Appeal in favor of the respondents² reversing a judgment of Lord COLERIDGE, C. J., in favor of the appellant.³

The facts are fully set out in the report of the case below.⁴

The defendants effected with the plaintiffs, who are underwriters, two valued policies for £7,500 each on tobacco valued in the policies at £15,000, which formed the cargo of the "Lamplighter," a United States merchant ship, on a voyage from New York to Genoa. The insurance included war risks, and afterwards, during the insured voyage, the cargo was totally destroyed by the "Alabama," a cruiser of the Confederate States of America, then at war with the United States. The plaintiffs accordingly paid the defendants £15,000, the

¹ *Acc.*: *Globe Ins. Co. v. Sherlock*, 25 Ohio St., 50, 68. (1874). — ED.

² 6 Q. B. D. 633. — REP.

³ 5 C. P. D. 424. — REP.

⁴ The following statement has been reprinted from the report in the Court of Appeal, 6 Q. B. D. 633 (1881). — ED.

sum insured as for a total loss of the said cargo. The actual value of the cargo exceeded such sum by £6,557 7s. 3d.

The loss of the cargo of the "Lamplighter" formed one of the items of claim made by the United States against Great Britain in respect of the damage done by the "Alabama" and other Confederate cruisers, and which, pursuant to a treaty between the two sovereign States, made at Washington in 1871, was referred to arbitration, which resulted in an award under which Great Britain paid the sum awarded to the United States in satisfaction of such claim.

Afterwards, namely in June, 1874, the United States passed an Act of Congress¹ for constituting a court for the distribution of such sum amongst the subjects of the United States who had been injured by the Confederate cruisers, and whose claims should be allowed by that court under the provisions of such act, amongst which was section 12, as follows: "No claim shall be admissible or allowed by said court for any loss or damage for or in respect to which the party injured, his assignees, or legal representatives shall have received compensation or indemnity from any insurance company, insurer, or otherwise, but if such compensation or indemnity so received shall not have been equal to the loss or damage so actually suffered, allowance may be made for the difference. And in no case shall any claim be admitted or allowed for or in respect to unearned freights, gross freights, prospective profits, freights, gains, or advantages, or for wages of officers and seamen for a longer time than one year next after the breaking up of a voyage by the acts aforesaid: And no claim shall be admissible or allowed by the said court by or on behalf of any insurance company or insurer, either in its or his own right, or as assignee or otherwise in the right of a person or party insured as aforesaid, unless such claimant shall show, to the satisfaction of said court, that during the late rebellion the sum of its or his losses in respect to its or his war risks exceeded the sum of its or his premiums or other gains upon or in respect to such war risks; and, in case of any such allowance, the same shall not be greater than such excess of loss: and no claim shall be admissible or allowed by said court arising in favor of any insurance company not lawfully existing at the time of the loss under the laws of some one of the United States. And no claim shall be admissible or allowed by said court arising in favor of any person not entitled at the time of his loss to the protection of the United States in the premises, not arising in favor of any person who did not, at all times during the late rebellion, bear true allegiance to the United States."

The defendants claimed in the court so constituted, under the Act of Congress, the difference between the actual value of the said cargo of the "Lamplighter" and the sum so insured, and such claim was

¹ The Court of Commissioners of Alabama Claims was created by Acts of the Forty-third Congress, First Session, chap. 459, approved June 33, 1874. 18 U. S. Statutes at Large, part 3, p. 245. — Ed.

allowed, but in consequence of some heavy deductions for commission and expenses in prosecuting and establishing such claim, the actual sum received by the defendants was only £2,803 17s. 2d.

The plaintiffs alleged that they had, by payment of the total loss under the policies, become subrogated to the position of the defendants, and were therefore entitled to the sum which the defendants had so received from the United States Government.

Butt, Q. C., and *Cohen*, Q. C., (*Hollams* with them), for the appellant.

Sir *H. James*, A. G., and Hon. *A. E. Gathorne Hardy*, for the respondents, were not heard.

LORD SELBORNE, L. C. My Lords, this is a short but interesting and important question. Your Lordships have heard a very able argument, and have had the benefit of considering the able opinions of the learned judges in both the courts below, and I believe there is no doubt in the minds of any of your Lordships that the judgment under appeal is right.

Now, if I may venture to do so, with that sincere respect which I always feel for everything which falls from judges so eminent as Lord COLERIDGE and BAGGALLAY, L. J., I will indicate what I think is the fallacy in the reasoning of those learned judges. It is this: they have taken the valuation of the policy as conclusive and as operating by way of estoppel between these parties for a purpose for which, as it appears to me, it is not conclusive and does not estop them. For the purpose of the contract of insurance and for the purpose of all rights arising from that contract, it may well be that the valuation in a valued policy is conclusive, and the effect of it may be that for those purposes the assured is not entitled to say "My loss has been greater than that which was covered by the policy." He cannot say that, for the purpose of withholding from the insurer any indemnity or right by way of subrogation or substitution to which by the true legal result of the contract the insurer is entitled. Whenever it is sought to set up an estoppel founded upon the valuation for any purpose going beyond that which I have endeavoured to indicate, the law does not justify such a use of it. It is admitted that that is the English law when it is attempted to use the valuation for the purpose of determining what is and what is not a constructive total loss.

Now it appears to me that for every other purpose collateral to the contract, for the purpose of every question as to whether a particular claim to something which has arisen *aliunde* is or is not within those rights which result in law from the contract, there is no more reason for holding the valuation to be conclusive between the parties or to operate by way of estoppel than there is in the case in which it is admitted that in England it does not so follow. The title to a particular indemnity granted in particular terms out of a particular fund at the disposal of the United States of America by an Act of the supreme legislature of the United States is not a title which I think can possibly result

in law from the contract itself. If such a right exists, it must exist by the combined effect of the contract between the assurer and the assured, and the Act of Congress. It cannot follow from the contract of insurance alone without the Act of Congress.

If the Act of Congress is consistent with such a right, having regard to the contract of insurance, still more if the Act of Congress fairly and equitably interpreted confers such a right, there is no reason whatever why the right should not receive full effect. But how is it possible that such an effect can be produced as to a right which could have no existence apart from the Act of Congress, if the Act of Congress itself expressly excludes it? I cannot for a moment understand the doctrine of moral right and obligation or implied trusts affecting supreme governments and independent states, as applied to a question of this kind. The rights resulting from the contract must be such as in point of law the contract makes: the rights resulting from the Act of Congress must be such as according to its true construction and legal effect the Act of Congress makes; and the rights resulting from both together must be such as are consistent with and flow from the legitimate operation of the whole. Here it is admitted that there is in the Act of Congress everything said and done which a supreme legislature could possibly say or do for the purpose of excluding the present claim and attributing that fund which has been appropriated in this case to the sufferers by the capture, not to the valued part but to the unvalued part of the loss. That distinction, which in my opinion does exclude for this purpose the part covered by the valuation of the policy of insurance, is made by the Act of Congress. It was a true and *bona fide* valuation, but it did not cover the actual loss. The fund awarded by the Act of Congress of the United States is only for that part of the actual loss which the valuation did not cover and which the insurers have not paid.

Whatever views of moral obligation may be entertained with regard to the Act of Congress, I think it is correctly described by BRETT, L. J., as an act of pure gift from the American Government. 6 Q. B. D. 643-5. We cannot go behind it and inquire into the motives for an act of a supreme legislature on a matter within their legislative powers; and that being so, I am entirely unable, for any practical purpose, to distinguish this case—in which the supreme Government of the United States having absolute power of disposition over this fund have by a solemn Act of their Congress declared that it should be given, not in respect of the loss which had been indemnified as between the assurers and the assured, but in respect of the loss which the assured had suffered beyond that amount—from the case of a voluntary gift by an individual in the same terms. Mr. Butt, in his able argument, which was as candid I think as it was able, admitted that if a member of the family of the shipowner who had suffered the loss, or the owner of the cargo, had, after the insurers had paid the loss, made a will in the precise terms of this Act of the Congress of the United

States, and had given a fund, over which he had absolute control, for the purpose of indemnifying his relatives or his friends for that portion of the loss which the insurance had not covered, the insurers could not have claimed the gift. I am unable to see, for any legal purpose, a distinction between such a case and the present.

It is a satisfaction to me to find that in taking that view of the matter I only differ from BAGGALLAY, L. J., so far as this: he thought that the cases of *Randal v. Cockran*¹ and *Blaauwpot v. Da Costa*² before Lord Hardwicke and Lord Northington, under the Order in Council of the 18th of June, 1741, were authorities in point and covering the present case. With the greatest respect for that very learned judge I am unable to agree in that conclusion. I should not have had any difficulty at all in this case in upholding the claim of the appellant if the Act of Congress of the United States had been in terms similar to the terms of that proclamation.³ The difference is that when the king of Great Britain came to distribute the fund which arose from the seizures of goods which had been taken, by way of reprisal, from Spain, the Crown directed it to be divided into moieties: one moiety was to go to the officers and sailors of the ships that had made the captures, but the other moiety was to be paid to and amongst such of His Majesty's subjects as had suffered by the unjust seizures and depredations of the Spaniards. There was no such exclusion of insurers as there is in the present case; in point of law and equity too, the true result of the contract of insurance was that the insurers had

¹ *Ante*, p. 937 (1748). — ED.

² *Ante*, p. 937, n. (1758). — ED.

³ During the argument Lord SELBORNE, L. C., sent for the *London Gazette* No. 8024, June 16 to June 20, 1741, which contained the proclamation dated 18 June, 1741. It was headed "By the Lords Justices, a Declaration appointing the distribution of Prizes taken by way of reprisal before His Majesty's declaration of War." It recited (*inter alia*) that whereas the king, having taken into consideration the depredations and unjust seizures by Spanish ships contrary to the law of nations and in violation of the treaties between Great Britain and Spain, whereby the king's "trading subjects had sustained great losses," and having determined to take measures for vindicating the honor of his Crown and "for procuring reparation and satisfaction to his injured subjects," was pleased with the advice of his Privy Council on the 10th of July, 1739, to order that general reprisals should be granted against the ships' goods and subjects of the king of Spain; and whereas between that date and the king's declaration of war on the 19th of October following the king's ships had taken several ships, vessels, and goods belonging to the king of Spain or his subjects or inhabitants, the property whereof became vested in the king; the Lords Justices having taken the same into consideration, "together with the great losses the king's subjects had sustained by the repeated depredations by the Spaniards for many years past for which they had received no reparation;" declared that the net produce arising from the sale or disposal of all the ships, vessels, and goods which had been so seized and taken and which had been or should be condemned, should be divided into two moieties, one "to be paid to and amongst such of the king's subjects as had suffered by the unjust seizures and depredations of the Spaniards, and to be distributed in such manner and proportionally and under such regulations as the king should thereafter be pleased to appoint;" the other moiety to be paid to and amongst the officers and sailors of the king's ships who were concerned in the captures, to be divided in the manner provided. — REP.

taken the loss upon themselves and were entitled to all indemnities received in respect of the loss; they were sufferers in equity at all events if not in the strictest legal sense from those depredations; they were to take the place of the original sufferers, and to have all their rights, and therefore, according to the true effect of that proclamation, it was a grant by the Crown in their favor. If anything of the same sort had been done by the Act of Congress in the present case, it would be very probable that your Lordships would come to the same conclusion. I see that BRETT, L. J., expresses some hesitation upon that subject. It is not necessary for me to say more about it, excepting that I do not myself share that hesitation. I put the matter entirely upon the ground that the terms of the grant in the cases which have been referred to not only impliedly but actually, according to their fair and legitimate construction in law and equity, operated in favor of the insurers, who having paid the loss were entitled to be recouped.

Those cases, then, appear to me to be clearly and broadly distinguishable from the present case. I think that the view taken by the majority of the Court of Appeal is correct, and therefore I move your Lordships to dismiss this appeal with costs.

LORD BLACKBURN. My Lords, I am of the same opinion. The point, when one comes at it (and I should say, in justice to Mr. Butt, that he has avoided making any false points, and has brought it to us very clearly), is a very short one, and one upon which I have no doubt at all.

The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land, or any other contract of indemnity) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back.

The first question is this. There had been a policy of insurance and a total loss by capture and destruction of the property insured and a payment of the full value insured — a payment of the total loss under that policy. Subsequently to that payment there came the Treaty of Washington; and afterwards, in consequence of an Act of Congress, a sum of money was paid to the persons who had received payment under the policy; and the question, I apprehend, comes to be, Was that sum or was it not paid so as to be a reduction or diminution of their loss?

The cases which have been cited, *Randal v. Cockran*¹ and *Blaauwpot v. Da Costa*,² bear this resemblance to the present case, that after the loss had occurred there was a sum of money coming into the hands of

¹ *Ante*, p. 937 (1748). — ED.

² *Ante*, p. 937, n. (1758). — ED.

the English Government; and the king was pleased (for I think it is clear that he was not bound) to say that half of that money should be applied to those who had suffered from the captures. It was, certainly, I think, a voluntary gift on the part of the Crown, and was for the benefit of the sufferers. But then I think that that gift being made, as it was made, for the benefit of those who had suffered from the captures, and the money being paid for that purpose, it did diminish the loss; and consequently the benefit of it enured to the persons who were bound to indemnify; and it was so decided in those two cases. It was not because the king was bound to pay the money — he was not: it was not because there was a moral obligation to pay it — as if it had been said that our Government would have been shabby if they had not done it: it was because *de facto* there was a payment which prevented, or diminished *pro tanto*, the loss against which the insurers were bound to indemnify the assured.

There was a subsequent case, which has not been cited, which proceeded upon an error and has been since reversed (I mean the case of *Godsall v. Boldero*¹) where a person had insured the life of Mr. Pitt, having no other interest in his life than as a creditor of Mr. Pitt, which gave him an interest, and the House of Commons voted out of pure grace and favor a large sum of money to pay Mr. Pitt's debts, and the executors paid this debt. The insurance company set up the defence that this was a contract of indemnity and that Mr. Pitt's debt having been paid there could not be a right to recover against them. Lord Ellenborough falling into a blunder which has been since corrected thought that the contract of life assurance was a contract of indemnity, and accordingly held that that was a good defence on the part of the insurance company. I have been told by people connected with insurance companies and other people with whom I have been brought into contact in the course of my professional experience, that no sooner had that been done than there was such an outcry that every one said he would never insure with a company which was capable of doing such a shabby thing. Consequently the insurance company instantly paid the whole loss and the whole of the costs, and published everywhere that they had done so. Nevertheless Lord Ellenborough's decision stood until it was decided in the Exchequer Chamber² that that case went altogether upon a mistaken idea that a contract of life insurance was a contract of indemnity, whereas it was nothing of the sort. But if it had been a contract of indemnity the grant of Parliament to pay Mr. Pitt's debts would have prevented the man's sustaining any loss by the death of Mr. Pitt, and consequently the decision would have been right. I mention this merely to show that the question is not whether the money was voluntarily paid or not voluntarily paid, but whether *de facto* the money which was paid did reduce the loss.

¹ *Ante*, p. 927 (1807). — Ed.

² *Dalby v. India and London Life Assur. Co.*, *ante*, p. 932 (Ex. Ch., 1854). — Ed.

In the present case the Government of the United States did not pay it with the intention of reducing the loss. Lord COLERIDGE says in his judgment, and says very truly, that the Government of the United States cannot by any action of theirs deprive a man suing in this country of any right which he has. I quite agree in that; but I think that Lord COLERIDGE, if he had taken the same view as I do of the matter, would have seen that an Act of Congress of the United States might effectually prevent any such right arising. If once the right had vested to recover any such sum, of course an Act of Congress could not take it away; but when Congress in express terms say, "We do not pay the money for the purpose of repaying or reducing the loss against which the insurance company have indemnified, but for another and a different purpose," it effectually prevents the right arising. BRAMWELL, L. J., in his judgment has used the phrase, "It was not given as salvage." 6 Q. B. D. 640. I should myself prefer to use my own phrase expressing the same idea and to say that it was not paid in such a manner as to reduce the loss against which the plaintiffs had to indemnify the defendants; it is the same thing but rather differently expressed.

That, I think, would dispose of the case if it were not for a point which Mr. Butt has urged, or rather submitted (for I do not think he argued very strongly in favor of it), namely, that because this was a valued policy of insurance, the value being put at £15,000, the defendants could never under any circumstances, as against the plaintiffs, set up the fact, which is a fact, that the value of the property exceeded £15,000. Upon the statement of that point it looks so artificial when applied to these facts that one might almost rest there and say, "It cannot be." I think it is plain that the reasons for which the value has been held to be conclusive extend no further than this, that for the purposes of the contract between the parties the policy may be valued at so much. Whether the principle was rightly applied in the case of the *North of England Insurance Association v. Armstrong*¹ it is not necessary now to say. I own that if I had a similar case to decide sitting in the Court of Error, I should pause before I said that it was rightly decided, but whether that decision was right or wrong it is not at all necessary to consider here. It is plain to my mind that the valuation being only for the purpose of the policy of insurance and for

¹ In *North of England Iron Steamship Ins. Assn. v. Armstrong*, L. R. 5 Q. B. 244 (1870), an insurance company issued a policy of £6,000 on the steamship "Hetton," which was valued in the policy at the same sum. The real value was £9,000. The "Hetton" was run down by the steamship "Uhlenhorst" and totally lost. The insurance company paid the policy in full. By litigation after this payment the owners of the "Hetton" recovered from the owners of the "Uhlenhorst" upwards of £5,000, the amount thus recovered being the limit of the "Uhlenhorst's" liability under the Merchants Shipping Act. The insurance company brought action to recover from the owners of the "Hetton" the amount realized from that litigation, except certain sums belonging to the master and crew and the owners of the cargo and freight. It was held that the insurance company was entitled to recover. — ED.

the purpose of binding the defendants to admit it in favor of the plaintiffs, this sum was not paid in such a way as to reduce the loss against which the plaintiffs had contracted to indemnify them. The circumstance that by agreement between the parties the amount they had contracted to pay was not to exceed £15,000 appears to me quite immaterial.

For these reasons I agree that the judgment as it stands is right and ought to be affirmed.

LORD WATSON. My Lords, I have come to the same opinion as your Lordships upon this point, which is one of novelty but not of great difficulty, and which arises, I think, entirely upon the terms of the Act of Congress. If compensation has, under that statute, been awarded by the American Congress to the respondents in respect of their losses, then I take it that the same rule would be followed as was adopted by the courts in the two cases which have been referred to of *Randal v. Cockran*¹ and *Blaauwpot v. Da Costa*.² In that case the money voted would have been received by the respondents towards indemnification for the loss against which they were insured; and upon the principle that one who has been already indemnified against that loss must impart to those who have indemnified him any benefits which he subsequently obtains of that description the appellant would have been entitled to judgment. But in this case the Act of Congress declares in very express terms, when you take the whole of section 12 together, in the first place that no compensation is to be given by the commissioners on account of loss which has been insured against or covered by insurance, and secondly that underwriters are not to receive any benefit from the funds distributed under the Act, and that the compensation given to any claimant must be given to compensate him for any loss either from want of insurance or from being underinsured. In the present case it is perfectly obvious from the statements made by the parties, upon which they agreed, that compensation was awarded to the respondents upon the second of these grounds, namely, in respect that the insurance which they effected fell short of protection against the whole loss which they sustained.

It is conceded that compensation might be given to the respondents in these very terms and upon this footing by any benevolent individual, who being under no obligation to give it, chose to indemnify the respondents; and it is conceded that in the event of his doing so no claim would lie to that money at the instance of the underwriters. Why the American Congress were not in a position to do the same as any third party might have done, not being under any obligation to do so, I have not been able to understand in the course of this argument; and I do not think that any cause whatever has been shown why they should not do so. Legal obligation is out of the question; but we have heard something about moral obligation. I do not at all understand what that means. I think that this fund was entirely at the

¹ *Ante*, p. 937 (1748). — ED.

² *Ante*, p. 937, n. (1758). — ED.

disposal of the legislature of the United States, that it was an act of grace on their part to assign it, and give it either to one or to the other of the losers by the acts of the "Alabama," and that in giving it as they have done, they were attaching a condition to the gift, which condition was not only entirely within their power but which they might attach without violating any legal responsibility or moral obligation.

Those being my views, I entirely concur in the disposal of this case in the manner which your Lordships suggest.

LORD FITZGERALD. My Lords, I concur in the judgment pronounced by the noble and learned Lord on the woolsack, and in the reasons he has pressed for that judgment. I adopt also his criticisms on the authorities cited and his limitation to the rule which was contended for by the appellant as the result of some of those authorities, viz., that is that on a valued policy the value agreed on was as between the parties conclusive under all circumstances and for all purposes, whether incidental to the contract or collateral and subsequent. I hope that I am not exceeding my province in saying that I should have thought this a very plain case if it had not been that I was induced to hesitate on reading the judgments of Lord COLERIDGE and BAGGALLAY, L. J., whose opinions are of such weight and justly entitled to so much respect.

The case presented itself to my mind thus—this is really the old action for money had and received. The parties have expanded by their pleadings the facts on which they respectively rest. The plaintiff alleges that the defendant has received a sum of money which in equity and good conscience he ought not to retain, but should pay over to the plaintiff. The defendant admits he received the sum in controversy through the judgment of the American tribunal, but denies the plaintiff's equity.

I have been wholly unable to discover on what the plaintiff's supposed equity rests. I agree with BRETT, L. J., that the United States Government might have done as it pleased with the whole £3,100,000, and that when it was devoted to the purposes specified in the Act of Congress it may be regarded as a free gift for those purposes.

The 12th section prohibits its application to such a claim as the plaintiffs'. The whole matter is well expressed by BRAMWELL, L. J., when he says in effect that the defendant received the money under the Act of Congress and judgment of the American court to keep for himself, and not to pay it over to the plaintiff.

*Order appealed from affirmed; and appeal dismissed with costs.*¹

¹ *Contra*, on the relation between subrogation and agreed valuation: The St. Johns, 101 Fed. R. 469 (D. C., S. D. N. Y., 1900).—ED.

PHŒNIX INSURANCE CO. v. ERIE AND WESTERN
TRANSPORTATION CO.

SUPREME COURT OF THE UNITED STATES, 1886. 117 U. S. 312.

APPEAL from the Circuit Court of the United States for the Eastern District of Wisconsin.

This was a libel in admiralty against a common carrier by an insurance company which had insured the owners upon the goods carried, and had paid them the amount of the insurance, and claimed to be subrogated to their rights against the carrier. The defence relied on was that, by a provision of the contract of carriage, the carrier was to have the benefit of any insurance upon the goods. The District Court held that this provision was valid, and therefore no right of subrogation accrued to the libellant, and entered a decree accordingly. The libellant appealed to the Circuit Court,¹ . . . and . . . to this court.

Mr. *Geo. D. Van Dyke* for appellant (Mr. *Geo. A. Black* also filed a brief for same).

Mr. *Geo. B. Hibbard*, for appellee.

Mr. Justice GRAY² . . . delivered the opinion of the court. . . .

The policy of insurance contains no express stipulation for the assignment to the insurer of the assured's right of action against third persons. In the bills of lading, it is expressly stipulated that the carriers whose railroad or vessels form part of the line of transportations, shall not be liable for loss or damage by fire, collision, or dangers of navigation; and that each carrier shall be liable only for a loss of the goods while in its custody, "and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods."

The question is, whether under these circumstances the insurer, upon payment of a loss, became subrogated to the right to recover damages from the carrier.

When goods insured are totally lost, actually or constructively, by perils insured against, the insurer, upon payment of the loss, doubtless becomes subrogated to all the assured's rights of action against third persons who have caused or are responsible for the loss. No express stipulation in the policy of insurance, or abandonment by the assured, is necessary to perfect the title of the insurer. From the very nature of the contract of insurance as a contract of indemnity, the insurer, when he has paid to the assured the amount of the indemnity agreed on between them, is entitled, by way of salvage, to the benefit of anything that may be received, either from the remnants of the goods or from damages paid by third persons for the same loss. But the

¹ Only a part of the statement has been reprinted.—Ed.

² In reprinting the opinion, some passages foreign to subrogation have been omitted.—Ed.

insurer stands in no relation of contract or of privity with such persons. His title arises out of the contract of insurance, and is derived from the assured alone, and can only be enforced in the right of the latter. In a court of common law, it can only be asserted in his name, and, even in a court of equity or of admiralty, it can only be asserted in his right. In any form of remedy, the insurer can take nothing by subrogation but the rights of the assured. *Comegys v. Vasse*, 1 Pet. 193, 214; *Fretz v. Bull*, 12 How. 466, 468; *The Monticello*, 17 How. 152, 155; *Garrison v. Memphis Ins. Co.* 19 How. 312, 317; *Hall v. Railroad Cos.*, 13 Wall. 367, 370, 371; *The Potomac*, 105 U. S. 630, 634, 635; *Mobile & Montgomery Railway v. Jurey*, 111 U. S. 584, 594; *Clark v. Wilson*, 103 Mass. 219; *Simpson v. Thomson*, 3 App. Cas. 279, 286, 292, 293. That the right of the assured to recover damages against a third person is not incident to the property in the thing insured, but only a personal right of the assured, is clearly shown by the fact that the insurer acquires a beneficial interest in that right of action, in proportion to the sum paid by him, not only in the case of a total loss, but likewise in the case of a partial loss, and when no interest in the property is abandoned or accrues to him. *Hall v. Railroad Cos.*, *The Potomac*, and *Simpson v. Thomson*, above cited.

The right of action against another person, the equitable interest in which passes to the insurer, being only that which the assured has, it follows that if the assured has no such right of action, none passes to the insurer; and that if the assured's right of action is limited or restricted by lawful contract between him and the person sought to be made responsible for the loss, a suit by the insurer, in the right of the assured, is subject to like limitations or restrictions.

For instance, if two ships, owned by the same person, come into collision by the fault of the master and crew of the one ship and to the injury of the other, an underwriter who has insured the injured ship, and received an abandonment from the owner, and paid him the amount of the insurance as and for a total loss, acquires thereby no right to recover against the other ship, because the assured, the owner of both ships, could not sue himself. *Simpson v. Thompson*, above cited; *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50, 68.

Upon the same principle, any lawful stipulation between the owner and the carrier of the goods, limiting the risks for which the carrier shall be answerable, or the time of making the claim, or the value to be recovered, applies to any suit brought in the right of the owner, for the benefit of his insurer, against the carrier; as, for instance, if the contract of carriage expressly exempts the carrier from liability for losses by fire: *York Co. v. Central Railroad*, 3 Wall. 107; or requires claims against the carrier to be made within three months: *Express Co. v. Caldwell*, 21 Wall. 264; or fixes the value for which the carrier shall be responsible: *Hart v. Pennsylvania Railroad*, 112 U. S. 331. So the stipulation, not now in controversy, in the bills of lading in the present case, making the value of the goods at the place and time of

shipment the measure of the carrier's liability, would control, although in the absence of such a stipulation the carrier would be liable for the value at the place of destination, as held in *Mobile & Montgomery Railway v. Jurey*, 111 U. S. 584.

The stipulation in these bills of lading, that the carriers "shall not be liable for loss or damage by fire, collision, or the dangers of navigation," clearly does not protect them from liability for any loss occasioned by their own negligence. By the settled doctrine of this court, even an express stipulation in the contract of carriage, that a common carrier shall be exempt from liability for losses caused by the negligence of himself and his servants, is unreasonable and contrary to public policy, and therefore void. *Railroad Co. v. Lockwood*, 17 Wall. 357; *Railroad Co. v. Pratt*, 22 Wall. 123; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174; *Railroad Co. v. Stevens*, 95 U. S. 655. And it may be that, as held by Judge Wallace in a case in the Circuit Court, a stipulation that "no damage that can be insured against will be paid for" would not protect the carrier from liability for his own negligence, because that would be to compel the owners of the goods to insure against the negligence of the carrier. *The Hadji*, 22 Blatchf. 235.

But the stipulation upon the subject of insurance, in the bills of lading before us, is governed by other considerations. It does not compel the owner of the goods to stand his own insurer, or to obtain insurance on the goods; nor does it exempt the carrier, in case of loss by negligence of himself or his servants, from liability to the owner, to the same extent as if the goods were uninsured. It simply provides that the carrier, when liable for the loss, shall have the benefit of any insurance effected upon the goods.¹ . . .

As the carrier might lawfully himself obtain insurance against the loss of the goods by the usual perils, though occasioned by his own negligence, he may lawfully stipulate with the owner to be allowed the benefit of insurance voluntarily obtained by the latter. This stipulation does not, in terms or in effect, prevent the owner from being reimbursed the full value of the goods; but being valid as between the owner and the carrier, it does prevent either the owner himself, or the insurer, who can only sue in his right, from maintaining an action against the carrier upon any terms inconsistent with this stipulation.

Nor does this conclusion impair any lawful rights of the insurer. His right of subrogation, arising out of the contract of insurance and payment of the loss, is only to such rights as the assured has, by law or contract, against third persons. The policy containing no express stipulation upon the subject, and there being no evidence of any fraudulent concealment or misrepresentation by the owner in obtaining the

¹ Here followed passages to the effect that an owner of a ship or of goods may procure insurance against the result of his own negligence, and that any one who has simply made himself responsible as an insurer or a warehouseman or a carrier may do the like. — ED.

insurance, the existence of the stipulation between the owner and the carrier would have afforded no defence to an action on the policy, according to two careful judgments rendered in June last and independently of each other, the one by the English Court of Appeal, and the other by the Supreme Judicial Court of Massachusetts. *Tate v. Hyslop*, 15 Q. B. D. 368; *Jackson Co. v. Boylston Ins. Co.*, 139 Mass. 508.¹ . . .

It may be added that our conclusion accords with the decision of Judge Shipman in *Rintoul v. New York Central Railroad*, 21 Blatchf. 439, as well as with those of Judge Dyer in the District Court, and Judge Drummond in the Circuit Court, in the present case. 10 Biss. 18, 38. See also *Carstairs v. Mechanics' & Traders' Ins. Co.*, 18 Fed. Rep. 473; *The Sidney*, 23 Fed. Rep. 88; *Mercantile Ins. Co. v. Calebs*, 20 N. Y. 173.

Decree affirmed.

Mr. Justice BRADLEY dissented.²

WILLIAMS, APPELLANT, *v.* HAYS, RESPONDENT.

SUPREME COURT OF NEW YORK, FIRST DEPARTMENT, GENERAL TERM,
1892. 64 Hun, 202.³

THE Phenix Insurance Company issued a policy to Parsons & Loud, part owners, upon their share in the brig "Emily T. Sheldon." The brig was lost, and the loss was caused, as alleged, by the negligence, misconduct, and improper navigation of Hays, who was charterer, master, and part owner. The company paid Parsons & Loud's loss, and assigned to Williams its claim by way of subrogation against Hays, and thereupon Williams brought this action. The defence was that Hays had had separate insurance upon his share in the brig from the same company, that he had brought action against the company for the same loss, that the issues in that action, so far as the loss of the brig was concerned, were the same as in this, and that in that action, Hays had a verdict and judgment, which had been affirmed by the Court of Appeals.⁴

Upon the trial at the New York Circuit the court directed a verdict for the defendant; and from the judgment on this verdict this appeal was taken.

G. A. Black, for the appellant.

W. W. Goodrich, for the respondent.

¹ Here these cases were summarized. — Ed.

² The dissenting opinion may be found in 118 U. S. 210a—Ed.

³ The statement has been rewritten. — Ed.

⁴ That litigation may be found in *Hays v. Phenix Ins. Co.*, 25 Jones & Spencer, 199 (1889); s. c. affirmed, 127 N. Y. 656 (1897). — Ed.

VAN BRUNT, P. J.¹ . . . The single question presented is whether the plaintiff is estopped by the judgment in the case of the defendant against the Phenix Insurance Company above referred to.

Undoubtedly, a recovery by the defendant in his action against the Phenix Insurance Company upon his policy of insurance is a bar against the insurance company from setting up, in its own right, any claim against the defendant because of the loss of the vessel, because a recovery upon the policy is inconsistent with the existence of such right of action. *Doty v. Brown*, 4 N. Y. 71; *Castle v. Noyes*, 14 N. Y. 329; *Gates v. Preston*, 41 N. Y. 113. But the plaintiff in this action does not represent any claim which the insurance company had as against the defendant, but that which Parsons & Loud had as part owners of the vessel.

Such being the case, therefore, the judgment rendered in the case of *Hays v. Phenix Insurance Company* in no way operated as an estoppel against Parsons & Loud from maintaining an action upon the same ground upon which the insurance company based its defence. This is clearly so, because estoppels to be available must be mutual. *Lawrence v. Campbell*, 32 N. Y. 455.

If, therefore, Parsons & Loud were not precluded from maintaining an action against the defendant, their assignees are endowed with all the rights which they themselves possessed.

It being, therefore, the claim of Parsons & Loud which is sought to be enforced in this action, and the plaintiff being merely their successor in interest, he would seem to be entitled to all the rights which they could have enforced against the defendant. The mere fact that the intermediary was the Phenix Insurance Company in no way affects this right, because he represented a different and distinct interest from that which the insurance company represented in the action of Hays against it. *Mersereau v. Pearsall*, 19 N. Y. 109.

We think, therefore, that the previous judgment did not operate as an estoppel, and the plaintiff had a right to try the issue presented only upon the merits.

The judgment should be reversed and a new trial ordered, with costs to appellant to abide event.

O'BRIEN and ANDREWS, JJ., concurred.

Judgment reversed and new trial² ordered, with costs to appellant to abide event.³

¹ After stating the case. — Ed.

² The result of the new trial may be found in *Williams v. Hays*, 143 N. Y. 442 (1894). — Ed.

³ On the general topic of subrogation in marine insurance see also : —

Yates v. Whyte, 4 Bing. N. C. 272 (1838), s.c. 5 Scott, 640 ;

White v. Dobinson, 14 Sim. 273 (1844) ;

Clark v. Wilson, 103 Mass. 219 (1869) ;

Mercantile M. Ins. Co. v. Clark, 118 Mass. 288 (1875) ;

Sea Ins. Co. v. Hadden, 13 Q. B. D. 706 (C. A., 1884). — Ed.

SECTION II.

Fire Insurance.

MASON v. SAINSBURY AND ANOTHER.

KING'S BENCH, 1782. 3 Doug. 61.¹

THIS was an action on the riot act, to recover damages sustained by the demolition of a house in the riots of 1780. There was a verdict for the plaintiff, with £259 damages, subject to the opinion of the court, on a case which stated that the plaintiff had insured the house in the Hand-in-Hand fire office, which had paid the loss; and that this action was brought in the plaintiff's name, and with his consent, for the benefit of the insurance office. The case was argued in Hilary Term, by Mingay for the plaintiff, and by Davenport for the defendants.

The court, considering it to be a case of great importance. directed another argument, which came on in this term.

Wallace, A. G., for the plaintiff.

Adair, *Sergeant*, *contra*.

LORD MANSFIELD. The facts of this case lie in a narrow compass. The argument turns much on want of precision in stating the case, as most arguments do. The office paid without suit, not in ease of the Hundred, and not as co-obligors, but without prejudice. It is, to all intents, as if it had not been paid. The question, then, comes to this, Can the owner, having insured, sue the Hundred? Who is first liable? If the Hundred, it makes no difference; if the insurer, then it is a satisfaction, and the Hundred is not liable. But the contrary is evident from the nature of the contract of insurance. It is an indemnity. Every day the insurer is put in the place of the insured. In every abandonment it is so. The insurer uses the name of the insured. The case is clear: the act puts the Hundred, for civil purposes, in the place of the trespassers; and, upon principles of policy, as in the case of other remedies against the Hundred, I am satisfied that it is to be considered as if the insurers had not paid a farthing.

WILLES, J. I am of the same opinion. I cannot distinguish this from the case of the escape. The Hundred is not answerable criminally, but they cannot be considered as free from blame. They may have been negligent, which is partly the principle of the act.

ASHURST, J. At all events the plaintiff must have a verdict for the amount of the premium, as to which he has received no compensation. But, on the larger ground, I agree with my lord, that it is like the case of an abandonment. They are not to be in a worse condition by paying without a suit.

¹ s. c. Marshall on Ins. (2d ed.) 794. — ED.

BULLER, J. Whether this case be considered on strict legal principles, or upon the more liberal principles of insurance law, the plaintiff is entitled to recover. Strictly, no notice can be taken of anything out of the record. Taken in its narrow form, the contract is only a wager; more liberally construed, it is an indemnity. Still, upon the words, and as to third persons, it is only a wager, of which third persons shall not avail themselves. It has been admitted, and rightly, that the Hundred is put in the place of the trespassers. How could they have availed themselves of this defence? By plea of accord and satisfaction? It was not paid as satisfaction, and the evidence would not have supported such a plea. In the case put of the escape, the recovery is not a satisfaction, and the sheriff may sue.

The better way is to consider this as a contract of indemnity. The principle is, that the insurer and insured are one, and, in that light, paying before or after can make no difference. I am, therefore, clearly of opinion that the Hundred cannot avail themselves of this defence.

*Postea to the plaintiff.*¹

HART AND OTHERS v. WESTERN RAILROAD CORPORATION.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1847. 13 Met. 99.

THIS was an action of trespass upon the case, founded on St. 1840, c. 85, to recover the amount of a loss which the plaintiffs sustained by a fire alleged to have been communicated to their dwelling-house by a locomotive engine of the defendants. The parties submitted the case to the court, on the following agreed facts: —

On the 9th of July, 1845, a carpenter's shop, owned by William W. Boyington, adjoining the railroad track of the defendants, near their passenger depot in Springfield, was destroyed by fire communicated by the locomotive engine of the defendants. There was a high wind, which

¹ In *London Assur. Co. v. Sainsbury*, 3 Doug. 245 (Ex. Ch., 1785), the insurance company brought action in its own name against the Hundred. The declaration stated that the plaintiff had insured Langdale, that divers persons destroyed the house and goods by fire, and that the plaintiff paid to Langdale its share of the loss. The plea was the general issue, and also that Langdale had brought action against the Hundred and had had a verdict, which still remained in force. The plaintiff replied that it paid Langdale before Langdale brought his action; that in that action the jury deducted from the damages the amount of the insurance and did so declare to the court at the time of giving the verdict; and that the damages sustained by Langdale amounted in fact to the aggregate of that verdict and the sum paid by the insurance company. Upon demurrer, judgment was rendered in the King's Bench for the defendants by a divided court; and in the Exchequer Chamber this judgment was unanimously affirmed.

In *Clark v. Inhabitants of Blything*, 2 B. & C. 254 (1823), the owner of property maliciously burnt brought action against the Hundred; and it was held on the authority of the principal case that he could recover, although he had collected from an insurance office the full amount of his loss. — *Ed.*

wafted sparks from this shop, while it was burning, over Lyman Street, sixty feet, upon the dwelling-house of the plaintiffs, and set it on fire, whereby it was partially consumed.

"The plaintiffs were insured by the Springfield Mutual Fire Insurance Company, who requested the plaintiffs to commence a suit against the defendants, to compel payment by them of the plaintiffs' loss, and offered to indemnify the plaintiffs from costs, and to save them harmless, in reference to said suit. The plaintiffs refused to commence a suit, as requested, but demanded the amount of their loss of the said insurance company, who paid the same, first notifying to the defendants that they did not intend thereby to relinquish any claim which they might have against the defendants for the amount, in their own or in the plaintiffs' names. The insurance company, in the name of the plaintiffs, then brought this action to recover the amount paid by said company to the plaintiffs. After the action was commenced, and before the entry of the writ, the plaintiffs executed an instrument, declaring that they had received payment of their loss, of the insurance company; that they had no claim against the defendants; that they (the plaintiffs) had not authorized the commencement of this action against the defendants, and did not wish to have it prosecuted; and fully releasing any claim which they might have against the defendants on account of said loss.

"At the May term of this court, in 1847, the case was opened to the jury, and the defendants presented the aforesaid release from the plaintiffs, and contended that the insurance company, in consequence of this release, could not maintain this action. The court ruled, that receiving payment of the loss by the plaintiffs of the insurance company constituted an equitable assignment, by the plaintiffs, to the company, of any claim they might have had. Whereupon the parties agreed the facts before recited in relation to the origin of the fire.

"In case the court are of opinion that receiving payment by the plaintiffs, of the insurance company, amounted to an equitable assignment by them of any claim they might have had against the defendants; that the release referred to was in fraud of the insurance company; and that the defendants are liable for the loss, on the facts stated, the plaintiffs are to have judgment for the sum of \$623.65 damages, and interest on this sum, from the 14th of November, 1845. Otherwise the plaintiffs are to become nonsuit."

J. Willard and R. A. Chapman, for the plaintiffs.

Phelps, for the defendants.

SHAW, C. J. This is an action of first impression, and is, we believe, the first brought upon the St. of 1840, c. 85, involving the present question. The action is brought, in fact, by the Springfield Mutual Fire Insurance Company for their own benefit, in the name of the present plaintiffs, under the circumstances mentioned in the agreed statement of facts, on which the case was submitted to our decision.¹ . . .

¹ Passages foreign to subrogation have been omitted. — ED.

The next question is, whether the insurance company, having, pursuant to their contract of indemnity, paid the loss to the plaintiffs, are entitled to maintain this suit in the plaintiffs' name, but for their own benefit, to recover the damages to which the defendants are liable by the statute.

We consider this to be a statute purely remedial, and not penal. Railroad companies acquire large profits by their business; but their business is of such a nature as necessarily to expose the property of others to danger; and yet, on account of the great accommodation and advantage to the public, companies are authorized by law to maintain them, dangerous though they are, and so they cannot be regarded as a nuisance. The manifest intent and design of this statute, we think, and its legal effect, are, upon the considerations stated, to afford some indemnity against this risk to those who are exposed to it, and to throw the responsibility upon those who are thus authorized to use a somewhat dangerous apparatus, and who realize a profit from it. This indemnity, provided by law against a special risk, may be considered as a quality annexed to the estate itself, and passing with it to any and all persons who may stand in the relation of owners, however divided and distributed such ownership may be. The effect of the statute is to diminish the specific risk to which such buildings may be exposed from their proximity to the railroad, and in this respect to put them upon an equality with other risks.

Now, when the owner, who *prima facie* stands to the whole risk, and suffers the whole loss, has engaged another person to be at that particular risk for him, in whole or in part, the owner and the insurer are, in respect to that ownership and the risk incident to it, in effect one person, having together the beneficial right to an indemnity provided by law for those who sustain a loss by that particular cause. If, therefore, the owner demands and receives payment of that very loss from the insurer, as he may, by virtue of his contract, there is a manifest equity in transferring the right to indemnity, which he holds for the common benefit, to the assurer. It is one and the same loss, for which he has a claim of indemnity, and he can equitably receive but one satisfaction. So that if the assured first applies to the railroad company, and receives the damages provided, it diminishes his loss *pro tanto*, by a deduction from, and growing out of, a legal provision attached to, and intrinsic in, the subject insured. The liability of the railroad company is, in legal effect, first and principal, and that of the insurer secondary; not in order of time, but in order of ultimate liability. The assured may first apply to whichever of these parties he pleases; to the railroad company, by his right at law, or to the insurance company, in virtue of his contract. But if he first applies to the railroad company, who pay him, he thereby diminishes his loss, by the application of a sum arising out of the subject of the insurance, to wit, the building insured, and his claim is for the balance. And it follows, as a necessary consequence, that if he first applies to the insurer, and receives his

whole loss, he holds the claim against the railroad company in trust for the insurers. Where such an equity exists, the party holding the legal right is conscientiously bound to make an assignment in equity to the person entitled to the benefit; and if he fails to do so, the *cestui que trust* may sue in the name of the trustee, and his equitable interest will be protected.

But we think this position is exceedingly well sustained by authorities.¹ . . .

In regard to the right of the insurance company to sue in the name of the assured, we think the cases fully affirm the position, that by accepting payment of the insurers, the assured do implicitly assign their right of indemnity, from a party liable, to the assured. It is in the nature of an equitable assignment, which authorizes the assignee to sue in the name of the assignor for his own benefit; and this a right which a court of law will support, and will restrain and prohibit the assignor from defeating it by a release. The formal discharge, therefore, given by the nominal plaintiffs, is not a bar to the action. See *Payne v. Rogers*, 1 Doug. 407; *Whitehead v. Hughes*, 2 Crompt. & Mees. 318; *Phillips v. Clagett*, 11 Mees. & Welsb. 84; *Timan v. Leland*, 6 Hill, 237; *Browne on Actions*, 105.

*Judgment for the plaintiffs.*²

KING v. STATE MUTUAL FIRE INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1850. 7 Cush. 1.³

ASSUMPSIT on a policy of fire insurance, submitted to the Court of Common Pleas and, on appeal, to this court.

J. A. Andrew, for the plaintiff.

O. S. Keith, for the defendants.

SHAW, C. J. This case comes before the court on a statement of facts. The statement is not very full and exact. We understand, from the statement and from the policy, which is made part of it, that the plaintiff made the insurance in his own name and for his own benefit, not describing his interest as that of a mortgagee, and paid the premium out of his own funds. The insurance was for \$300, on his interest in a two-story wooden barn. That interest, in fact, as it appears in the statement of facts and the mortgage deed produced, was that of a mortgagee under a deed previously made to him, by one Murphy, conditioned for the payment of \$400, which debt was out-

¹ The discussion of the authorities has been omitted. — ED.

² See *Monmouth County Mut. F. Ins. Co. v. Hutchinson*, 21 N. J. Eq. (6 C. E. Green) 107 (1870); *Connecticut F. Ins. Co. v. Erie Ry. Co.*, 73 N. Y. 399 (1878). — ED.

³ The reporter's statement has been omitted. — ED.

standing and unpaid at the time of making the policy, the fire, and the demand of payment. The defendants admit the loss by fire, within the time, and admit their liability, unless they have a right, as a preliminary condition to such payment, to demand an assignment of the plaintiff's mortgage interest, as set forth in the statement of facts, or such proportion thereof, as the amount so to be paid by them would bear to the whole mortgage debt. The plaintiff declined making such assignment, and brought this action to recover a total loss.

The court are of opinion that the plaintiff having insured for his own benefit, and paid the premium out of his own funds, and the loss having occurred by the peril insured against, he has, *prima facie*, a good right to recover; and having the same insurable interest at the time of the loss which he had at the time of the contract of insurance, he is entitled to recover a total loss. The court are further of opinion that, if the defendants could have any claim, should the plaintiff hereafter recover his debt in full of the mortgagor, it must be purely equitable; that the defendants can have no claim until such money is recovered, if at all; and, therefore, that they have no right to demand the partial transfer of the mortgage debt, by them required, as a condition to their liability to pay, pursuant to the terms of their policy. This consideration is perhaps decisive of the present case; but the question having been argued upon broader grounds, and some authorities cited to sustain the claim of the defendants, which may give rise to further litigation, we have thought it best to consider the other question now.

We are inclined to the opinion, both upon principle and authority, that when a mortgagee causes insurance to be made for his own benefit, paying the premium from his own funds, in case a loss occurs before his debt is paid, he has a right to receive the total loss for his own benefit; that he is not bound to account to the mortgagor for any part of the money so recovered, as a part of the mortgage debt; it is not a payment in whole or in part; but he has still a right to recover his whole debt of the mortgagor. And so, on the other hand, when the debt is thus paid by the debtor, the money is not, in law or equity, the money of the insurer who has thus paid the loss, or money paid to his use.

The contract of insurance with the mortgagee, is not an insurance of the debt or of the payment of the debt; that would be an insurance of the solvency of the debtor; of course, as a contract of indemnity, it is not broken by the non-payment of the debt, or saved by its payment.

It is not, strictly speaking, an insurance of the property, in the sense of a liability for the loss of the property by fire, to any one who may be the owner. It is rather a personal contract with the person having a proprietary interest in it, that the property shall sustain no loss by fire within the time expressed in the policy. It is a personal contract, which does not pass to an assignee of the property. *Lynch v. Dalzell*, 3 Bro. P. C. 497; *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507. A mortgagee has a proprietary interest, a title as owner, in the mortgaged property,

not indeed absolute, but defeasible ; still, it is a proprietary interest in that property, and the insurer guarantees to him, that the subject in which he has such interest shall not be destroyed or diminished by the peril insured against.

There is no privity of contract or of estate, in fact or in law, between the insurer and the mortgagor ; but each has a separate and independent contract with the mortgagee. On what ground, then, can the money thus paid by the insurer to the mortgagee be claimed by the mortgagor ? But if he cannot, it seems *a fortiori*, that the insurer cannot claim to charge his loss upon the mortgagor, which he would do, if he were entitled to an assignment of the mortgage debt, either in full or *pro tanto*.

The better to understand the precise case under consideration, it may be well to distinguish it from some, which may seem like it, but depend on other principles.

If the mortgage debt is paid, and the mortgage discharged before the loss by fire, it may well be held, that the mortgagee, the assured, cannot recover ; not merely because the debt is paid, but because the mortgage is thereby redeemed, and revested in the mortgagor ; and the proprietary interest of the assured in the property insured, in respect to which alone he had any insurable interest, is determined. And it is a fixed rule of law, that, to make a policy valid, and enable the assured to recover a loss, he must have an interest in the subject, when the contract is made, and when the loss occurs. He must have such an interest when the contract is made, otherwise it is a wager policy, and void ; and when the fire occurs, otherwise he sustains no loss by any damage done by the fire to the thing insured, and he has no claim on the contract of indemnity. So, if an owner insure his house, which is burnt within the time limited ; if he has sold his house in the meantime, he has no legal claim to recover.¹ . . .

But it is said, and in this certainly lies the strength of the argument, that it would be inequitable for the mortgagee first to recover a total loss from the underwriters, and afterwards to recover the full amount of his debt from the mortgagor, to his own use. It would be, as it is said, to receive a double satisfaction. This is plausible, and requires consideration ; let us examine it. Is it a double satisfaction for the same thing, the same debt or duty ?

The case supposed is this : A man makes a loan of money, and takes a bond and mortgage for security. Say the loan is for ten years. He gets insurance on his own interest, as mortgagee. At the expiration of seven years the buildings are burnt down ; he claims and recovers a loss to the amount insured, being equal to the greater part of his debt. He afterwards receives the amount of his debt from the mortgagor, and discharges his mortgage. Has he received a double satisfaction for one and the same debt ?

He surely may recover of the mortgagor, because he is his debtor,

¹ The omitted passages discussed the mortgagor's rights. — Ed.

and on good consideration has contracted to pay. The money received from the underwriters was not a payment of his debt; there was no privity between the mortgagor and the underwriters; he had not contracted with them to pay it for him, on any contingency; he had paid them nothing for so doing. They did not pay because the mortgagor owed it; but because they had bound themselves, in the event which has happened, to pay a certain sum to the mortgagee.

But the mortgagee, when he claims of the underwriters, does not claim the same debt. He claims a sum of money due to him upon a distinct and independent contract, upon a consideration, paid by himself, that upon a certain event, to wit, the burning of a particular house, they will pay him a sum of money expressed. Taking the risk or remoteness of the contingency into consideration (in other words, the computed chances of loss), the premium paid and the sum to be received are intended to be, and in theory of law are, precisely equivalent. He then pays the whole consideration, for a contract made without fraud or imposition; the terms are equal, and precisely understood by both parties. It is in no sense the same debt. It is another and distinct debt, arising on a distinct contract, made with another party, upon a separate and distinct consideration paid by himself. The argument opposed to this view seems to assume that it would be inequitable, because the creditor seems to be getting a large sum for a very small one. This may be true of any insurance. A man gets \$1,000 insured for \$5, for one year, and the building is burnt within the year; he gets \$1,000 for \$5. This is because, by experience and computation, it is found that the chances are only one in two hundred that the house will be burnt in any one year, and the premium is equal to the chance of loss. But suppose—for in order to test a principle we may put a strong case—suppose the debt has been running twenty years, and the premium is at five per cent, the creditor may pay a sum, equal to the whole debt, in premiums, and yet never receive a dollar of it from either of the other parties. Not from the underwriters, for the contingency has not happened, and there has been no loss by fire; nor from the debtor, because, not having authorized the insurance at his expense, he is not liable for the premiums paid.

What, then, is there inequitable, on the part of the mortgagee, towards either party, in holding both sums? They are both due upon valid contracts with him, made upon adequate considerations paid by himself. There is nothing inequitable to the debtor, for he pays no more than he originally received, in money loaned; nor to the underwriter, for he has only paid upon a risk voluntarily taken, for which he was paid by the mortgagee a full and satisfactory equivalent.¹

¹ *Dicta acc.*: *Suffolk F. Ins. Co. v. Boyden*, 9 Allen, 123, 125-127 (1864), *per* HOAR, J.; *International Trust Co. v. Boardman*, 149 Mass. 158, 161 (1889), *per* C. ALLEN, J.

Dicta contra: *Ætna F. Ins. v. Tyler*, *ante*, p. 890 (1836), *per* WALWORTH, C.; *Carpenter v. Providence Washington Ins. Co.*, *ante*, p. 915, n. (1842), *per* STORY, J.; *Smith v. Columbia Ins. Co.*, 17 Pa. 253, 260-261 (1851), *per* GIBSON, J.; *Kernochan v.*

It may be said, that, upon these grounds a wager policy might be held valid, and a good ground of action. We suppose a wager policy is not held void because it is without consideration, or unequal between the parties; but because it is contrary to public policy, and prohibited by positive law. But, independently of considerations of public policy, if an insurance were made on a subject in which the assured has no pecuniary interest — although in other respects he may be deeply concerned in it, and on that ground be willing to pay a fair premium — made with a full knowledge of all the circumstances, by both parties, without coercion or fraud, we cannot perceive why it would not be valid as between the parties. But upon the strong objections, on grounds of public policy, to all gaming contracts, and especially to contracts which would create a temptation to destroy life or property, such policies, without interest, are justly held to be void.

We are not unaware, that there are very respectable authorities opposed to the views of the law above taken.

Mr. Phillips, in treating of the rights of parties after an abandonment, seems to put the rights of the underwriter, who has paid a loss, on the ground of subrogation, and then adds: "Where a policy against fire is effected by a mortgagee for his own benefit, in case of loss, and payment by the underwriters, they thereby become entitled to a proportional interest in the debt secured by the mortgage." 2 Phil. Ins. (2d ed.) 419. In support of this position, the learned author cites several authorities, which we propose to examine.

Robert v. Traders' Ins. Co., 17 Wend. 631. We think this case does not support the position for which it is cited.¹ . . .

Mr. Phillips also cites *Tyler v. Ætna Ins. Co.*, 16 Wend. 385. Some portion of the language of the chancellor, in giving the judgment of the Court of Errors, in that case, is certainly more in point.¹ . . .

Looking at the analogies and illustrations on which the reasoning of the learned chancellor is founded, it may be a question, whether he has not relied too much on the cases of marine insurance, in which the doctrines of constructive total loss, abandonment, and salvage, are fully acknowledged, but which have slight application to insurances, against loss by fire.

We are then brought to the case of *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495. The language of Mr. Justice Story, in

New York Bowery F. Ins. Co., 5 Duer, 1, 5-6 (1855), *per* DUER, J.; *Sussex County Mut. Ins. Co. v. Woodruff*, 26 N. J. L. (2 Dutch.) 541, 554-558 (1857), *per* WILLIAMSON, C.; *Honoré v. Lamar F. Ins. Co.*, 51 Ill. 409, 414 (1869), *per* LAWRENCE, J.; *Washington F. Ins. Co. v. Kelly*, 32 Md. 421, 441-444 (1870), *per* STEWART, J.; *Thomas v. Montauk F. Ins. Co.*, 43 Hun, 218, 220-221 (1887), *per* BRADLEY, J.

Compare *Clark v. Wilson*, 103 Mass. 219 (1869), a marine case; *Mercantile M. Ins. Co. v. Clark*, 118 Mass. 288 (1875), also a marine case.

See *Kernochan v. New York Bowery F. Ins. Co.*, 17 N. Y. 428, 436 (1858); *Pearman v. Gould*, 42 N. J. Eq. (15 Stew.) 4, 9-10 (1886); *Nelson v. Bound Brook Mut. F. Ins. Co.*, 43 N. J. Eq. (16 Stew.) 256 (1887); *Phenix Ins. Co. v. First Nat. Bank*, 85 Va. 765 (1889). — Ed.

¹ The discussion of this case has been omitted. — Ed.

giving the opinion of the court in that case, is certainly very strong; but the part of it which bears upon the point of the present case was not necessary to the judgment of the court.¹ . . .

It is obvious to remark, as the result of all these cases, concurring with many others, that a mortgagee has an insurable interest; that he may insure generally on the property, and need not disclose the peculiar nature of his interest, unless inquired of; that, before payment of his debt, he may recover and receive to the amount of his debt; and that it is no defence for the underwriter, that the plaintiff holds a defeasible, and not an absolute, title to the property insured.

Some other cases are referred to, as analogous, but the analogy is not very clear or direct.² . . .

On a view of the whole question, the court are of opinion, that a mortgagee who gets insurance for himself, when the insurance is general upon the property, without limiting it in terms to his interest as mortgagee, but when, in point of fact, his only insurable interest is that of a mortgagee, in case of a loss by fire, before the payment of the debt and discharge of the mortgage, has a right to recover the amount of the loss for his own use.

Judgment for the plaintiff.

TRASK v. HARTFORD AND NEW HAVEN RAILROAD CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1861. 2 Allen, 331.

TORT to recover damages for the destruction of the plaintiff's dwelling-house and shed by fire communicated by the locomotive engine of the defendants. At the trial in the superior court, it appeared that heretofore the plaintiff recovered judgment against the defendants for the loss of a shop by fire from the same cause, and that the house and shed took fire from the burning of the shop. At the time of the fire, he held a policy of insurance on the dwelling-house, issued by the Merchants and Farmers' Mutual Fire Insurance Company, the amount of which they afterwards paid to him, and thereupon caused this action to be brought and prosecuted for their benefit. MORTON, J., ruled that the former judgment was a bar to this action, and a verdict was accordingly returned for the defendants. The plaintiff alleged exceptions.

H. Morris, for the plaintiff.

N. A. Leonard, for the defendants, was not called upon.

MERRICK, J.³ It is an established principle of law, that judgment in a civil suit upon a certain alleged cause of action is conclusive upon the parties in relation to it, and that another suit for the same cause

¹ The discussion of this case has been omitted. — Ed.

² The omitted passages dealt chiefly with *Godsall v. Boldero*, ante, p. 927 (1807). — Ed.

³ DEWEY, J., did not sit in this case. — REP.

cannot be maintained for any purpose whatever. No man is liable to be twice charged, or to be a second time proceeded against in a civil action, for the same unlawful act, if the first has been pursued to final judgment. 1 Stark. Ev. (4th Amer. ed.) 196; *Eastman v. Cooper*, 15 Pick. 276. This doctrine was affirmed, explained, and enforced by this court, in the recent case of *Bennett v. Hood*, 1 Allen, 47; and in its proper application to the facts disclosed in the bill of exceptions is decisive of the present action. The tortious act of the defendants, which is stated and complained of in the writ and declaration, is the setting fire by one of their locomotive engines to the shop of the plaintiff, by means of which his dwelling-house and shed were burnt and consumed. This same cause of action was set forth in the former suit, a copy of the judgment in which was produced by the plaintiff on the trial of this. As to that cause of action, therefore, the judgment was final and conclusive upon both of the parties. The loss of the shop and of the dwelling-house and shed were distinct items or grounds of damage, but they were both the result of a single and indivisible act. The plaintiff therefore does not show any right to maintain another action to recover additional damages merely by showing that, in consequence of his omission to produce upon the trial all the evidence which was admissible in his behalf, he failed to obtain the full amount of compensation to which in that event he might have been entitled. Having chosen to submit the determination of the issue upon the evidence which he did in fact produce, he is bound to abide by the verdict which was rendered, and to accept the judgment in full satisfaction of his claim. It would be unjust, as well as in violation of the fixed rule of law, to allow him to subject the defendants to the hazard and expenses of another suit to obtain an advantage which he lost either by his own carelessness and neglect, or by an intentional withholding of a part of his proof. Nor can it make any difference that the Merchants and Farmers' Insurance Company had an equitable interest, as insurers of the dwelling-house and shed lost by the fire, in the damages which the plaintiff might have recovered for the destruction of that property. To protect their interest, the insurance company should have seasonably intervened and supplied, or caused to be supplied, the evidence which would have shown that the plaintiff ought to recover compensation as well for the burning of the dwelling-house and shed as for the shop; both having been destroyed at the same time, by one and the same tortious and unjustifiable act of the defendants. The fact therefore that the insurance company had an equitable interest, which the law will protect — *Hart v. Western Railroad*, 13 Met. 99 — in a part of the damages which the plaintiff was entitled to recover against the defendants, affords no reason why they should be deprived of the benefit of the general principle of law which protects all parties against the unnecessary multiplication of suits, and the hazard, vexation, and charges which unavoidably attend them. The presiding judge sustained this principle, and the exceptions taken on this account must therefore be overruled.

HALL & LONG v. THE RAILROAD COMPANIES.

SUPREME COURT OF THE UNITED STATES, 1871. 13 Wall. 367.

ERROR to the Circuit Court for the Middle District of Tennessee.

Hall & Long allowed this suit in their names, for the use of certain insurance companies, against the Nashville and Chattanooga Railroad Company, to recover the value of cotton shipped by them on the road of the defendant as a common carrier, which was accidentally consumed by fire, while being transported, and "became and was a total loss." The cotton had been insured by Hall & Long against loss by fire, in the companies for whose use the suit was brought, and these companies had paid the amount insured by them, respectively. On demurrer the question was whether the underwriter who insures personal property against loss by fire, and pays the insurance upon a total loss by accidental burning, while in transition, can bring an action in the name of the owner, for his use against the common carrier, based upon the common-law liability of such common carrier. The court below adjudged that he could not, and the plaintiffs brought the case here on error.

Mr. *Henry Cooper*, in support of the judgment below.Mr. *W. Atwood*, *contra*.

Mr. Justice STRONG delivered the opinion of the court.

It is too well settled by the authorities to admit of question that, as between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods, and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract or for non-performance of his legal duty. Standing thus, as the insurer does, practically, in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner. Hence it has often been ruled that an insurer, who has paid a loss, may use the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss. It is conceded that this doctrine prevails in cases of marine insurance, but it is denied that it is applicable to cases of fire insurance upon land, and the reason for the supposed difference is said to be that the insurer in a marine policy

becomes the owner of the lost or injured property by abandonment of the assured, while in land policies there can be no abandonment. But it is a mistake to assert that the right of insurers in marine policies to proceed against the carrier of the goods, after they have paid a total loss, grows wholly, or even principally, out of any abandonment. There can be no abandonment where there has been total destruction. There is nothing upon which it can operate, and an insured party may recover for a total loss without it. It is laid down in Phillips on Insurance, § 1723, that "a mere payment of a loss, whether partial or total, gives the insurers an equitable title to what may afterwards be recovered from other parties on account of the loss," and that "the effect of a payment of a loss is equivalent in this respect to that of abandonment." There is, then, no reason for the subrogation of insurers by marine policies to the rights of the assured against a carrier by sea which does not exist in support of a like subrogation in case of an insurance against fire or land. Nor do the authorities make any distinction between the cases, though a carrier may, by stipulation with the owner of the goods, obtain the benefit of insurance.¹ . . .

It has been argued, however, that these decisions rest upon the doctrine that a wrong-doer is to be punished; that the defendants against whom such actions have been maintained were wrong-doers; but that, in the present case, the fire by which the insured goods were destroyed was accidental, without fault of the defendants, and, therefore, that they stood, in relation to the owner, at most in the position of double insurers. The argument will not bear examination. A carrier is not an insurer, though often loosely so called. The extent of his responsibility may be equal to that of an insurer, and even greater, but its nature is not the same. His contract is not one for indemnity, independent of the care and custody of the goods. He is not entitled to a cession of the remains of the property, or to have the loss adjusted on principles peculiar to the contract of insurance; and when a loss occurs, unless caused by the act of God, or of a public enemy, he is always in fault. The law raises against him a conclusive presumption of misconduct, or breach of duty, in relation to every loss not caused by excepted perils. Even if innocent, in fact, he has consented by his contract to be dealt with as if he were not so. He does not stand, therefore, on the same footing with that of an insurer who may have entered into his contract of indemnity, relying upon the carrier's vigilance and responsibility. In all cases, when liable at all, it is because he is proved, or presumed to be, the author of the loss. There is nothing, then, to take the case in hand out of the general rule that an underwriter, who has paid a loss, is entitled to recover what he has paid by a suit in the name of the assured against a carrier who caused the loss.

Judgment reversed, and the cause remanded for further proceedings.

¹ Here followed a discussion of authorities. — ED.

CASTELLAIN v. PRESTON.

COURT OF APPEAL, 1883. 11 Q. B. D. 380.

APPEAL of the plaintiff from the judgment of CHITTY, J., in favor of the defendants. The facts are fully stated in the report of the proceedings before CHITTY, J. (8 Q. B. D. 613), and it is necessary here only to briefly recapitulate them.

The plaintiff sued on behalf of the London, Liverpool, and Globe Insurance Company to recover a sum of £330, with interest since the 25th of September, 1878. On the 25th of March, 1878, the defendants, as owners of certain lands and buildings in Liverpool, effected an insurance on the buildings against loss by fire, and they kept the policy on foot by payment of the premiums until after the fire hereinafter mentioned occurred. The policy was in the usual form, giving the insurers the option of reinstating the property. On the 31st of July, 1878, the defendants contracted to sell the land and the buildings to their tenants, Messrs. Rayner, for the sum of £3,100, and they received a deposit. The contract provided that the time of the completion should be such day within two years from the date as the vendors should name. On the 15th of August in the same year a fire occurred damaging part of the buildings. A claim was made on behalf of the defendants, and after negotiation as to the sum to be paid, the amount of the claim was ultimately fixed at £330, and that sum was, in fact, paid on the 25th of September, 1878, by the insurers, who were at that time ignorant of the existence of the contract for sale. On the 25th of March, 1879, the defendants named the 5th of May as the day of completion, and on the following 12th of December the conveyance was executed and the balance of the purchase-money paid.

The present action was commenced on the 31st of October, 1881.

Charles Russell, Q. C., and *A. Aspinall Tobin*, for the plaintiff.

Gully, Q. C., and *W. R. Kennedy*, for the defendants.

BRETT, L. J. In this case the action is brought by the plaintiff, as representing an insurance company, against the defendants in respect of money which has been paid by that company to the defendants on account of the loss by fire of a building. The defendants were the owners of property consisting partly at all events of a house, and the defendants had made a contract of sale of that property with third persons, which contract, upon the giving of a certain notice as to the time of payment, would oblige those third persons, if they fulfilled the contract, to pay the agreed price for the sale of that property, a part of which was a house, and, according to the peculiarity of such a sale and purchase of land or real property, the vendees would have to pay the purchase-money, whether the house was, before the date of payment, burnt down or not. After the contract was made with the third persons, and before the day of payment, the house was burnt down. The

vendors, the defendants, having insured the house in the ordinary form with the plaintiff's company, it is not suggested that upon the house being burnt down the defendants had not an insurable interest. They had an insurable interest, as it seems to me, — first, because they were at all events the legal owners of the property; and, secondly, because the vendees or third persons might not carry out the contract; and if for any reason they should never carry out the contract, then the vendors, if the house was burnt down, would suffer the loss. Upon the happening of the fire, the defendants made a claim on the insurance company represented by the plaintiff, and were paid a certain sum which represented the damage done to the house. After that, the contract of sale between the defendants and the third persons, the vendees of the property, was carried out, and the full amount of the purchase-money was paid by the third persons to the defendants notwithstanding the fire. Under those circumstances the plaintiff representing the insurance company brings this action. I do not say that he brings it to recover back the money which has been paid by the insurance company (for that expression of opinion would rather interfere with the form of the action), but he brings the action in respect of that money.

The question is whether this action is maintainable. The case was tried before CHITTY, J., and he, in a very careful and elaborate judgment (8 Q. B. D. 613, at p. 615), has come to the conclusion that the insurance company cannot recover against the defendants in respect of the money paid by them. It seems to me that the foundation of his judgment is this, that he considers that the doctrine of subrogation of the insurer into the position of the assured is confined within limits which prevent it from extending to the present case. I must now consider whether I can agree with him.

In order to give my opinion upon this case, I feel obliged to revert to the very foundation of every rule which has been promulgated and acted on by the courts with regard to insurance law. The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance; and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong.

In the course of this discussion many propositions and rules well known in insurance law have been glanced at. For instance, to speak of marine insurance, the doctrine of a constructive total loss originated solely to carry out the fundamental rule which I have mentioned. It was a doctrine introduced for the benefit of the assured; for, as a

matter of business, a constructive total loss is equivalent to an actual total loss ; and if a constructive total loss could not be treated as an actual total loss, the assured would not recover a full indemnity. But grafted upon the doctrine of constructive total loss came the doctrine of abandonment, which is a doctrine in favor of the insurer or underwriter, in order that the assured may not recover more than a full indemnity. The doctrine of constructive total loss and the doctrine of notice of abandonment engrafted upon it were invented or promulgated for the purpose of making a policy of marine insurance a contract of indemnity in the fullest sense of the term. I may point out that the doctrine of notice of abandonment is most difficult to justify upon principle ; it was introduced rather as a matter of justice in favor of the underwriters, so as to prevent the assured from obtaining by fraud more than a full indemnity. That doctrine is to a certain extent technical ; that is to say, although the assured has in reality suffered a constructive total loss, and although he is upon general principles entitled to recover, nevertheless he must fail unless he has given a notice of abandonment. I suppose that the doctrine of notice of abandonment was originally introduced by merchants and underwriters, and afterwards adopted as part of the law as to marine insurance ; but at first sight it seems a mere encroachment of the judges.

I have mentioned the doctrine of notice of abandonment for the purpose of coming to the doctrine of subrogation. That doctrine does not arise upon any of the terms of the contract of insurance ; it is only another proposition which has been adopted for the purpose of carrying out the fundamental rule which I have mentioned, and it is a doctrine in favor of the underwriters or insurers in order to prevent the assured from recovering more than a full indemnity ; it has been adopted solely for that reason. It is not, to my mind, a doctrine applied to insurance law on the ground that underwriters are sureties. Underwriters are not always sureties. They have rights which sometimes are similar to the rights of sureties ; but that, again, is in order to prevent the assured from recovering from them more than a full indemnity. But it being admitted that the doctrine of subrogation is to be applied merely for the purpose of preventing the assured from obtaining more than a full indemnity, the question is whether that doctrine as applied in insurance law can be in any way limited. Is it to be limited to this, that the underwriter is subrogated into the place of the assured so far as to enable the underwriter to enforce a contract, or to enforce a right of action ? Why is it to be limited to that, if when it is limited to that it will, in certain cases, enable the assured to recover more than a full indemnity ? The moment it can be shown that such a limitation of the doctrine would have that effect, then, as I said before, in my opinion, it is contrary to the foundation of the law as to insurance, and must be wrong. And, with the greatest deference to my Brother CHITTY, it seems to me that that is the fault of his judgment. He has by his judgment limited this doctrine of subrogation to placing the insurer in the

position of the assured only for the purpose of enforcing a right of action to which the assured may be entitled. In order to apply the doctrine of subrogation, it seems to me that the full and absolute meaning of the word must be used; that is to say, the insurer must be placed in the position of the assured. Now, it seems to me that in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavor to express, namely, that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be or has been diminished. That seems to me to put this doctrine of subrogation in the largest possible form, and if in that form, large as it is, it is short of fulfilling that which is the fundamental condition, I must have omitted to state something which ought to have been stated. But it will be observed that I use the words "of every right of the assured." I think that the rule does require that limit. In *Burnand v. Rodocanachi*,¹ the foundation of the judgment, to my mind, was, that what was paid by the United States government could not be considered as salvage, but must be deemed to have been only a gift. It was only a gift to which the assured had no right at any time until it was placed in their hands. I am aware that with regard to the case of reprisals, or that which a person whose vessel had been captured got from the English government by way of reprisal, the sum received has been stated to be, and perhaps in one sense was, a gift of his own government to himself; but it was always deemed to be capable of being brought within the range of the law as to insurance, because the English government invariably made the "gift," so invariably, that as a matter of business, it had come to be considered as a matter of right. This enlargement, or this explanation, of what I consider to be the real meaning of the doctrine of subrogation, shows that, in my opinion, it goes much further than a mere transfer of those rights which may at any time give a cause of action either in contract or in tort, because if upon the happening of the loss there is contract between the assured and a third person, and if that contract is immediately fulfilled by the third person, then there is no right of action of any kind into which the insurer can be subrogated. The right of action is gone; the contract is fulfilled. In like manner if upon the happening of a tort the tort is immediately made good by the tortfeasor, then the right of action is gone; there is no right of action existing into which the insurer can be subrogated. It will be said that there did for

¹ *Ante*, p. 946 (H. L., 1882). — Ed.

a moment exist a right of action in favor of the assured into which the insurer could have been subrogated. But he cannot be subrogated into a right of action until he has paid the sum insured and made good the loss. Therefore innumerable cases would be taken out of the doctrine if it were to be confined to existing rights of action. And I go further and hold that if a right of action in the assured has been satisfied, and the loss has been thereby diminished, then, although there never was nor could be any right of action into which the insurer could be subrogated, it would be contrary to the doctrine of subrogation to say that the loss is not to be diminished as between the assured and the insurer by reason of the satisfaction of that right. I fail to see at present if the present defendants would have had a right of action at any time against the purchasers, upon which they could enforce a contract of sale of their property whether the building was standing or not, why the insurance company should not have been subrogated into that right of action. But I am not prepared to say that they could be, more particularly as I understand my learned Brother, who knows much more of the law as to specific performance than I do, is, at all events, not satisfied that they could. I pass by the question without solving it, because there was a right in the defendants to have the contract of sale fulfilled by the purchasers notwithstanding the loss, and it was fulfilled. The assured have had the advantage therefore of that right, and by that right, not by a gift which the purchasers could have declined to make, the assured have recovered, notwithstanding the loss, from the purchasers, the very sum of money which they were to obtain whether this building was burnt or not. In that sense I cannot conceive that a right, by virtue of which the assured has his loss diminished, is not a right which, as has been said, affects the loss. This right, which was at one time merely in contract, but which was afterwards fulfilled, either when it was in contract only, or after it was fulfilled, does affect the loss; that is to say, it affects the loss by enabling the assured, the vendors, to get the same money which they would have got if the loss had not happened.

While I am applying the doctrine of subrogation which I have endeavored to enunciate, I think it due to CHITTY, J., to point out what passages in his judgment require some modification (8 Q. B. D. at p. 617). I find him reading this passage: "I know of no foundation for the right of underwriters, except the well-known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss." That is a quotation from Lord Cairns in *Simpson v. Thomson*.¹ The learned judge then goes on: "What is the principle of subrogation? On payment the insurers are entitled to enforce all the remedies, whether in contract or in tort, which the insured has against third parties, whereby the insured can

¹ *Ante*, p. 944 (H. L. Sc., 1877). — ED.

compel such third parties to make good the loss insured against." That is, as it seems to me, to confine this doctrine of subrogation to the principle that the insurers are entitled to enforce all remedies, whether in contract or in tort. I should venture to add this: "And if the assured enforces or receives the advantage of such remedies, the insurers are entitled to receive from the assured the advantage of such remedies." Then when we come to this illustration, "Where the landlord insures, and he has a covenant by the tenant to repair, the insurance office, on payment in like manner, succeeds to the right of the landlord against his tenant," I would add this, — "and if the tenant does repair, the insurer has the right to receive from the assured a benefit equivalent to the benefit which the assured has received from such repair." Then, dealing with the case of *Burnand v. Rodocanachi*,¹ the learned judge cites the opinion of Bramwell, L. J. (8 Q. B. D. at p. 618). He says that Bramwell, L. J., in his judgment, held that it was not salvage, but "that in the circumstances the sum received by the shipowner was but a pure gift, and there was no right on the part of the insurers to recover any part of it over against him." I, for myself, venture to add this as the reason, "because there was no right in the assured to demand the compensation from the American government." There was no right to demand it; it was bestowed and received as a pure gift. *Darrell v. Tibbitts*² seems to me to be entirely in favor of the plaintiff in this case. I shall not retract from the very terms which I used in that case. It seems to me that in *Darrell v. Tibbitts* the insurers were not subrogated to a right of action or to a remedy. They were not subrogated to a right to enforce the remedy, but what they were subrogated into was the right to receive the advantage of the remedy which had been applied, whether it had been enforced or voluntarily administered by the person who was bound to administer it. That seems to me to be the doctrine. Then with regard to the passage,³ "The doctrine is well established that where something is insured against loss, either in a marine or a fire policy, after the assured has been paid by the insurers for the loss, the insurers are put into the place of the assured with regard to every right given to him by the law respecting the subject-matter insured." I wish to explain that that was a distinct clause, and it was so intended by me when I stated it. I then mentioned contracts: "And with regard to every contract which touches the subject-matter insured, and which contract is affected by the loss or the safety of the subject-matter insured by reason of the peril insured against." I fail to conceive any contract which gives a right over the thing insured which is not affected by the loss or safety

¹ *Ante*, p. 946 (H. L., 1882). — ED.

² In *Darrell v. Tibbitts*, 5 Q. B. D. 560 (C. A., 1880), an insurance society paid a landlord a loss under a policy, and later discovered that the tenants had repaired the damage, as was required by their lease; and it was held that the insurance society was entitled to recover from the landlord the sum paid by it. — ED.

³ *Per* BRETT, L. J., in *Darrell v. Tibbitts*, *supra*. — ED.

of it, and if it is necessary to bring the present case within those terms, it seems to me that the contract of purchase and sale was affected by that loss. I will not go further with the judgment of CHITTY, J., except to say this, that at the end my learned Brother has put it thus, that "the only principle applicable is that of subrogation as understood in the full sense of that term" (8 Q. B. D. at p. 625). There I agree with him, only my view of the full sense is larger than that which he adopted. "And that where the right claimed is under a contract between the insured and third parties, it must be confined to the case of a contract relating to the subject-matter of the insurance, which entitled the insurers to have the damages made good." I think it would be better expressed in this way,—"which entitles the assured to be put by such third parties into as good a position as if the damage insured against had not happened." If it is put in that sense, it seems to me to be consistent with the proposition which I laid down at the beginning of what I have said, and to cover this case. I will repeat it,—"which entitles the assured to be put by such third parties into as good a position as if the damage insured against had not happened." The contract in the present case, as it seems to me, does enable the assured to be put by the third party into as good a position as if the fire had not happened, and that result arises from this contract alone. Therefore, according to the true principles of insurance law, and in order to carry out the fundamental doctrine, namely, that the assured can recover a full indemnity, but shall never recover more, except, perhaps, in the case of the suing and laboring clause under certain circumstances, it is necessary that the plaintiff in this case should succeed. The case of *Darrell v. Tibbitts*¹ has cut away every technicality which would prevent a sound decision. The doctrine of subrogation must be carried out to the full extent, and carried out in this case by enabling the plaintiff to recover.

CORRON, L. J. In this case the appellant's company insured a house belonging to the defendants, and before there was any loss by fire the defendants sold the house to certain purchasers. Afterwards there was a fire, and an agreed sum was paid by the insurance office to the defendants in respect of the loss. The appellant apparently seeks to recover the sum which the office paid to the defendants, and if the plaintiff's claim could be shaped only in this form, I think my opinion would be against him. The plaintiff's claim may be treated in substance in another way, namely, the company seek to obtain the benefit either wholly or partly of the amount paid by them out of the purchase-money which the defendants have received since the fire from the purchasers. In my opinion the plaintiff is right in that contention. I think that the question turns on the consideration of what a policy of insurance against fire is, and on that the right of the plaintiff depends. The policy is really a contract to indemnify the person insured for the loss which he has sustained in consequence of the peril insured against

¹ *Ante*, p. 979, n. (C. A., 1880).—ED.

which has happened, and from that it follows, of course, that as it is only a contract of indemnity, it is only to pay that loss which the assured may have sustained by reason of the fire which has occurred. In order to ascertain what that loss is, everything must be taken into account which is received by and comes to the hand of the assured, and which diminishes that loss. It is only the amount of the loss, when it is considered as a contract of indemnity, which is to be paid after taking into account and estimating those benefits or sums of money which the assured may have received in diminution of the loss. If the proposition is stated in that manner, it is clear that the office would be entitled to the benefit of anything received by the assured before the time when the policy is paid; and it is established by the case of *Darrell v. Tibbitts* that the insurance company is entitled to that benefit, whether or not before they pay the money they insist upon a calculation being made of what can be recovered in diminution of the loss by the assured; if they do not insist upon that calculation being made, and if it afterwards turns out that in consequence of something which ought to have been taken into account in estimating the loss, a sum of money, or even a benefit, not being a sum of money, is received, then the office, notwithstanding the payment made, is entitled to say that the assured is to hold that for its benefit; and although it was not taken into account in ascertaining the sum which was paid, yet when it has been received it must be brought into account; and if it is not a sum of money, but a benefit, that has been received, its value must be estimated in money.

Now, Lord Blackburn, in the case of *Burnand v. Rodocanachi*,¹ states the principle in these words: "The general rule of law (and it is obvious justice) is, that where there is a contract of indemnity (it matters not whether it is a marine policy or a policy against fire on land, or any other contract of indemnity), and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back." In *Darrell v. Tibbitts*,² to which I have already referred, the question which we had to consider was whether the insurance office was entitled to the benefit produced in consequence of a covenant to repair if the building should be damaged by an explosion of gas. In my opinion it was not intended in any way to limit the right of the insurer as an insurer to cases where the contract in respect of which benefit had been received related to the same loss or damage as that against which the contract of indemnity was created by the policy. That was what was before this court in that case, and undoubtedly expressions do occur as to a contract relating to

¹ *Ante*, p. 946 (H. L., 1882). — *Ed.*

² *Ante*, p. 979, n. (C. A., 1880). — *Ed.*

the loss or affecting the loss, but the principle was not limited to contracts. The principle which I have enunciated goes further; and if there is a money or any other benefit received which ought to be taken into account in diminishing the loss or in ascertaining what the real loss is against which the contract of indemnity is given, the indemnifier ought to be allowed to take advantage of it in order to calculate what the real loss is, even although the benefit is not a contract or right of suit which arises and has its birth from the accident insured against. Of course the difficulty is to consider what ought to be taken into account in estimating that loss against which the insurer has agreed to indemnify, and we have been pressed in argument with many difficulties. One which possibly was put to us most strongly was that the contract of sale has nothing to do with destruction by fire, and if any part of the purchase-money is to be taken into account, why is a gift not to be taken into account? That may be said to diminish the loss as well as a contract of sale. The answer is that when a gift is made afterwards in order to diminish the loss, it is bestowed in such terms as to show an intention to benefit the assured, and to give the insurer the benefit of that would be to divert the gift from its intended object to a different person. That really was what was decided in *Burnand v. Rodocanachi*.¹ There the money bestowed, not as a matter of right but as a gift, was intended to benefit the assured beyond the amount which they had got in consequence of any insurance. There is another ground which may possibly exclude gifts. It may be that the right of the insurer to have a sum brought into account in diminution of the loss, against which he has given a contract of indemnity, is confined to that which is a right or other incident belonging to the person insured, as an incident of the property at the time when the loss takes place. This definition would not include a sum subsequently bestowed on the assured by way of gift, for it can in no way be said to have been appertaining to him as owner of the property at the time when the loss took place. But in the present case what we have to consider is whether the contract of sale is not an incident of the property belonging to the owners at the time of the loss in such a way that it ought to be brought into account in estimating the loss, against which the insurer has undertaken to indemnify. What was the position of the parties? The defendants' house was insured, and there was a loss from fire, the damage caused by the fire being estimated by the parties at £330. Ultimately, the property having been already agreed to be sold at a fixed price, the assured received the whole amount of that price. Now, they did that in respect of a contract relating to the subject insured, the house; and, to my mind, if they received the whole amount of the price which they previously had fixed as the value of the house, that must of necessity be brought into account when it was received, for the purpose of ascertaining what was the ultimate loss against which they had concluded a contract of indemnity with the insurance office.

¹ *Ante*, p. 946 (H. L., 1882). — ED.

Here the purchasers have paid the money in full; and as the property was valued between the vendors and the purchasers at £3,100, the vendors got that sum in respect of that which had been burned, but which had not been burned at the time when the contract was entered into. They had fixed that to be the value; and then any money which they get from the purchasers, and which, together with £330, the sum paid by the office, exceeds the value of the property as fixed by them under the contract to sell, must diminish, and in fact entirely extinguishes the loss occasioned to the vendors of the property by the fire. Therefore, though it cannot, to my mind, be said that the insurers are entitled, because the purchase is completed, to get back the money which they have paid, yet they are entitled to take into account the money subsequently received under a contract for the sale of the property existing at the time of the loss, in order to see what the ultimate loss was against which they gave their contract of indemnity. On the principle of *Darrell v. Tibbitts*,¹ when the benefit afterwards accrued by the completion of the purchase, the insurance company were entitled to demand that the money paid by them should be brought into account. Therefore the conclusion at which I have arrived is, that if the purchase-money has been paid in full, the insurance office will get back that which they have paid, on the ground that the subsequent payment of the price which had been before agreed upon, and the contract for payment of which was existing at the time, must be brought into account by the assured, because it diminishes the loss against which the insurance office merely undertook to indemnify them. In my opinion, therefore, the decision below was erroneous. I think CHITTY, J., based it upon this, that in this case there was no right of subrogation, no contract which the office could have insisted upon enforcing for their benefit. I think it immaterial to decide that question, because the vendors have exercised their right to insist upon the completion of the purchase.

BOWEN, L. J. I am of the same opinion.

The answer to the question raised before us appears to me to follow as a deduction from the two propositions, first, that a fire insurance is a contract of indemnity; and, secondly, that when there is a contract of indemnity no more can be recovered by the assured than the amount of his loss.

First of all, is a fire insurance a contract of indemnity? It appears to me it is quite as much a contract of indemnity as a marine insurance is; the differences between the two are caused by the diversity of the subject-matters. On a marine policy a ship may be insured which is at a distance and movable, or goods may be insured on board of vessels which are at a distance, and on a fire policy a house is insured which is fixed to the land; but both are contracts of indemnity. Only those can recover who have an insurable interest, and they can recover only to the extent to which that insurable interest is damaged by the loss.

¹ *Ante*, p. 979, n. (C. A., 1880).

In the course of the argument it has been sought to establish a distinction between a fire policy and a marine policy. It has been urged that a fire policy is not quite a contract of indemnity, and that the assured can get something more than what he has lost. It seems to me that there is no justification in authority, and I can see no foundation in reason, for any suggestion of that kind. What is it that is insured in a fire policy? Not the bricks and the materials used in building the house, but the interest of the assured in the subject-matter of insurance, not the legal interest only, but the beneficial interest; and I do not know any reason why there should be a different definition of what is an insurable interest in fire policies from that which is well known as the established definition in marine policies, allowance being made for the differences of the subject-matter. It seems to me that it is an ocular illusion to suppose that under any circumstances more may be obtained by the assured than the amount of the loss. I think this illusion can be detected if it is recollected what are the ordinary business rules according to which insurances are made. It is well known in marine and in fire insurances that a person who has a limited interest may insure nevertheless on the total value of the subject-matter of the insurance, and he may recover the whole value, subject to these two provisions: First of all, the form of his policy must be such as to enable him to recover the total value, because the assured may so limit himself by the way in which he insures as not really to insure the whole value of the subject-matter; and, secondly, he must intend to insure the whole value at the time. When the insurance is effected he cannot recover the entire value unless he has intended to insure the entire value. A person with a limited interest may insure either for himself, and to cover his own interest only, or he may insure so as to cover not merely his own limited interest, but the interest of all others who are interested in the property. It is a question of fact what is his intention when he obtains the policy. But he can only hold for so much as he has intended to insure. Let us take a few of the cases which are most commonly known in commerce of persons who insure. There are persons who have a limited interest and yet who insure for more than a limited interest, who insure for the total value of the subject-matter. There is the case, which is I suppose the most common, of carriers and wharfingers and commercial agents, who have an interest in the adventure. It is well known what their rights are. Then, to take a case which perhaps illustrates more exactly the argument, let us turn to the case of a mortgagee. If he has the legal ownership, he is entitled to insure for the whole value; but even supposing he is not entitled to the legal ownership, he is entitled to insure *prima facie* for all. If he intends to cover only his mortgage, and is only insuring his own interest, he can only in the event of a loss hold the amount to which he has been damnified. If he has intended to cover other persons beside himself, he can hold the surplus for those whom he has intended to cover. But one thing he cannot do, that is, having intended only to

cover himself, and being a person whose interest is only limited, he cannot hold anything beyond the amount of the loss caused to his own particular interest. Suppose for a moment the case of a ship and a mortgagee who has lent £500 on the ship. The ship is worth £10,000. If he insures for £10,000, meaning only to cover his own interest and not the interest of anybody besides, can it for a moment be supposed that the mortgagee who insures under those circumstances can hold the £10,000? That would be an over insurance, and to treat it in any other way would be to make a marine policy not a contract of indemnity, but a wager, a speculation for gain. Suppose, again, there are several mortgagees for small sums, can they all recover and hold (having *ex hypothesi* insured their separate interests only) the entire value of the ship? It seems to me they cannot. They can recover only what they have lost. That being, as I apprehend, the law about mortgages of ships, is there any real distinction between that and the mortgagee of a house? I can see none. It seems to me that the same principle applies, and here, as in many other problems of insurance law, the problem will be solved by going back and resting upon the doctrine of indemnity.

Let us take another instance which has been much pressed upon us in the course of the argument, the case of a tenant for years or a tenant from year to year. We have been asked to hold that a tenant from year to year can always recover the full value of the house from the insurance company, although he has intended to insure only his limited interest in it. There is some justification for that in the language of James, L. J., in *Rayner v. Preston*.¹ He says this: "In my view of the case it is perhaps unnecessary to refer to the Act of Parliament as to fire insurance. But that Act seems to me to show that a policy of insurance on a house was considered by the legislature, as I believe it to be considered by the universal consensus of mankind, to be a policy for the benefit of all persons interested in the property; and it appears to me that a purchaser having an equitable interest under a contract of sale is a person having an interest in the house within the meaning of the Act. I believe that there is no case to be found in which the liability of the insurance office has been limited to the value of the interest of the insured in the house destroyed. If a tenant for life having insured his house has the house destroyed or damaged by fire, I have never heard it suggested that the insurance office could cut down his claim by showing that he was of extreme old age or suffering from a mortal disease." Now, with the greatest

¹ In *Rayner v. Preston*, 18 Ch. D. 1 (C. A., 1881), vendees brought action against vendors to establish a right to a sum received by the vendors from underwriters upon insurance written before the contract of sale was made. The contract contained no reference to insurance. Between the date of the contract and the time for completion, the buildings purchased were injured by fire. It was held by the majority (COTTON, L. J., and BRETT, L. J., but JAMES, L. J., dissenting) that the action did not lie. — ED.

possible respect and reverence for all that is left to us of the judgments of a great judge like James, L. J., I confess I do not follow that. I have no doubt the insurance offices seldom take the trouble to look to the exact interest of the tenant who insures, and perhaps of the landlord who insures, and for the best of all reasons, because it is generally intended that the insurance shall be made not merely to cover the limited interest of the tenant, but also to cover the interest of all concerned. In most cases the covenants as to repair throw liability on one side or the other, and in a large class of leases the liability to repair is by the provisions of the lease thrown upon the tenant. Therefore in these cases no question ever can arise between the insurance office and the tenant from year to year, or the tenant for years, as to the amount which the insurance office ought to pay. But if a tenant for a year, or a tenant for six months, or a tenant from week to week, insures, meaning only to cover his interest, does anybody really suppose that he could get the whole value of the house? It is true that in most cases the claim of the tenant from year to year, or for years, cannot be answered by handing over to him what may be the marketable value of his property; and the reason is that he insures more than the marketable value of his property, and he loses more than the marketable value of his property; he loses the house in which he is living, and the beneficial enjoyment of the house as well as its pecuniary value. That I think is all that was meant by the Vice-Chancellor in *Simpson v. Scottish Union Insurance Co.*, 1 H. & M. 618, at p. 628. I will pass on to the case of a life tenant. I will take the case of a life tenant who is a very old man, and whose house is burnt down, but who has intended only to insure his own interest. I am far from saying that he could not under any conceivable circumstances be entitled to have the house reinstated. A man cannot be compensated simply by paying him for the marketable value of his interest. But it does not follow from that that he gets or can keep more than he has lost. I very much doubt whether if a life tenant, having intended to insure only his life interest, dies within a week after the loss by fire, the court would award his executors the whole value of the house. In all these difficult problems I go back with confidence to the broad principle of indemnity. Apply that and an answer to the difficulty will always be found. The present case arises between vendors and vendees. That does not fall within the category of the cases which I have been discussing, where a person with a limited interest intends only to cover his own interest. But can it be any exception to the infallible rule that a man can only be indemnified to the extent of his loss? What is really the interest of the vendors, the assured? Their insurable interest is this: they had insured against fire, and they had then contracted with the purchasers for the sale of the house, and after the contract, but before the completion, the fire occurred. Their interest, therefore, is that at law they are the legal owners, but their beneficial interest is that of vendors with a lien for the unpaid purchase-money;

they would get ultimately all the purchase-money provided the matter did not go off owing to defective title. Such persons in the first instance can obviously recover from the insurance company the entire amount of the purchase-money. That was decided in the case of *Collingridge v. Royal Exchange Assurance Corporation*; ¹ but can they keep the whole, having lost only half? Surely it would be monstrous to say that they could keep the whole, having lost only half. Suppose for a moment that only £50 remained to be paid of the purchase-money, and that a house had been burnt down to the value of £10,000, would it be in accordance with any principle of indemnity that persons who were only interested, and could only be interested to the extent of £50, could recover £10,000? They would be getting a windfall by the fire; their contract of insurance would not be a contract against loss; it would be a speculation for gain. Then what is the principle which must be applied? It is a corollary of the great law of indemnity, and is to the following effect: That a person who wishes to recover for and is paid by the insurers as for a total loss, cannot take with both hands. If he has a means of diminishing the loss, the result of the use of those means belongs to the underwriters. If he does diminish the loss, he must account for the diminution to the underwriters. In *Simpson v. Thomson*,² it is said by Lord Cairns, L. C.: "I know of no foundation for the right of underwriters, except the well-known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss."

Is there any real distinction here between fire policies and marine policies? It seems to me that the learned judge below, and the American authorities on which he relies, have fallen into the mistake of supposing that the distinction which obtains as to certain incidents of marine policies and fire policies, is derived from a difference of principle, and not from the diversity of the subject-matter. In any case the principle of indemnity is the same, and there is no departure from it. I will make plain what I mean by reading the language of *CHITTY, J.* He says (8 Q. B. D. 618): "An obvious distinction exists between the case of marine insurance and of insurance of buildings

¹ In *Collingridge v. Royal Exchange Assur. Corp.*, 3 Q. B. D. 173 (1877), action was brought upon a policy of insurance by an owner whose buildings, after the making of the policy, had been required by the Metropolitan Board of Works for the purpose of making new streets and other improvements. After the value of the property had been determined by arbitration and the title had been approved by the Board, but before payment or conveyance, the buildings were destroyed by fire. The underwriters contended that they were not liable to pay anything, and that, if they were liable to pay at all, the only loss was incurred by the Board, and that, as the premises would be pulled down upon conveyance, the amount of recovery could not exceed the damage done to the buildings, considered as old materials. It was held that the owner was entitled to recover, and that the underwriters must pay the damage to the buildings, considered as buildings. — *ED.*

² *Ante*, p. 944 (H. L. Sc., 1877). — *ED.*

annexed to the soil. In the case of marine insurance where there is a constructive total loss, the thing is considered as abandoned to the underwriters, and as vesting the property directly in them. But this doctrine of abandonment cannot be applied to the insurance of buildings annexed to the soil; although the buildings annexed are destroyed, there cannot be a cession of the right to the soil itself." It seems to me, if I may venture to say it of so experienced a judge, that there is an ambiguity in the way in which he is dealing with the doctrine of constructive total loss. The doctrine of abandonment is itself based upon the principle of indemnity. It is well known, historically, that that is so, and in reason it must be so. It is only since marine policies have ceased to be wager policies throughout the world and become contracts of indemnity, that the doctrine of abandonment has become universal; and so far from its constituting a difference of principle between marine insurance law and fire insurance law, it is the same principle of indemnity, only worked out differently, because what happens at sea is the loss of a ship, and what happens on land is the loss of a house. It is true that the doctrine of abandonment is inapplicable. But if the buildings annexed to the soil are destroyed, it is not a question of constructive total loss, it is a question of actual total loss. The same ambiguity, I think, is to be found in the language of the American case¹ which CHITTY, J., cites at page 624. The learned judge in that case says: "It may be a question whether he" (the Chancellor) "has not relied too much on the cases of marine insurance in which the doctrine of constructive total loss, abandonment, and salvage are fully acknowledged, but which have slight application to insurance against loss by fire." Slight application it is true, but not because the doctrine of indemnity is not to be carried out to its extreme in case of loss by fire, but because the subject-matter in the one case is the vessel lost at sea, and in the other the house burned, which is annexed to the soil. CHITTY, J., goes on to discuss the case on the basis of what he calls the principle of subrogation. I will add very little to what BRETT, L. J., has said about that. It seems to me that a good deal of confusion would be caused if one were to suppose that insurers are in the position of sureties. A surety is a person who answers for the default of another, and an insurer is a person who guarantees against loss by an event. The default or non-default of another, as between that other and the person who is insured, may diminish or increase the loss; but what the insurer is guaranteeing is not the default of that person; he is guaranteeing that no loss shall happen by the event. And subrogation is itself only the particular application of the principle of indemnity to a special subject-matter, and there, I think, is where the learned judge has gone wrong. He has taken the term "subrogation" and has applied it as if it were a hard and fast line, instead of seeing that it is part of the law of indemnity. If there are means of diminishing the loss, the insurer may pursue them, whether he is asking for contracts

¹ *King v. State Mut. F. Ins. Co.*, ante, p. 965 (1850). — Ed.

to be carried out in the name of the assured, or whether he is suing for tort. It is said that the law only gives the underwriters the right to stand in the assured's shoes as to rights which arise out of, or in consequence of, the loss. I venture to think there is absolutely no authority for that proposition. The true test is, can the right to be insisted on be deemed to be one the enforcement of which will diminish the loss? In this case the right, whatever it be, has been actually enforced, and all that we have to consider is whether the fruit of that right after it is enforced does not belong to the insurers. It is insisted that only those payments are to be taken into consideration which have been made in respect of the loss. I ask why, and where is the authority? If the payment diminishes the loss, to my mind it falls within the application of the law of indemnity. On this point I should like to pause one instant to consider the definition which Bætt, L. J., has given. It does seem to me that, taking his language in the widest sense, it substantially expresses what I should wish to express, with one small appendage that I desire to make. I wish to prevent the danger of his definition being supposed to be exhaustive by saying that if anything else occurs outside it the general law of indemnity must be looked at.

With regard to gifts, all that is to be considered is, has there been a loss, and what is the loss, and has that loss been in substance reduced by anything that has happened? Now, I admit that, in the vast majority of cases, it is difficult to conceive a voluntary gift which does reduce the loss. I do not think that the question of gift was the root of the decision in *Burnand v. Rodocanachi*,¹ although it seems to me that it was a very essential matter in considering the case. I think the root of the decision in *Burnand v. Rodocanachi* was that the payment which had been made did not reduce the loss, not having been intended to do so. The truth was that the English government and the American government agreed that the sums which were to be paid were to be paid not in respect of the loss, but in respect of something else, and therefore the payment could not be a reduction of the loss. Suppose that a man who has insured his house has it damaged by fire, and suppose that his brother offers to give him a sum of money to assist him. The effect on the position of the underwriters will depend on the real character of the transaction. Did the brother mean to give the money for the benefit of the insurers as well as for the benefit of the assured? If he did, the insurers, it seems to me, are entitled to the benefit; but if he did not, but only gave it for the benefit of the assured, and not for the benefit of the underwriters, then the gift was not given to reduce the loss, and it falls within *Burnand v. Rodocanachi*. If it was given to reduce the loss, and for the benefit of the insurers as well as the assured, the case would fall on the other side of the line, and be within *Randal v. Cockran*,² to which allusion has been made. In the present case the vendors have been paid the whole of

¹ *Ante*, p. 946 (H. L., 1882). — ED.

² *Ante*, p. 937 (1748). — ED.

their purchase-money. Even if they had not been paid, but had still the purchase-money outstanding, they would have had some beneficial interest in the nature of their vendors' lien. An unpaid vendor's lien is worth something, I suppose. I do not say that it is necessary to decide the point, and I only mention it to make more clear my view of this case, not as laying down the law for future occasions. But if an unpaid vendor's lien is worth something, on what principle could a vendor keep the unpaid vendor's lien and be paid for it by the insurers? In such a case he would be taking with both hands. Now, why should not underwriters be entitled at all events to insist on the vendor's lien? As to specific performance I say nothing. I am not familiar, as Cotton, L. J., is, with that branch of the law, and there may be some special reasons why the insurers should not be able to insist upon specific performance; but why should not they insist upon the unpaid vendor's lien? The vendor, if he did not exercise it for their benefit, would be trying to make the contract between himself and the insurers more than a contract of indemnity. CHITTY, J., seems to think that in this instance it is necessary to recollect that the contract of sale was not a contract, either directly or indirectly, for the preservation of the buildings insured; that the contract of insurance was a collateral contract wholly distinct from and unaffected by the contract of sale. What does it matter? The beneficial interest of the vendors in the house depends on the contract being fulfilled or not, and the fulfilment of the contract lessens the loss, its non-fulfilment affects it. CHITTY, J., indeed, says further, that "the attempt now made is to convert the insurance against loss by fire into an insurance of the solvency of the purchaser" (8 Q. B. D. 621). That may be answered in the same way. It is not that the solvency of the purchaser is guaranteed, but that the vendors are guaranteed against the loss which is diminished or increased according as the purchaser turns out to be solvent or not. The solvency of the purchaser affects the loss; that is the only way in which it touches the insurance; it is not because the insurance is directly an insurance of his solvency. Finally (and this is the last observation that I wish to make upon the judgment of CHITTY, J.), he puts the case of a landlord insuring, and the tenant under no obligation to repair. He takes a case "where, under an informal agreement evidently drawn by the parties themselves, the large rent of £700 was reserved, and the tenant, notwithstanding the fire, was bound to pay the rent." He says: "Assume that the building in such a case was ruinous, and would last the length of the term only. Could the insurers recover a proportionate part of each payment of rent as it was made, or could they wait until the end of the term, and then say in effect, 'You have been paid for the whole value of the building, and therefore we can recover against you'?" That seems to me at first sight to look as if it were a very difficult point; but I think this difficulty diminishes, if it does not vanish, as soon as it is considered what are the conditions of the hypothesis. Is the learned judge supposing that the landlord,

who is a person with a limited interest, did intend to insure all other interests besides his own? The landlord can do so if he so intended; the question is, has he done so? If the landlord intended to insure all other interests besides his own, the difficulty dissipates itself into thin air. If he did not, it would be a very odd case, and perhaps one might ride safely at anchor by saying that one would wait till it arose. But I am not desirous of being over cautious, because I am satisfied to rest on the broad principle of indemnity, and I say, "Apply the broad principle of indemnity, and you have the answer." The vendor cannot recover for greater loss than he suffers; and if he has only a limited interest in the subject-matter, and only intends to insure that interest, I know of no means in law or equity by which he is entitled to obtain anything else out of the insurance office except what is measured by the measure of his loss. As to the form of action, I need add nothing to what has fallen already from the other members of the court. I am so much in accord with their views that I should not have added a judgment as long as mine has been if it were not for the great importance, to my mind, of keeping clear in these insurance cases what is really the basis and foundation of all insurance law.

*Judgment reversed.*¹

¹ On the topic of this section, see also:—

Rockingham Mut. F. Ins. Co. v. Boshier, 39 Me. 253 (1855);

Midland Ins. Co. v. Smith, 6 Q. B. D. 561 (1881);

Niagara F. Ins. Co. v. Fidelity Title & Trust Co., 123 Pa. 516 (1889);

Ins. Co. of North America v. Fidelity Title & Trust Co., 123 Pa. 523 (1889);

West of England F. Ins. Co. v. Isaacs, [1897] 1 Q. B. 226 (C. A., 1896);

United States v. American Tobacco Co., 166 U. S. 468 (1897);

Farmers' F. Ins. Co. v. Johnston, 113 Mich. 426, 429-430 (1897);

Lake Erie & Western Railroad Co. v. Falk, 62 Ohio St. 297 (1900).—Ed.

SECTION III.

*Life Insurance.*CONNECTICUT MUTUAL LIFE INS. CO. v. NEW YORK AND
NEW HAVEN RAILROAD CO.SUPREME COURT OF CONNECTICUT, 1856. 25 Conn. 265.¹

ACTION on the case. On demurrer to the plea, the questions of law were reserved for the advice of this court.

Hungerford and *W. D. Shipman*, for the plaintiffs.

Baldwin, for the defendants.

STORRS, J. The defendants, a railroad company are charged with having negligently occasioned the death of one Dr. Beach, by which event the plaintiffs, a life insurance company, have been compelled to pay to his representatives the amount of an insurance effected upon his life, of which amount a recovery is sought in this action. A plea in bar sets forth a payment to the administratrix of the deceased of the damages of which the defendants' negligence had rendered them legally liable, and also a discharge by her. This plea and the demurrer thereto require no examination, as they are immaterial in the view which we take of the declaration.

It is clear from the declaration, that a pecuniary injury has been sustained by the plaintiffs, in consequence of the unlawful conduct of the defendants. If the injury thus set forth be actionable, or an injury in a legal sense, there must be a recovery. But we are of the opinion, that the wrong complained of is not the proper subject of a suit at law, both for reasons appertaining to the peculiar nature of the injury, and to the manner in which its consequences are brought home to the party claiming redress.

The act complained of is the producing of death. We are at once met with the inquiry, whether under the common law system, a party is liable, *civiliter*, for the destruction of human life, whatever the nature of the consequences may be, or however clearly such a wrong may involve pecuniary damage.² . . .

We have no inclination to abrogate the common law doctrine, that the death of a human being, whatever may be its consequences in a pecuniary or in any other aspect, is not an actionable injury.

The other branch of our inquiry, relating to the manner in which the injury complained of was brought home to the party claiming to have suffered by it, concerns principles of great practical interest and novel in their present application. The plaintiffs sustain no relations to the authors of the wrong other than that of mere contractors with

¹ The reporter's statement has not been reprinted. — ED.

² The discussion of this question has been omitted. — ED.

the party injured; and their contract liability is the medium through which the injury is brought home to them. They justly say, that their loss is in fact distinctly traceable and solely due to the misconduct of the defendants; that the death of Dr. Beach, caused by the defendants, in a legal sense determined the only contingency out of which their liability grew, and brought upon them the consequences of that liability, which, through the defendants' unlawful acts, had now become fixed. Still the question remains, notwithstanding this precise exhibition of cause and effect, whether these consequences, of which the deceased was primarily the subject, and which affected the plaintiffs only because they had put themselves into the position of contractors with him, were in a legal view brought home to the plaintiffs, directly or indirectly. The completeness of the proof of connection between the acts of the defendants and the loss of the plaintiffs, does not vary, although it may tend to confuse the aspects of the case. The single question is, whether a plaintiff can successfully claim a legal injury to himself from another, because the latter has injured a third person in such a manner that the plaintiffs' contract liabilities are thereby affected. An individual slanders a merchant and ruins his business; is the wrong doer liable to all the persons, who, in consequence of their relations by contract to the bankrupt, can be clearly shown to have been damnified by the bankruptcy? Can a fire insurance company, who have been subjected to loss by the burning of a building, resort to the responsible author of the injury, who had no design of affecting their interest, in their own name and right? Such are the complications of human affairs, so endless and far-reaching the mutual promises of man to man, in business and in matters of money and property, that rarely is a death produced by a human agency, which does not affect the pecuniary interest of those to whom the deceased was bound by contract. To open the door of legal redress to wrongs received through the mere voluntary and factitious relation of a contractor with the immediate subject of the injury, would be to encourage collusion and extravagant contracts between men, by which the death of either through the involuntary default of others, might be made a source of splendid profits to the other, and would also invite a system of litigation more portentous than our jurisprudence has yet known. So self-evident is the principle that an injury thus suffered is indirectly brought home to the party seeking compensation for it, that courts have rarely been called upon to promulgate such a doctrine. The case, however, of *Anthony v. Slaid*, 11 Metc., 290, referred to at the bar, is in point. A contractor for the support of paupers had been subject to extra expense by means of a beating which one of those paupers had received, and he sought from the assailant a recovery of the expenditure. But the court held that the damage was remote and indirect; having been sustained not by means of any natural or legal relation between the plaintiff and the party injured, but by means of the special contract by which he had undertaken to support the town paupers.

The case, however, would present a different aspect, if, by virtue of the contract between the railroad company and the deceased, a direct relation was established between the former and the insurers. If the contract for the transportation of Dr. Beach safely, either in its terms, or through its necessary legal incidents, or by fair inference as to the intent of the parties, devolved upon the railroad company, a duty towards the present plaintiffs, the latter might sue for a violation of that duty. An obligation thus imposed will not always require a suit for its breach to be brought by a party to the contract; an independent right of action resides in the party to whom the duty was to be performed. In this respect there is no difference between an obligation imposed by law and by contract. Where the duty of keeping a highway is lodged in a certain quarter by statute, the way is to be kept in repair by the public, for everybody, and when any person is injured by its defects, the breach of duty is to him, and he has an action for the violation of his right. If a stage coach proprietor agrees with a master to carry his servant, and injures the latter on the road, he is liable directly to the servant; for although undertaken at the request of and by agreement with another, the duty was directly to the party injured. Longmeid and ux. v. Holliday, 6 Eng. Law & Eq. R. 563. But it is evident that the present case cannot be brought within the principle of such decisions. It would be unfair to argue, that when two parties make a contract, they design to provide for an obligation to any other persons than themselves and those named expressly therein, or to such as are naturally within the direct scope of the duties and obligations prescribed by the agreement. On this point it is enough to say, that when an agreement is entered into, neither party contemplates the requirement from the other, of a duty towards all the persons to whom he may have a relation by numberless private contracts, and who may therefore be affected by the breach of the other's undertakings. We cannot find that any public law charged the present defendants with any duty to the plaintiffs regarding Dr. Beach's life; nor can we see that Dr. Beach exacted, either expressly or by reasonable intendment, any obligation from the defendants towards the insurers of his life, when he contracted for his transportation to New York. Had the life of Dr. Beach been taken with intent to injure the plaintiffs through their contract liability, *a different question would arise, inasmuch as every man owes a duty to every other not intentionally to injure him.*

We decide, that in the absence of any privity of contract between the plaintiffs and defendants, and of any direct obligation of the latter to the former growing out of the contract or relation between the insured and the defendants, the loss of the plaintiffs, although due to the acts of the railroad company, being brought home to the insurers only through the artificial relation of contractors with the party who was the immediate subject of the wrong done by the railroad company, was a remote and indirect consequence of the misconduct of the defendants, and not actionable.

Since the determination of this case we have observed a decision recently made in Maine, *Rockingham M. F. Ins. Co. v. Boshier*, 39 Maine R. 253, fully confirming the legal theory which we have advanced. The suit was brought against a party who had wilfully fired a store, by the insurance company, who had paid the consequent loss, and in their own name. The court dismissed the action on demurrer; taking the same view of the common law doctrine which we have expressed, relative to the indirect and remote manner in which the interests of the insurer were prejudiced by the misconduct of the wrong doer.

The cases in which insurers have been permitted to recover against the authors of their losses, are not in contravention of these principles. They have recovered, not by color of their own legal right, but under a general doctrine of equity jurisprudence, commonly known as the doctrine of subrogation, applicable to all cases, wherein a party, who has indemnified another in pursuance of his obligation so to do, succeeds to, and is entitled to a cession of, all the means of redress held by the party indemnified against the party who has occasioned the loss. In some instances the doctrine has been carried so far, that an insurer has been permitted to recover from the insured such compensation as the latter has subsequently obtained from the wrong doer; as if the money paid by the tort feisor, under such circumstances, was really paid for the use of the insurer. By virtue of this doctrine, there is no doubt of the right of an insurer, who has paid a loss, to use the name of the insured, in order to obtain redress from the author of the wrong; a right to be exercised for the benefit of the party equitably entitled to its benefits, not to be enforced by its possessor in his own name, but by him as the successor to the remedies of the person whom he has indemnified. Having no independent claim on the wrong doer, he might be successfully met by the superior equities of the wrong doer, such for instance as a payment to the party directly injured, without notice of the insurer's claim to be subrogated. Nothing can be plainer than that an indirect liability of this kind is an argument rather against the claim of a direct responsibility of the wrong doer, than a suggestion in its favor. The views taken by courts in recognizing the insurer's right of subrogation, tend to sustain the principle which we now maintain. [See case of *Propeller Monticello*, 17 How. R. 154. *Mason v. Sainsbury*, 26 E. C. L. R. 36; *Yates v. White*, 33 E. C. L. R. 349; *Quebec Fire Ins. Co. v. St. Louis*, 22 Eng. Law & Eq. Rep. 73; *Hart v. W. B. R. Co.*, 13 Met. 99.]

We advise the superior court to render judgment for the defendants. In this opinion, the other judges, WAITE and HINMAN, concurred.

*Judgment for defendants.*¹

¹ *Acc. v. Insurance Co. v. Brame*, 95 U. S. 754 (1877).

See *Harding v. Town of Townshend*, 43 Vt. 536 (1871); *Bradburn v. Great Western Ry. Co.*, L. R. 10 Ex. 1 (1874); *Grand Trunk Ry. Co. v. Jennings*, 13 App. Cas. 800 (P. C., 1888). — ED.

CHAPTER X.

CONDITIONS APPLICABLE AFTER LOSS.

SECTION I.

*Marine Insurance.*¹

LENOX v. UNITED INS. CO.

SUPREME COURT OF NEW YORK, 1802. 3 Johns. Cas. 224.

THIS was an action on a policy of insurance, dated the 13th March, 1800, on three boxes of muslins, on board of the vessel called the "Rambler," at and from New York to Monte Christo, etc. The goods were valued at \$2,610, the sum insured. The vessel was captured by the French during the voyage, and the plaintiff abandoned for a total loss. By the policy, the loss was made payable "thirty days after proof thereof." The plaintiff, at the time he abandoned and claimed a total loss, exhibited to the defendants the customary protest of the master, stating the loss, and the bill of lading and invoice of the goods. The two latter were not sworn to, and the defendants refused to admit the invoice, without the oath of the plaintiff, which he declined to give, as not requisite on his part.

At the trial, the interest, loss, and abandonment were fully proved by the plaintiff, and the jury found a verdict for the plaintiff for a total loss.

A motion was made to set aside the verdict, and for a new trial.

Hamilton, for the plaintiff.

Harrison and Troup, *contra*.

THOMPSON, J. The true question arising out of the above case, and which is submitted to the decision of the court, appears to be to determine what is the construction to be given to that part of the policy which declares "that the loss is made payable in thirty days after proof thereof." On the part of the defendant it is contended that proof of loss is a condition precedent; that the plaintiff commenced his action prematurely, without producing to the underwriters the kind of proof contemplated by the policy; that the proof previously necessary to be exhibited, must be proof of interest as well as loss, and that by witnesses, or at least by the oath of the party himself. In the present

¹ For notice of abandonment, as a step toward a claim for constructive total loss, see *ante*, Chap. VIII, Sect. I, (C). — Ed.

case, no such proof was offered before the commencement of the plaintiff's action. The evidence of loss and interest exhibited to the defendants consisted of the customary protest, and the bill of lading, and invoice of the muslins; but the bill of lading was not sworn to. On the part of the plaintiffs it is contended that these were all that were necessary to be offered, in order to satisfy the terms of the contract.

It is a governing rule, in expounding policies of insurance, as well as other contracts, that the intent of the parties ought to be sought after and carried into effect where it can be discovered from the instrument itself. Proof, in strict legal construction, means evidence before a court or jury, in a judicial way. It is certain, however, that such could not have been the understanding of the parties to this contract as to the meaning of the term. And it was not contended by the defendants' counsel that such kind of proof was contemplated; but that proof collateral, and out of court, would satisfy the terms of the contract; that this proof must be either by witnesses, or by the affidavit of the plaintiff.

The parties to a contract have undoubtedly a right to modify it as they think proper, and to impose on each other such restrictions as they shall choose, if not illegal. So that, if it was clearly inferrible from the instrument, that it was the intent of the parties, that before the loss was payable, proof by witnesses, or by the oath of the party, of both loss and interest, must be exhibited to the underwriters, the contract ought to be so construed as to carry that intention into effect. But I think the terms do not necessarily warrant such an inference, and all rational presumption is against such conclusion. It is not fairly to be presumed that the plaintiff would lay himself under restrictions that might totally prevent a recovery in case of a loss; and such might be his situation in case it was necessary for him to produce proof by witnesses, of his interest and loss, before he could bring his action, as no mode is provided in the law to compel witnesses to appear before any officer or magistrate to attest to such facts. Although it was in the power of the plaintiff, by his own affidavit, to attest to his interest, yet, in my judgment, that ought not to be required, unless it was essential, in order to satisfy the terms of the contract. And although I do not think it necessary, for the purpose of deciding the present question, to determine how far voluntary oaths ought to be tolerated, yet I do not hesitate to say they ought, very rarely, if ever, to be administered.

It is a circumstance worthy of notice that by this policy the loss is made payable in thirty days after proof of loss only, and not after proof of loss and interest; and although on the trial it is incumbent on the insured to prove his interest as well as loss, yet he would be bound to do this, independent of this clause in the policy. This is a clause peculiar to our own policies, and I cannot think it ought to receive a construction that will impose on the insured the necessity of producing the same proof preliminarily, that would be requisite on the trial, to entitle him to recover. Admitting, therefore, that proof necessarily im-

plies evidence under oath, still, as to loss (which is all that is expressly required by the policy), the protest of the captain furnishes that species of proof. It was stated in argument by the plaintiff's counsel, and not denied by the defendants, that policies had lately undergone an alteration in this clause; that formerly the loss was made payable in so many days after proof of loss and interest, but that lately the word *interest* had been expunged. Taking this, then, as a fact, it would afford a strong inference that it was the intention of the parties to dispense with any proof of interest, as a preliminary step under this clause; at all events, that nothing more should be required than the usual documents, to wit, the invoice and bill of lading. The interest of commerce, as well as the convenience of parties, demands this construction, unless forbidden by the terms of the contract, and more especially as the clause is peculiar to our own policies. One of the principal objects of this clause, no doubt, was to give the underwriters time to determine, after being apprized of the loss, whether they would pay without a suit; and for the purpose of furnishing them with evidence on which to ground their determination, they ought to have offered what may afford them a reasonable satisfaction, according to the course of mercantile business. I am, therefore, of opinion that the documentary proof, to wit, the protest, bill of lading, and invoice of the goods insured, were all the preliminary proofs necessary for the plaintiff to exhibit to the underwriters, previous to his bringing his action, according to the legal import and true interest and meaning of this clause in the policy; and more especially, in the present case, as it is stated, that the plaintiff's interest and loss were fully proved on the trial, and the only possible benefit resulting to the defendants from the contrary construction, would be to turn the plaintiff round to bring a new suit. This consideration ought not, however, to influence the decision, if it was clearly made necessary by the contract that the preliminary proof should be different from that offered. But as I do not think that requisite, I am of opinion the verdict ought not to be set aside.

RADCLIFF, J.¹ The question is whether by the terms of the policy the plaintiff was obliged to make oath of his interest in the cargo before he was entitled to demand payment of the defendants. . . . The expression is general, "thirty days after proof of loss." It must be taken in connection with the subject-matter, and according to the usual course of such proceedings. The loss itself is usually proved by the protest of the captain. . . . As far as proof of interest may be required, independent of the captain's protest, I think it can only be construed to mean the usual documentary proofs attending the subject, the bill of lading, invoice, and other papers, if there be any. These satisfy the terms of the expression, granting that proof of loss also implies proof of interest, which may admit of some question. The parties in this case could not mean legal proof, which can only be taken in a course of legal proceeding. They plainly referred to a different mode of proof,

¹ The greater part of this opinion has been omitted. — ED.

before the commencement of any legal process, and I think could only have contemplated the production of that species of evidence which would satisfy a reasonable mind. . . .

Upon the whole, I am of opinion that there is no adjudged case which is decisive of the question before us, and that on principle and reason, and according to the usual course of such proceedings, the proof offered by the plaintiff was sufficient.

KENT, J. The only question raised in this case is, whether the plaintiff produced to the defendants proof of loss, before bringing his suit, sufficient to entitle him to recover ?

The plaintiff exhibited the protest, bill of lading, and invoice. This species of proof has been aptly termed documentary evidence. The interest of the assured may be proved by such documents. The bill of lading is always received as a document of the goods laden on board, and in the present case, the authenticity of the handwriting of the master was not questioned. The protest is, in mercantile understanding, high evidence of loss ; and it may well have been intended by the parties, since the strict proof requisite on a trial was surely never within their contemplation. As long as the words of the policy can be satisfied, by furnishing the papers that were produced, we ought not to extend them so far as to include proof by the oath of witnesses, or the oath of the party, which seems to have been required in the present case. The law will not sanction an oath administered, at the instance of an individual, when there is not a *lis pendens*, unless there be a positive provision for the case. Many difficulties would arise under the construction, that the parties intended proof by witnesses. These difficulties are avoided by confining the words to the vouchers respecting the property on board, and as to the loss ; and such vouchers are to be furnished to the insurer, not in the light of proof, technically considered, but as reasonable information or notice, upon which he is to act.¹ . . .

I am of opinion, accordingly, that the plaintiff is entitled to judgment.

LIVINGSTON, J., dissented.

LEWIS, C. J., not having heard the argument, gave no opinion.

*Judgment for the plaintiff.*²

¹ Here followed a discussion of authorities. — ED.

² See *Talcot v. Marine Ins. Co.*, 2 Johns. 130, 136 (1807).

In *Barker v. Phoenix Ins. Co.*, 8 Johns. 307, 317-318 (1811), KENT, C. J., for the court, said : "The act of abandonment, under the general law of insurance, and the furnishing the preliminary proofs, under the special stipulation in the policy, are distinct acts, and must not be confounded. The clause in the policy, that the loss is to be paid thirty days after proof thereof, gave rise to what is termed in our books *the preliminary proofs* ; and as its object was only to furnish reasonable information to the insurer, so that he might be able to form some estimate of his rights and duties, before he was obliged to pay, it has always been liberally expounded, and is construed to require only the best evidence of the fact that the party possesses at the time."

In *Lawrence v. Ocean Ins. Co.*, 11 Johns. 241 (1814), the insurance was on goods, and the defendants objected to the sufficiency of the preliminary proof, because the

proof of loss was only a copy of a letter from merchants to the owners of the ship, enclosing a letter which they had received from the master to the effect that the ship had been captured and condemned as prize; and it was held that the preliminary proof of loss was sufficient. THOMPSON, C. J., for the court, said: "The objection to the sufficiency of the preliminary proofs was properly overruled. The usual and customary documents, accompanied with an affidavit showing the interest of the assured, were exhibited to the underwriters, together with a copy of a letter from the master . . ., received from Messrs. Parish & Co., and which was the only evidence of loss in their possession; and this was all that could be required."

On the topic of this section, see also:—

Abel v. Potts, 3 Esp. 242 (1800);

Ruan v. Gardner, 1 Wash. C. C. 145, 148-149 (1804);

Haff v. Marine Ins. Co., 4 Johns. 132 (1809);

Craig v. United Ins. Co., 6 Johns. 226 (1810);

Allegre v. Maryland Ins. Co., 6 H. & J. 408, 410-412 (1825);

Pacific Ins. Co. v. Catlett, 4 Wend. 75, 83-84 (1829);

Child v. Sun Mut. Ins. Co., 3 Sandf. 26, 41-42 (1849);

Savage v. Corn Exchange F. & Inland Navigation Ins. Co., 4 Bosw. 1, 12-13 (1858);

Peoria M. & F. Ins. Co. v. Walser, 22 Ind. 73, 84-85, 87 (1864);

Fuller v. Detroit F. & M. Ins. Co., 36 Fed. R. 469, 474 (C. C. N. D. Ill., 1888).

—ED.

SECTION II.

Fire Insurance.

WORSLEY v. WOOD AND OTHERS, ASSIGNEES.

KING'S BENCH, IN ERROR, 1796. 6 T. R. 710.

THIS was an action of covenant brought in the Court of Common Pleas.¹ The declaration stated that by a policy of insurance made before Lockyer and Bream became bankrupts, namely, on the 9th of March, 1792, it was witnessed that Lockyer and Bream had paid £11 16s. to the Phoenix Company, and had agreed to pay to them, at their office, the sum of £11 16s. on the 25th of March, 1793, and the like sum yearly on the said day during the continuance of the policy for insurance from loss or damage by fire, not exceeding the sum of £7,000. That Worsley covenanted with L. and B. that so long as the assured should pay the above premium, the capital stock and funds of the Phoenix Company should be liable to pay to the assured any loss that the assured should suffer by fire on the property therein mentioned, not exceeding £7,000, according to the tenor of the printed proposals delivered with the policy. That in the printed proposals referred to by the policy it is declared that the company would not be accountable for any loss by fire caused by foreign invasion, civil commotion, etc.; and also that all persons assured sustaining any loss by fire should forthwith give notice to the company, and as soon as possible after deliver in as particular an account of their loss as the nature of the case would admit, and make proof of the same by their oath and by their book of accounts or other vouchers as should be reasonably required; and should procure a certificate under the hands of the minister and churchwardens and of some reputable householders of the parish not concerned in the loss, importing that they were acquainted with the character and circumstances of the person insured, and knew or believed that he by misfortune and without any kind of fraud or evil practice had sustained by such fire the loss and damage therein mentioned; and in case any difference should arise between the assured and the company touching any loss, such difference should be submitted to the judgment of arbitrators indifferently chosen, whose award should be conclusive, etc.; and when any loss should have been duly proved, the assured should immediately receive satisfaction to the full amount of the same. The declaration then stated that on the 1st of July, 1792, a loss happened by fire in the house of L. and B., in which all their books of account were destroyed to the amount of £7,000. That L. and B. on the same day gave notice of it to the company, and on the same day

¹ Reported in the Common Pleas, *sub. nom.* Wood v. Worsley, 2 H. Bl. 574 (1795).—Ed.

delivered to the company as particular an account of their loss as the nature of the case admitted, and were then and there also ready and willing and then and there tendered to make proof of the loss by their oath, and to produce such vouchers as could be reasonably required in that behalf; that on the same day they procured and delivered to the said company a certificate under the hands of four reputable householders of the parish, to the effect required in the printed proposals, and applied to E. Embry, the minister, and H. Hutchins and J. Bellamy, the churchwardens of the parish, to sign such certificate, but that they without any reasonable or probable cause wrongfully and unjustly refused and have ever since refused to sign it. The declaration then stated that the funds of the company were sufficient to pay this loss, yet the company have not paid it either to the bankrupts or to their assignees; nor have the company submitted the said difference to the judgment of such arbitrators, etc.¹ . . .

The defendant pleaded (to the first count) that the bankrupts were not interested in the house or goods, etc., at the time of the loss; on which issue was taken in the replication. 2dly. That the loss was occasioned by the fraud and evil practice of the bankrupts; on which issue was taken, etc. 3dly. That the minister and churchwardens did not refuse wrongfully and injuriously and without any reasonable or probable cause to sign the certificate; on which issue was taken. . . .

To the last of these pleas the plaintiffs replied that the bankrupts as soon as possible after the loss, namely, on the 1st of July, 1792, procured and delivered to the company such certificate as is required in the printed proposals under the hands of four respectable inhabitants, etc., but that the minister and churchwardens wrongfully refused to sign it without any reasonable or probable cause for so doing.

The rejoinder stated that the minister and churchwardens did not wrongfully refuse, etc.; on which issue was taken in the surrejoinder.

The jury found all the issues for the plaintiffs, and gave a verdict for £3,000.

The defendant below removed the record into this court by writ of error, and assigned for error that the declaration, the replication, and the other pleadings of the plaintiffs below were not sufficient in law to maintain the action.

This case was twice argued in this court, the first time in last Easter term by *Wood* for the plaintiff in error and *Lambe* for the defendants, and now by *Law* for the former and *Gibbs* for the latter.

LORD KENYON, C. J.² . . . This case requires our serious consideration, because the Court of Common Pleas have already given their opinion on it in favour of the plaintiff's claim, though it has been suggested that it was not the unanimous opinion of that court.³ We are called upon in this action to give effect to a contract made between

¹ In reprinting the statement, passages as to a second count have been omitted. — ED.

² A passage on the second count has been omitted. — ED.

³ Mr. Justice HEATH differed from the rest of the Court of C. B. — REP.

these parties; and if from the terms of it we discover that they intended that the procuring of the certificate by the assured should precede their right to recover, and that it has not been procured, we are bound to give judgment in favor of the defendant below. These insurance companies, who enter into very extensive contracts of this kind, are liable (as we but too frequently see in courts of justice) to great frauds and impositions; common prudence therefore suggests to them the propriety of taking all possible care to protect them from frauds when they make these contracts. The Phoenix Company have provided, among other things, that the assured should, as soon as possible after the calamity has happened, deliver in an account of their loss and procure a certificate under the hands of the minister and churchwardens and of some reputable householders of the parish, importing that they knew the character and circumstances of the assured, and believed that they had sustained the loss without any kind of fraud. That this is a prudent regulation this very case is sufficient to convince us; for it appears on the record that soon after the fire the assured delivered in an account of their loss which they said amounted to £7,000, that they obtained a certificate from some of the reputable inhabitants that the loss did amount to that sum, and that the jury after inquiring into all the circumstances were of opinion that the loss did not exceed £3,000, and yet it is also stated that the minister and churchwardens, who refused to certify that they believed that the loss amounted to £7,000, wrongfully and without any reasonable or probable cause refused to sign such certificate. The great question here is, Whether or not it was the intention of these parties that that certificate should precede payment by the insurance office; now it seems to me from the printed proposals that it was their intention that it should precede payment. What is a condition precedent or what a condition subsequent is well expressed by my brother Ashhurst in the case of *Hotham v. The East India Company*,¹ to which I refer in general. If there be a condition precedent to do an impossible thing, the obligation becomes single; but however improbable the thing may be, it must be complied with, or the right which was to attach on its being performed does not vest. If the condition be that A. shall enfeoff B., and A. do all in his power to perform the condition, and B. will not receive livery of seisin, yet from the time of Lord Coke to the present moment it has not been doubted but that the right which was to depend on the performance of that con-

¹ In *Hotham v. East India Co.*, 1 T. R. 638, 645 (1787), the action being covenant on a charter-party, ASHHURST, J., for the court, said: "There are no precise technical words required in a deed to make a stipulation a condition precedent or subsequent; neither doth it depend on the circumstance, whether the clause is placed prior or posterior in the deed, so that it operates as a proviso or covenant. For the same words have been construed to operate as either the one or the other, according to the nature of the transaction. The merits therefore of the question must depend on the nature of the contract, and the acts to be performed by the contracting parties, and the subsequent facts disclosed on the record, which have happened in consequence of this contract." — ED.

dition did not arise. In the case of *Hesketh v. Gray*,¹ which has been cited as a determination in this court, there was also an application to the great seal at the time when Lord Ch. J. Willes was the first commissioner to dispense with the condition, which was that the Bishop of Chichester should accept the resignation of a living; but it was held that there was no ground for a Court of Equity to interfere. This court also held, when the case came before them, that it was a condition precedent and must be performed.

In this case, however, it is said that, though the minister and churchwardens did not certify, some of the inhabitants did certify, and that that was sufficient, it being a performance of the condition *cy près*. But I confess I do not see how the terms *cy près* are applicable to this subject; the argument for the plaintiffs below goes to show that if none of the inhabitants of this parish certified, a certificate by the inhabitants of the next or of any other parish would have answered the purpose. But the assured cannot substitute one thing for another. In the case of *Campbell v. French*,² we explained the grounds of this doctrine, and said that the party who had not complied with the condition could not substitute other terms or conditions in lieu of those which all the parties to the contract had originally made. So here it was competent to the insurance office to make the stipulations stated in their printed proposals, they had a right to say to individuals who were desirous of being insured, "Knowing how liable we are to be imposed upon, we will, among other things, require that the minister, churchwardens, and some of the reputable inhabitants of your parish shall certify that they believe that the loss happened by misfortune and without fraud, otherwise we will not contract with you at all." If the assured say that the minister and churchwardens may obstinately refuse to certify, the insurers answer, "We will not stipulate with you on any other terms." Such are the terms on which I understand this insurance to have been effected; and therefore I am clearly of opinion that there is no foundation for the action, and that the judgment below must be reversed.³

*Judgment reversed.*⁴

¹ Sayer, 185 (1755). — ED.

² 6 T. R. 200 (1795). — ED.

³ Concurring opinions by ASHHURST, GROSE, and LAWRENCE, JJ., have not been reprinted. — ED.

⁴ Other early cases on provisions as to certificates are: *Oldman v. Bewicke*, 2 H. Bl. 577, n. (1785); *Routledge v. Burrell*, 1 H. Bl. 254 (1789).

See *London Guarantie Co. v. Fearnley*, 5 App. Cas. 911, 916, 918 (1880). — ED.

MASON v. HARVEY.

EXCHEQUER, 1853. 8 Exch. 819.

ASSUMPSIT on a policy of insurance effected by the plaintiff, a pawnbroker, with the Norwich Union Fire Insurance Society. The declaration stated the insurance to be (*inter alia*) £150 on the shop of the plaintiff, and £1,000 on pledges received under the 39 & 40 Geo. III. c. 99; also that there was indorsed on the policy the following (among other) conditions¹: — “Eighth: Whenever any fire shall happen, the party insured shall give immediate notice thereof to one of the secretaries or agents of the society, and within three calendar months deliver to such secretary or agent, under his or her hand, accounts exhibiting the full particulars and amount of the loss sustained, estimated with reference to the state in which the property destroyed or damaged was immediately before the fire happened; and such accounts shall, if required by the directors, be supported by the oral testimony, and by the depositions or affirmations in writing of the claimant, and of his or her servants, and by the production of his or her books and vouchers.” The declaration alleged that, whilst the property continued so insured, the “said shop and divers pledges received under the 39 & 40 Geo. III. c. 99, and then being in the said shop, were damaged and destroyed by fire,” etc. — Breach, that the loss which so happened has not been made good to the plaintiff.

Plea, that the plaintiff did not, within the period of three calendar months after the said shop and pledges were so damaged and destroyed by fire, deliver to any secretary or agent of the said society, under his hand, any such accounts as are in and by the eighth condition mentioned and required, exhibiting the full particulars and amount of the loss sustained by the plaintiff as alleged, estimated with reference to the state in which the property damaged and destroyed was immediately before the fire happened by which the property was so damaged and destroyed.

Demurrer and joinder.

Unthank, in support of the demurrer. The plea is bad in substance. A compliance with the requisitions of the condition in question is not a condition precedent to the plaintiff's right to sue on the policy, but only renders him liable to an action for his breach of duty. The case falls within the principle of the decisions, that, where a person takes an estate or benefit under a contract, subject to a duty, the law will imply an undertaking to perform it; for the breach of which an action may be maintained: *Burnett v. Lynch*, 5 B. & C. 589. The language and sense of the condition are alike opposed to its construction as a condition precedent; and, moreover, it would be unjust so to construe it.

¹ Some of the conditions expressly declared that, in case of non-compliance with their requisitions, “the policy will become void.” — *REP.*

Suppose the plaintiff delivered particulars of his loss, but some few of the pledges were omitted, is he on that account to be deprived of the whole benefit of the policy? [POLLOCK, C. B. The term "full particulars" must mean the best particulars the assured can reasonably give; otherwise it might happen that, if by some inadvertence a duplicate was omitted, or mentioned as lost when in fact it was not, the assured could not recover at all.] The only case on the subject is that of *Worsley v. Wood*, 6 T. R. 710; s. c., in error, 2 H. Blac. 574, where one of the conditions of the policy was, that persons insured should procure a certificate of the minister, churchwardens, and some reputable housekeepers of the parish, importing that they were acquainted with the character of the assured, and believed that he had really sustained the loss without fraud; and it was held that the procuring such certificate was a condition precedent to the right of the assured to recover; and that it was immaterial that the minister and churchwardens wrongfully refused to sign the certificate. In that case, however, the same injustice would not arise from construing the stipulation as a condition precedent, since it might be complied with at any time. [PLATT, B., referred to *Oldham v. Bewicke*, 2 H. Blac. 557, note.]

Crowder (Brewer with him) *contra*. The delivery of particulars of the loss is a condition precedent to the right of the assured to recover. *Worsley v. Wood* in effect decides this case. The assured is bound to give the best particulars which he can under the circumstances. He was then stopped by the court.

POLLOCK, C. B. By the contract of the parties, the delivery of the particulars of loss is made a condition precedent to the right of the assured to recover. It has been argued that such a construction would be most unjust, since the plaintiff might be prevented from recovering at all by the accidental omission of some article. But the condition is not to be construed with such strictness. Its meaning is, that the assured will, within a convenient time after the loss, produce to the company something which will enable them to form a judgment as to whether or no he has sustained a loss. Such a condition is, in substance, most reasonable; otherwise a party might lie by for four or five years after the loss, and then send in a claim when the company perhaps had no means of investigating it. The plaintiff may have liberty to amend by withdrawing the demurrer, otherwise judgment for the defendant.

ALDERSON, B., PLATT, B., and MARTIN, B., concurred.

*Amendment accordingly.*¹

¹ See *Inman v. Western F. Ins. Co.*, 12 Wend. 452 (1834); *Davis v. Davis*, 49 Me. 282 (1862); *Doyle v. Phoenix Ins. Co.*, 44 Cal. 264 (1872); *Home Ins. Co. v. Lindsey*, 26 Ohio St. 348 (1875); *Baker v. German F. Ins. Co.*, 124 Ind. 490 (1890); *Peabody v. Satterlee*, 166 N. Y. 174, 179-180 (1901). — ED.

PROTECTION INS. CO. v. PHERSON.

SUPREME COURT OF INDIANA, 1854. 5 Ind. 417.

ERROR to the Shelby Circuit Court.

DAVISON, J. Assumpsit by George Pherson, surviving partner of the late firm of J. and G. Pherson, against the Protection Insurance Company of Hartford, Conn., upon a policy of insurance against fire for \$2,500 on a stock of goods at Boggstown, Shelby County. The policy was issued to J. and G. Pherson, on the 26th of February, 1851, for one year from that date, and on the 31st of March, in the same year, the storehouse, with all the goods insured, was consumed by fire. Plea, the general issue. Verdict for the plaintiff. New trial refused, and judgment on the verdict.

The company, in her defence to the action, set up: 1. That threats had been made against George Pherson, which induced him to fear that the store would be fired; and to provide against danger in that respect, the insurance was effected, without notifying the company's agent that such threats had been made. 2. That the plaintiff himself had burned or connived at the burning of his own goods. 3. That the plaintiff had failed to procure the certificate of a magistrate or notary, as required by the eighth condition of the policy.

The first and second points raised no question of law. They were properly left to the consideration of the jury, and the verdict, so far as it relates to them, was, in our opinion, supported by the weight of evidence.

But the policy contained a clause, designated as its eighth condition, which provided that "all persons insured by said company and sustaining loss or damage by fire, shall, if the property insured is situated one mile from the city of Cincinnati, forthwith procure a certificate under the hand of a magistrate or notary public (most contiguous to the place of the fire and not concerned in the loss or related to the insured) that he has made due inquiry into the cause of the fire, and also as to the value of the property destroyed, and is acquainted with the character and circumstances of the person insured, and does believe that he really and by misfortune, and without fraud or evil practice, hath sustained, by such fire, loss and damage to the amount claimed," etc.

It was proved that one John McConnell, at the time of the fire, was an acting justice of the peace, who resided and kept his office within thirty rods of the place where the fire occurred, and that he was not concerned in the loss, or related to the insured; that Pherson called on said justice and requested of him a certificate, pursuant to the above condition, but he declined giving it; and that afterwards, on the 9th of April, 1851, the requisite certificate was obtained from William A. Stewart, a justice whose residence and office were at least a mile and a

half from the place of the fire; and that on the 1st of July in the same year, Pherson procured another certificate from James Harrison, a notary public, who kept his office and resided nine miles from the place where the goods were consumed.

The court, upon this branch of the case, charged the jury as follows:—

“It may not be so manifest that the plaintiff ought to fail if the magistrate or notary most contiguous to the place of the fire, not concerned in the loss, or related to the insured, should refuse to give the certificate contemplated by the eighth condition annexed to the policy; yet such is the law. It is more than the law. It is the express contract of the parties. Consequently, if at the time of the fire and afterwards, the residence and usual place of business of Justice McConnell, who declined giving the certificate, was materially nearer to the place of the fire than was the residence and usual place of official business of Justice Stewart or Notary Harrison, whose respective certificates have been produced, the verdict must be for the defendant.”

These instructions are not strictly correct. The word “materially,” in the connection in which it is used by the court, produces a misconstruction of the condition above quoted. That clause in the policy plainly designates the magistrate or notary whose residence was nearest the place of the fire, and disinterested and not related to the assured, as the person alone competent to make the requisite certificate. The condition, in that respect, is sufficiently explicit. It shows the intent of the parties, and that intention must govern its construction. Any difference in point of distance, from the place where the fire occurred, between the residence of McConnell and Stewart, was material. But it was made so by express contract, and the jury were bound to regard such difference in distance as material, without any further inquiry on their part. If McConnell was qualified to act under the condition, and resided “most contiguous” to the place where the goods were consumed, nothing short of his certificate would authorize a recovery in this case. It is said in argument, that “in determining the contiguity of the magistrate, distances will not be nicely calculated.” 25 Wend. 374.¹ Suppose that position to be correct, its force, when applied to

¹ In *Turley v. North American F. Ins. Co.*, 25 Wend. 374, 378 (1841), NELSON, C. J., for the court, said: “It seems the residence of a notary happens to be a few feet nearer the fire . . . and we are asked to go into nice calculation of distances and settle the point upon the laws of mensuration. *De minimis, etc.*, is a sufficient answer to this objection. The spirit of the condition requires no such mathematical precision from the assured.”

In *American Central Ins. Co. v. Rothchild*, 82 Ill. 166 (1876), SCOTT, J., for the court, said: “We will enter into no calculations to ascertain whether the office or residence of the officer who made the certificate . . . was a few feet nearer or more distant from the exact point where the fire occurred, than that of another notary or justice.”

In *Williams v. Niagara F. Ins. Co.*, 50 Ia. 561, 565 (1879) SEEVERS, J., for the court, said: “The provision in the policy that the certificate therein required must be given by the nearest magistrate or notary public was, without serious doubt, inserted

the case before us, is not perceivable. The evidence proves beyond a doubt that McConnell resided thirty, and Stewart at least four hundred and eighty, rods from the place of the fire. It therefore required no nice calculation to determine who was the magistrate "most contiguous." If, in relation to that point, there was any conflict of evidence, the verdict might be regarded as conclusive; but the proof that McConnell was the nearest magistrate and fully qualified to act under the condition, is too clear to admit of controversy.¹ . . .

We are of opinion that, in the case at bar, the company was not held to pay, unless the specified certificate had been obtained by the assured from the nearest magistrate. This has not been done, and the judgment must therefore be reversed.

Per curiam. The judgment is reversed with costs.² Cause remanded, etc.

J. Morrison and S. Major, for the plaintiffs.

W. J. Peaslee and M. M. Ray, for the defendant.

for the purpose of preventing the insured from selecting the officer to perform such duty. While this is so, the provision must have a reasonable instead of a literal construction. It does not, we think, require that the distance should be determined by the extension of a straight line, or that a surveyor should be called in and an exact measurement taken. *Turley v. North American F. Ins. Co.*, 25 Wend. 374. Nor is it required that the assured should cross lots. In the absence of bad faith on the part of the assured in selecting the officer nice distinctions as to distance should not be indulged. A few feet more or less cannot be material."

See *Smith v. Home Ins. Co.*, 47 Hun, 30, 40-41 (1888). — Ed.

¹ A passage on the authorities has been omitted. — Ed.

² In *Cornell v. Hope Ins. Co.*, 3 Mart. N. S. 223 (1825), the provision requiring a magistrate's certificate was recognized as creating a condition precedent to the right of recovery.

In *Roumage v. Mechanics F. Ins. Co.*, 13 N. J. L. (1 J. S. Green) 110 (1832), the nearest officer certified to fair character and accidental loss, but also certified that because of lack of knowledge he was not justified in naming the amount; and this was held fatal.

In *Leadbetter v. Etna Ins. Co.*, 13 Me. 265 (1836), the two nearest magistrates refused a certificate, for a reason not known, but the next nearest magistrate gave a certificate; and this was held fatal.

In *Johnson v. Phoenix Ins. Co.*, 112 Mass. 49 (1873), two magistrates were appealed to for a certificate, but it was not obtained; and this was held fatal.

In *Gilligan v. Commercial F. Ins. Co.*, 20 Hun, 93 (1880), s. c. affirmed, without opinion, 87 N. Y. 626 (1881), the certificate was from an officer whose office was about twenty-five rods from the fire, although other officers had places of business at least ten rods nearer, and the insurance company pointed out that the certificate was not from the nearest office; and this defect was held fatal.

In *Logan v. Commercial Union Ins. Co.*, 13 Can. S. C. 270 (1886), the policy required a certificate from two magistrates most contiguous to the place of the fire. The two most contiguous magistrates refused a certificate, but a certificate was obtained from two others; but this was held fatal.

In *Agricultural Ins. Co. v. Bemiller*, 70 Md. 400 (1889), the officer living nearest the fire gave a certificate containing all essential facts, except the amount of loss, and stating ignorance of the amount, but the officer having an office nearest the fire gave a complete certificate; and it was held that there was a fulfilment of the requirement of a certificate from the officer "living nearest the place of fire."

In *Kelly v. Sun Fire Office*, 141 Pa. 10, 19-21 (1891), it was held that the provision

KNICKERBOCKER INS. CO. v. GOULD ET AL.

SUPREME COURT OF ILLINOIS, 1875. 80 Ill. 388.

WRIT of error to the Circuit Court of DuPage County; the Hon. SILVANUS WILCOX, Judge, presiding.

Mr. *A. C. Story*, for the plaintiffs in error.

Mr. *B. D. Magruder*, for the defendant in error.

Mr. Justice CRAIG delivered the opinion of the court.

This was an action of assumpsit, brought by John S. and William Gould, in the Superior Court of Cook County, against the Knickerbocker Insurance Company of Chicago, on a policy of insurance of \$2,500, on certain goods contained in the mill of the plaintiffs, located at the corner of Beach and Polk Streets, in Chicago, which was destroyed by the Chicago fire of October, 1871.

On the motion of the defendant, the venue of the cause was changed to DuPage County, where a trial was had before a jury, resulting in a verdict and judgment in favor of the plaintiffs for \$2,905.41.

It is first urged, that the judgment cannot be sustained because timely notice of the loss was not given by the insured to the company.

The policy provides, that "in case of loss, the assured shall give immediate notice thereof in writing, and shall render to the company a particular account of said loss, in writing, under oath, stating the time, origin, etc." The goods mentioned in the policy were burned on the 8th or 9th of October, 1871. After the fire, an inventory of the goods destroyed was made out and delivered to the secretary of the company on the 13th day of November following. No objection whatever was made by the company in regard to the form of the proof, nor was any

as to the magistrate's certificate is valid; and the court's earlier views to the contrary were disapproved.

In *Lane v. St. Paul F. & M. Ins. Co.*, 50 Minn. 227 (1892), the plaintiff alleged that the nearest magistrates on account of groundless prejudice refused to give the certificate; and it was held that nevertheless the failure to furnish the certificate was fatal.

In *Ætna Ins. Co. v. People's Bank*, 8 U. S. App. 554 (C. C. A. Fourth Circuit, 1894), s. c. 10 C. C. A. 342, the policy contained a provision that, if required, the insured should "furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of the fire." Without being requested to do so, the insured attempted to get the certificate of one official, and finally filed a certificate from a notary who was related to himself, though having married his cousin. The company notified the insured that the certificate was defective; but no other certificate was furnished. It was held that this was fatal.

In *Home F. Ins. Co. v. Hammang*, 44 Neb. 566, 576-578 (1895), and *German-American Ins. Co. v. Norris*, 100 Ky. 29, 33-34 (1896), the provision requiring an official's certificate was held to be invalid; and in *Lang v. Eagle F. Co.*, 12 N. Y. App. Div. 39, 46 (1896), it was held that the provision is satisfied by obtaining the certificate of the nearest official who is willing to act. — ED.

objection interposed that previous notice of the loss had not been given, but the proofs of loss were retained. Nothing was paid on the policy, nor did the company take any action in regard to the claim.

It will be observed, that the language employed in the policy in regard to notice and proof of loss is peculiar: "In case of loss, the assured shall give immediate notice thereof, in writing, and shall render to the company a particular account of said loss, in writing." The language used would seem to indicate that it was the intention that notice of loss and proofs of loss should be furnished the company at the same time, unless the two portions of the sentence are closely connected by the word "and." It is not indicated in the first clause to whom the notice shall be given, nor is there any time specified in the last clause when proof of loss shall be rendered.

If this construction be the correct one, then the word "immediate" must receive a liberal construction, in order to carry out the manifest intent of the parties, as it is apparent that it was impossible immediately to furnish proofs of loss. This view seems more reasonable by referring to another provision in the policy, which is as follows: "Do insure, etc., to the amount of \$2,500, against all such immediate loss or damage as may occur by fire, etc., to be paid sixty days after *due notice* and proofs of the same, made by the assured, are received at the office of this company."

Here the words "due notice," not "immediate notice," are used, and the loss that may occur is to be paid sixty days after notice and proofs are received. If it had been within the contemplation of the contracting parties not to require notice and proofs of loss to be given at the same time, it is but reasonable to presume the payment of loss would have been specified to be made sixty days after notice of loss given or sixty days after proof of loss. When all the provisions of the policy are considered together, we feel warranted in giving the word "immediate" a liberal construction. This, too, is in harmony with the authorities.

In the *Peoria Marine and Fire Ins. Co. v. Lewis*, 18 Ill. 553, where the question arose whether the notice of loss had been given within the time required by the conditions of the policy, it was said: "The provisions in the conditions that notice is forthwith to be given of the loss, means within a reasonable time under the circumstances — the use of due diligence."

May, in his work on Insurance, states the rule in regard to notice of loss thus: "If the notice be required to be forthwith, or as soon as possible, or immediately, it will meet the requirements if given with due diligence under the circumstances of the case, and without unnecessary and unreasonable delay, of which the jury are ordinarily to be the judges."

Under the rule here announced, which is substantially the same as held by this court in the case cited *supra*, the question presented is,

whether the notice given under the circumstances was a substantial compliance with the provision of the policy.

The fire which consumed plaintiffs' property was a general conflagration. It spread over and consumed more than one hundred acres of the principal business portion of the city of Chicago. Business of all kinds was demoralized, and, to great extent, suspended. The office of the defendant, together with its books and papers, was destroyed.

The plaintiffs, who had been engaged in a large manufacturing business, held a large number of policies of insurance on their property. Time was absolutely necessary for them to arrange their papers, procure the necessary blanks, and learn the location of the offices of the insurance companies, before they could give notice of loss and furnish proofs.

Under all the circumstances of the case, we cannot say there was an unreasonable delay.

To give the word "immediate" a literal interpretation would defeat the ends of justice, and, in a case of this kind, require of the insured an impossibility, as the office of the company had been destroyed, and the plaintiffs had no information as to the location of the officers or agents of the company, and hence it was impossible, forthwith, to give the notice and furnish proof of loss.

It is also urged that the averments of the declaration were not sufficient, as to the value of the property destroyed and the amount of other insurance on the same.

Whether the declaration would have been regarded sufficient on demurrer, is a question that does not arise, as no demurrer was interposed.

We perceive no variance between the proof introduced and the declaration, and we are aware of no ground upon which the court could have sustained the motion of the defendants to exclude the evidence from the jury.

Had the defendants regarded the declaration insufficient, the proper mode to reach the defect was by demurrer.

It is also claimed, that the court erred in permitting the proofs of loss to be introduced as evidence of the kind, value, and amount of property destroyed.

Upon an examination of the record, we do not find the proofs were introduced for the purpose indicated.

The record discloses the fact, that the proofs were offered in evidence; for what purpose, however, the record is silent. They were objected to, but upon what grounds does not appear. The objection was overruled and the evidence was admitted to the jury.

It was proper to introduce, in evidence, the proofs of loss, for the purpose of establishing the fact that such proofs were made and delivered to the company as was required by the terms of the policy, and such, no doubt, was the object and purpose of the evidence.

The amount of actual loss seems to have been fully established by testimony entirely independent of the proofs of loss.

In *Lycoming Ins. Co. v. Rubin*, 79 Ill. 402, a contrary doctrine seems to have been impliedly approved. But in that case the insurance company insisted it was error to allow such proofs to go to the jury. The party insured conceded, in the argument, that this was error; but insisted that the supposed error was cured by instructions. The court, assuming that it was error, held it was not cured by instructions, and reversed the judgment upon the ground that, aside from the proofs referred to, the amount of the damages in the case could not be supported by the other evidence. The true rule is, that the proofs of loss are proper to show a compliance with the terms of the policy, but are not to be considered in ascertaining the amount of damages.

Nor do we see any force in the objection, that parol proof was admitted of the amount of insurance held by the plaintiffs on the property in other companies.

It was certainly competent to establish, by parol proof, the fact that plaintiffs were insured in other companies, and the evidence of the amount of such insurance cannot be said to be proving the contents of a writing by parol.

There was no issue involved which required the production of the policies held in other companies. Their terms and conditions were of no importance, and it was not necessary to establish their contents.

It is next urged that the court erred in giving plaintiffs' third and fourth instructions, which were as follows:—

“3. If the jury believe, from the evidence, that there was such a loss of the property described in the declaration herein as is therein set out, then they are authorized in determining for themselves, from all the facts and circumstances of this case, as developed by the evidence, whether or not, after said loss, the plaintiffs gave immediate notice thereof in writing to defendant.

“4. If the jury believe, from the evidence, that there was a loss of the property described in the declaration, as therein stated, and that after said loss the plaintiffs did not give immediate notice thereof in writing, yet if they, at the same time, find, from the evidence, that on or about November 13, 1871, the plaintiffs submitted to defendant proofs of said loss, as required by the policy of insurance herein introduced, and defendant accepted the same, and retained the possession thereof from thence thereafter, and made no objection to the plaintiffs not having given immediate notice of said loss in writing, either at the time said proofs were submitted, or at any time thereafter, then the jury are authorized in finding that defendant waived such immediate notice in writing, as is above mentioned.”

Whether due diligence has been used, in giving the required notice, may be regarded as a question of fact, which is ordinarily left to the jury, to be determined from all the circumstances in the case bearing

upon the question. May on Insurance, sec. 462; *Edwards v. Baltimore Ins. Co.*, 3 Gill (Md.), 176.

But where there is no dispute in relation to the facts and circumstances bearing upon the question of diligence in giving the notice, then the question may be regarded one of law for the court. May on Insurance, sec. 462; *Kimble v. Howard Fire Ins. Co.*, 8 Gray, 33.

The facts in regard to the diligence used in this case were not conceded, but were controverted before the jury, and therefore we see no error in the third instruction.

As to the fourth instruction, we are satisfied it is erroneous.

If a notice of loss was given, defective in form, and the company received it, and pointed out no defect, and made no objection thereto, such would, no doubt, be regarded as a waiver of a sufficient notice; but a failure to give notice in time, rests entirely upon a different ground from a failure to give notice in due form.

The reason is obvious. Where a defective notice is given, if the company points out the defects, the insured can supply them by a new notice, and if the company fails to point out the objections, they may very properly be regarded as waived. But a notice not served in time, rests on a different principle. If the company makes objection, the insured cannot remedy the defect. It is too late, and hence there is neither reason nor necessity for the company to speak or be concluded by its silence.

We do not think that an insurance company is concluded by a notice of loss not served in time, for the reason that no objection is interposed at the time service is made; and therefore the instruction, as given, was not correct.

But while the instruction failed to lay down the rule correctly, it could do no injury to the defendant, as notice of loss was, under all the circumstances, given within the time required by the policy. We cannot, therefore, reverse on account of the error contained in the instruction.

The first instruction of plaintiffs is objected to because it authorized the recovery of interest, in case the verdict should be in favor of the plaintiffs. After the amount of money named in the policy became due, we are aware of no reason why it would not draw six per cent interest. The policy was a contract, providing for the payment of money at a certain time, and as such, it was proper for the jury, in fixing the amount of the verdict, to allow interest. This point was expressly decided in the *Peoria Marine and Fire Ins. Co. v. Lewis*, 18 Ill. 553, and we observe no reason to change the rule there announced.

The last point relied upon by the defendant is, that the court erred in refusing a new trial on the ground of newly discovered evidence. Upon an examination of the affidavits presented on the motion, we are satisfied the testimony newly discovered is, in part, in the nature of impeaching evidence, and the rest is merely cumulative.

We understand the rule to be well settled, that a new trial will not be granted where the evidence is of that character.

After a careful examination of the whole record, we are satisfied it contains no substantial error. The judgment will, therefore, be affirmed. *Judgment affirmed.*¹

DOLLOFF v. PHENIX INS. CO.
DOLLOFF v. GERMAN-AMERICAN INS. CO.

SUPREME COURT OF MAINE, 1890. 82 Me. 266.

On exceptions.

These were actions of assumpsit on two policies of fire insurance brought to recover the aggregate sum of \$4,000. The plaintiff had one policy of insurance for \$2,000 in each of the defendant companies, each policy covering both buildings and personal property.

Plea, general issue with a brief statement of forfeiture of the policy through fraud, attempted fraud, and false swearing by the plaintiff in his proof of loss, and examination thereunder. This defence was relied on at the trial, in the Superior Court for Kennebec County, especially fraud and false swearing as to the personal property set forth in the proof of loss. On this point the defendants offered evidence to prove (1) the false and fraudulent insertion of articles which the plaintiff knew were not in the house at the time of the fire; (2) false and fraudulent exaggeration of quantities of such classes of articles as were in the house; (3) false and fraudulent exaggeration of the value of the articles destroyed.

The plaintiff's proof of loss contained 564 distinct items or classes of items, and aggregating \$6,800. He claimed the value of the buildings was \$3,200, and that their contents — the household goods and farming implements — was \$3,600.

Upon these issues of fraud, attempted fraud, and false swearing by the plaintiff, the presiding justice instructed the jury as follows: —

1. "That if the plaintiff knowingly put a false and excessive valuation on any single article, or put such false and excessive valuation on the whole as displays a reckless and dishonest disregard of the truth in regard to the extent of the loss, such knowing over-valuation is itself fraudulent and the plaintiff cannot recover at all."

2. "That if the plaintiff falsely and knowingly inserted in his sworn schedule of loss, as burned, any single article which in fact was not in the house, or was not burned, this would constitute a fraud on the company, and the plaintiff cannot recover anything on his policy."

¹ *Acc.*: Niagara F. Ins. Co. v. Scammon, 100 Ill. 644 (1881); Solomon v. Continental F. Ins. Co., 160 N. Y. 595 (1899).

See Inman v. Western F. Ins. Co., 12 Wend. 452, 460-461 (1834); Edwards v. Baltimore F. Ins. Co., 3 Gill, 176, 186-189 (1845); St. Louis Ins. Co. v. Kyle, 11 Mo. 278, 289-291 (1848); Harnden v. Milwaukee Mechanics' Ins. Co., 164 Mass. 382 (1895).

Compare Matthews v. American Central Ins. Co., 154 N. Y. 449 (1897). — Ed.

3. "That any wilfully false or fraudulent statement in regard to the loss of its amount, would avoid the policy whether the actual loss was greater or less than the amount claimed by the insured."

4. "That if the jury find that the plaintiff knowingly claimed in his sworn proof of loss more goods than were actually destroyed by fire, that would constitute the fraud, — I should rather say constitute the attempt at fraud, — and false swearing mentioned in the contract."

5. "That it is not necessary that the fraud should be to the full extent of the proof of loss, but that if in any respect the plaintiff purposely and designedly made a false statement in regard to the proof of loss, of what his loss was, although it might have been one of small amount, it defeats the policy for the full amount, both as to personal property and the buildings."

The jury returned a verdict for the defendants, and the plaintiff excepted to these instructions.

Each policy of insurance contained the following provision : —

"Any fraud or attempt at fraud, or false swearing on the part of the assured shall cause a forfeiture of all claim under this policy."

E. W. Whitehouse, for plaintiff.

Baker, Baker and Cornish, for defendants.

EMERY, J. The plaintiff procured of the defendant insurance company a policy of fire insurance for \$2,000 upon his home buildings and contents, each building being separately valued, and the contents also having a separate valuation. The policy of insurance contained the following stipulation : "Any fraud, or attempt at fraud, or false swearing on the part of the assured shall cause a forfeiture of all claims under this policy." The buildings and contents were consumed by fire, and the plaintiff, as required by the policy and also by statute (R. S., c. 49, § 21), notified the company of the loss, and delivered to them a written statement on oath, purporting to be a particular account of the loss and damage. In this instrument called "proof of loss," the plaintiff, as the jury have found, knowingly and purposely made false statements on oath of some pretended losses which he did not in fact sustain.

He contended, however, that his actual losses, throwing out his pretended losses, exceeded the whole amount of the policy, and that consequently the defendant company were not and could not be harmed by his false statement of additional losses, and should pay him his actual loss.

His argument was, that these false statements of additional losses did not increase the risk or the liability of the company, — that the true statements showed a loss of over \$2,000, and hence the false statements did no fraud, nor harm. The presiding justice overruled this contention, and instructed the jury to the opposite effect. The verdict being against him, the plaintiff excepted, and his exceptions present substantially this question : When the actual losses, truly stated in a proof of loss, exceed the whole amount of the insurance, will a knowingly and purposely false statement on oath in the proof of loss,

of other pretended losses, destroy the plaintiff's claim for his actual losses under such a policy as this?

We cannot doubt that it will. The parties stipulated that it should. It is so provided in the contract, and it is a lawful provision. The contract of insurance is one of indemnity only. The sole lawful object of obtaining a policy of insurance is to secure simple reimbursement for actual loss. Any purpose of making a profit on the part of the assured is unlawful, and will vitiate the contract. Such being the nature of the contract, it requires good faith on the part of the assured toward the insurers. Especially is this so in the adjustment of a loss after a fire. It is impracticable for the insurers to ascertain for themselves the extent of the losses, particularly where the contents of a dwelling-house and barn are insured, as in this case. The assured and his family or servants are usually the only persons who can give a true account of the losses. The insurers therefore usually, as in this policy, required from the assured a detailed statement on oath of such losses, as a necessary preliminary to the payment of the indemnity. The statute also requires this (R. S., c. 49, § 21). The statute and the policy both make this statement a necessary preliminary to a right of action on the policy, and they both contemplate of course a true statement. The demand of the statute and of the policy for such a statement is addressed to his conscience, like a bill for discovery. When, therefore, he meets this demand with knowingly false statements of losses he did not sustain, in addition to those he did sustain, he ought to lose all standing in a court of justice as to any claim under that policy.

The court will not undertake for him the offensive task of separating his true from his false assertions. Fraud in any part of his formal statement of loss taints the whole. Thus corrupted, it should be wholly rejected, and the suitor left to repent that he destroyed his actual claim by the poison of his false claim. *Claffin v. Insurance Co.*, 110 U. S. 81; *Sleeper v. Insurance Co.*, 56 N. H. 401; *Wall v. Insurance Co.*, 61 Maine, 32.

We have not overlooked the case of *Shaw v. Insurance Co.*, 1 Fed. Rep. 761, where Judge Lowell makes the distinction contended for by the plaintiff here. There the stipulation in the policy was: "All fraud or attempt at fraud *by* false swearing, etc." Here the words are, "Any fraud, or attempt at fraud, *or* false swearing, etc." It might be that there, harmful fraud should appear, while here, false swearing by itself is made a cause for forfeiture. But it will be seen that the U. S. Supreme Court in *Claffin v. Insurance Co.*, *supra*, three years after Judge Lowell's opinion, considered the same question, and decided it the other way, holding that false swearing alone, without its operating as a fraud upon the company, forfeited the policy.

The plaintiff invokes section 20 of chapter 49 (the Insurance Law) R. S., but that does not rescue him. It does not purport to save the assured from the consequences of his own fraud. It simply provides

that immaterial and innocent misstatements shall not avoid the policy. If the statements called for in that section are material or fraudulent, they are fatal. But that section has reference only to statements made in procuring the policy of insurance. It does not apply to statements made after the loss, in the proof of loss. No allusion was made to this statute in *Wall v. Insurance Co.*, *supra*, but it is uncertain whether the decision was before or after the enactment of the statute. It was intimated in *Ballatt v. Ins. Co.*, 61 Maine, 414, some time after the passage of the statute, that fraud in the proof of loss, if established, would bar the suit. While in *Williams v. Insurance Co.*, 61 Maine, 67, the jury negatived any fraud or false swearing, in the over-valuation of the goods, it was assumed that fraud or false swearing, if established, would forfeit all claim under the policy.

It is further suggested by the plaintiff, that the buildings having been separately valued in the policy, the insurance on them is not affected by any false swearing as to the personal property. The policy of insurance, however, is an entire, single contract, to stand or fall as a whole, so far as fraud or false swearing is concerned. *Barnes v. Insurance Co.*, 51 Maine, 110. *Exceptions overruled.*¹

PETERS, C. J., WALTON, VIRGIN, FOSTER, and HASKELL, JJ., concurred.



HART, APPELLANT, v. CITIZENS' INS. CO., RESPONDENT.

SUPREME COURT OF WISCONSIN, 1893. 86 Wis. 77.

APPEAL from the Circuit Court for Douglas County.

Action upon a policy of insurance against fire. The facts are stated in the opinion. The plaintiff appeals from a judgment in favor of the defendant.

For the appellant there was a brief by *Reed, Grace, Rock & Reed*, and oral argument by *H. H. Grace*.

J. B. Douglas, for the respondent.

¹ *Acc.* *Sleeper v. New Hampshire F. Ins. Co.*, 56 N. H. 401 (1876).

Contra: *Springfield F. & M. Ins. Co. v. Winn*, 27 Neb. 649 (1889).

Other cases on what constitutes fraud or false swearing are: *Helbing v. Svea Ins. Co.*, 54 Cal. 156 (1880); *Carson v. Jersey City Ins. Co.*, 43 N. J. L. (14 Vroom) 300. 310-311 (1881); *Clafin v. Commonwealth Ins. Co.*, 110 U. S. 81, 94-97 (1884); *Lion F. Ins. Co. v. Starr*, 71 Tex. 733 (1888); *Deitz v. Providence Washington Ins. Co.*, 23 W. Va. 526 (1890); *Pencil v. Home Ins. Co.*, 3 Wash. 485 (1892); *Obersteller v. Commercial Assur. Co.*, 96 Cal. 645 (1892); *Commercial Bank v. Firemen's Ins. Co.*, 87 Wis. 297 (1894); *Home Ins. Co. v. Winn*, 42 Neb. 331 (1894); *Commercial Ins. Co. v. Friedlander*, 156 Ill. 595 (1895); *Linscott v. Orient Ins. Co.*, 88 Me. 49 (1896); *Dohmen Co. v. Niagara F. Ins. Co.*, 96 Wis. 38, 53-57 (1897); *Davis v. Guardian Assur. Co.*, 155 N. Y. 682 (1898), affirming, without opinion, 87 Hun. 414 (1895); *Worachek v. New Denmark Mut. Home F. Ins. Co.*, 102 Wis. 88 (1899); *Fowler v. Phoenix Ins. Co.*, 35 Ore. 559 (1899). — ED.

WINSLOW, J. The action is upon a policy of insurance issued by defendant, November 11, 1890, upon plaintiff's dwelling-house. There is no dispute as to the facts. The house was burned March 5, 1891. Proofs of loss were served May 1, 1891, being within the time required by the policy. The defendant refused payment May 9, 1891, and plaintiff commenced this action May 3, 1892, nearly fourteen months after the fire.

The policy contained provisions requiring immediate notice of loss, proofs within sixty days after the fire, examination of the assured under oath if desired, and appraisal in case of disagreement as to amount of loss; also the following: "This company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal, or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required. No suit or action on this policy for the recovery of any claim shall be sustained in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

It was held by the Circuit Court that the action was barred because not commenced within twelve months next after the date of the fire, and plaintiff appeals.

It is well settled that a clause in a contract limiting the time within which an action may be commenced thereon to a time shorter than that allowed by the statute of limitations is valid. The question here is whether the expression "twelve months after the fire" means what it says, or something else. It is to be noticed that the parties here have not used the expression "after the loss occurs." Had this been the language used, it might reasonably be claimed, upon authority, that the "loss occurs," not at the date of the fire, but when the loss is ascertained and established and the right to bring an action exists. The decisions in favor of this doctrine are numerous. *Steen v. Niagara F. Ins. Co.*, 89 N. Y. 315; *Spare v. Home Mut. Ins. Co.*, 17 Fed. Rep. 568; *Chandler v. St. Paul F. & M. Ins. Co.*, 21 Minn. 85; *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507; *Miller v. Hartford F. Ins. Co.*, 70 Iowa, 704; *German Ins. Co. v. Fairbank*, 32 Neb. 750; *Barber v. Fire & M. Ins. Co.*, 16 W. Va. 658.

There are, however, many decisions to the contrary: *Chambers v. Atlas Ins. Co.*, 51 Conn. 17; *Johnson v. Humboldt Ins. Co.*, 91 Ill. 92; *Fullam v. New York Union Ins. Co.*, 7 Gray, 61; *Glass v. Walker*, 66 Mo. 32; *Bradley v. Phoenix Ins. Co.*, 28 Mo. App. 7; *Virginia F. & M. Ins. Co. v. Wells*, 83 Va. 736; *Peoria Sugar Refining Co. v. Canada F. & M. Ins. Co.*, 12 Ont. App. 418; *Blair v. Sovereign Ins. Co.*, 19 N. S. 372; *Travelers' Ins. Co. v. California Ins. Co.*, 1 N. Dak. 151; *Schroeder v. Keystone Ins. Co.*, 2 Phila. 286.

Other cases, bearing more or less directly on the question, might be cited upon either side of the proposition. It seems apparent that it can hardly be said that the great weight of authority is on either side. It is a case where there are two directly opposing lines of authorities, both very respectable in numbers and weight. It was claimed by appellant that this court had substantially approved of the affirmative view of the proposition in *Killips v. Putnam F. Ins. Co.*, 28 Wis. 472, and *Black v. Winneshiek Ins. Co.*, 31 Wis. 74. Examination of these cases shows that this court expressly declined to pass upon this question. The principle laid down in them is simply that if the insurance company, by its acts, induces the insured to suspend his proceedings and delay action on the policy, the time elapsing during such delay so caused should not be reckoned as a part of the time limited for the bringing of the action. It is an application of the familiar principle of estoppel.

Doubtless the tendency of so many courts to construe the term "loss" as meaning the time when liability was fixed, induced many insurance companies to substitute the word "fire," as in the policy before us. It would seem as if the phrase "twelve months next after the fire" was susceptible of but one meaning; yet the courts have disagreed upon this question also. In the following cases it has been held that the word "fire" is to be construed as meaning, not the date of the fire, but the time when liability is fixed and an action accrues to the insured. *Friezen v. Allemania F. Ins. Co.*, 30 Fed. Rep. 352; *Hong Sling v. Royal Ins. Co.*, 7 Utah, 441; *Case v. Sun Ins. Co.*, 83 Cal. 473.

On the other hand, the following cases hold that the limitation begins to run from the date of the fire. *Steel v. Phenix Ins. Co.*, 47 Fed. Rep. 863; *State Ins. Co. v. Meesman*, 2 Wash. 459; *McElroy v. Continental Ins. Co.*, 48 Kan. 200; *State Ins. Co. v. Stoffels*, 48 Kan. 205; *King v. Watertown Ins. Co.*, 47 Hun, 1.

It is noticeable that all of the three cases above cited which hold that "fire" means the time when liability is fixed rely for authority upon the cases which construe the word "loss" as having such meaning. No attention seems to have been given to the fact that the word "fire" has been substituted for the word "loss." It is also noticeable that in the case of *Case v. Sun Ins. Co.*, 83 Cal. 473, the facts were that the insured was compelled to submit to examination by the company, and to produce books, bills, and invoices, and that he complied with these requirements as rapidly as he was able, but was unable to fully comply therewith until more than thirteen months after the fire, or a month after the expiration of the time limited for bringing suit. Here, certainly, was a clear case of estoppel. The company, by its own acts, had postponed the time when a cause of action accrued until after the limitation had run, and should clearly be denied the right to rely upon the limitation. See, to this effect, *Thompson v. Phenix Ins. Co.*, 136 U. S. 287. The cases of *Friezen v. Allemania F. Ins. Co.*, 30

Fed. Rep. 352, and *Hong Sling v. Royal Ins. Co.*, 7 Utah, 441, are, however, direct authorities to the effect that "twelve months after the fire" means twelve months after the liability is fixed. The argument in support of this view is briefly that all clauses of the policy must be construed together; that there are clauses which necessitate the making of proofs, the submission of the assured to examination if required, the production of books and papers, and the submission of the question of the amount of loss to appraisers, all of which things will consume time; and, furthermore, the loss not being payable until sixty days after the amount is fixed, it may happen that more than twelve months may elapse after the date of the fire before the company can be sued; and thus the plaintiff's action may be cut off entirely if a literal meaning is to be given to the words. The deduction is that the parties cannot have meant what they said in the clause under consideration, but must have meant something else, which they did not say.

We cannot assent to this line of reasoning. It does violence to plain words. It smacks too strongly of making a contract which the parties did not make. It construes where there is no room for construction. Plain, unambiguous words which can have but one meaning are not subject to construction. "Twelve months next after the fire" has one certain meaning and but one. It can have no other. It may well be that the insurer may by his acts waive the limitation, or estop himself from insisting on it, as held in the cases of *Killips v. Putnam F. Ins. Co.*, 28 Wis. 472, *Black v. Winneshiek Ins. Co.*, 31 Wis. 74, and *Thompson v. Phenix Ins. Co.*, 136 U. S. 287; but the invocation of this principle does no violence to the contract of the parties. There is no element of estoppel present here, however. The defendant company have done nothing which has induced the insured to suspend proceedings or delay his action. They notified him at once on the receipt of his proofs that they denied liability. They did not require him to do anything. He had nearly ten months in which to bring his suit. By failing to do so he must be held to be barred by his contract.

The provision of section 1975, R. S., to the effect that no insurance policy shall contain a provision that no action or suit shall be brought thereon, is not applicable, because the clause under consideration is plainly not such a provision.

*Judgment affirmed.*¹

¹ *Contra*: *Sample v. London and Lancashire F. Ins. Co.*, 46 S. Car. 491 (1895); *Insurance Companies v. Scales*, 101 Tenn. 628, 640-642 (1898).

On the effect of war, see *Semmes v. Hartford Ins. Co.*, 13 Wall. 158 (1871).

On what constitutes the commencing of an action, see *Peck v. German F. Ins. Co.*, 102 Mich. 52 (1894); *Rogers v. Home Ins. Co.*, 35 C. C. A. 402 (Second Circuit, 1899); *Farrell v. German-American Ins. Co.*, 175 Mass. 340 (1899).

On the topic of this section, see also:—

Norton v. Rensselaer and Saratoga Ins. Co., 7 Cow. 645 (1827);

Cornell v. Le Roy, 9 Wend. 163 (1832);

Mechanic's F. Ins. Co. v. Nichols, 16 N. J. L. (1 Harr.) 410 (1838);

Lycoming Ins. Co. v. Schreffler, 42 Pa. 188, 191 (1862);

Ætna Ins. Co. v. Stevens, 48 Ill. 31, 34 (1868);
Insurance Companies v. Boykin, 12 Wall. 433 (1870);
Parmelee v. Hoffman F. Ins. Co., 54 N. Y. 193 (1873);
Smith v. Commonwealth Ins. Co., 49 Wis. 322, 326-327 (1880);
Waldeck v. Springfield F. & M. Ins. Co., 53 Wis. 129 (1881);
Central City Ins. Co. v. Oates, 86 Ala. 558 (1888);
Hamilton v. Liverpool, London, and Globe Ins. Co., 136 U. S. 242 (1890);
Hamilton v. Home Ins. Co., 137 U. S. 370, 385 (1890);
Quinlan v. Providence Washington Ins. Co., 133 N. Y. 356, 362 (1892);
Steele v. German Ins. Co., 93 Mich. 81 (1892);
McNally v. Phoenix Ins. Co., 137 N. Y. 389, 397-398 (1893);
White v. Royal Ins. Co., 149 N. Y. 485 (1896);
Hicks v. British America Assur. Co., 162 N. Y. 284 (1900). — ED.

SECTION III.

Life Insurance.

TAYLOR v. ÆTNA LIFE INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1859. 13 Gray, 434.

ACTION of contract on a policy of insurance on the life of Andrew Taylor, for seven years from the 11th of April, 1855, in the sum of \$700, payable "within ninety days after due notice and proof of the death of said Andrew Taylor, if within the term of this policy."¹ . . .

Answer, 1st. That the plaintiffs never "furnished to the defendant sufficient, due, and proper preliminary proofs of the death of the said Andrew Taylor, and of the time, circumstances, and occasion of his said death, if the same occurred, nor any such as by law and usage in such case are reasonably required and by the terms of said policy provided for." . . .

The parties submitted the case to the court upon the following agreed statement:—

"Upon the first ground of defence stated in the answer, it is admitted by the plaintiff that no affidavit or certificate of the attending physician, as to the circumstances and occasion of the death of Andrew Taylor, was ever furnished to the defendants; although the plaintiff was informed, at the time he gave the notice and furnished certain other proofs of such death, that the defendants held such certificate or affidavit to be essential, and that, until furnished, the proof would not be considered complete, nor the loss payable. It is admitted that the ship's physician was present and attending during the sickness and at the time of the death of said Taylor; and the plaintiff offers no excuse for not furnishing such certificate, except the inconvenience and expense of sending to the Pacific coast to obtain it.

"The defendants admit that notice and proofs of the fact of the death of said Andrew Taylor were furnished to them by the plaintiff on the 10th of February, 1856, which were deficient only by reason of the absence of such certificate or affidavit of the attending physician; and the defendants claim that by the terms and reasonable intendment of the contract, and by the usage and understanding of this and other life insurance companies, such affidavit or certificate is a requisite and essential part of the preliminary proof, to be supplied by parties demanding the amount of the policy, under the circumstances aforesaid, and without which no recovery can be had by suit at law. . . .

"Upon the foregoing statement, it is agreed that the court shall

¹ In reprinting the statement and the opinion, matter foreign to proof of death has been omitted.—Ed.

enter such judgment as either party may be entitled to, and as law and justice require; it being understood and provided, however, that if the court shall be of opinion that proof of such understanding and usage as the defendants allege would be competent and material to the proper decision of the controversy, the case shall be remitted to the proper court for trial of such questions by a jury; and further, that if the court shall be of opinion that the plaintiff ought not to recover without furnishing the affidavit or certificate of the physician, he shall be allowed the opportunity to obtain and supply the same, or a sufficient excuse for its absence, with the same effect upon this suit as if furnished originally, except that such equitable adjustment of the costs or interest shall be made upon the final result, as the court may direct."

J. Wells, for the plaintiff.

F. Chamberlin, for the defendants.

METCALF, J. 1. By the terms of the policy, the sum insured was payable in ninety days "after due notice and proof of the death" of Andrew Taylor. Such notice and proof were therefore prerequisite to the maintenance of this action. The defendants, in their answer, deny that they were furnished by the plaintiff with such proof. They admit, however, in the statement of facts, that there was no defect in the proof of said Taylor's death, unless, in order to constitute due proof thereof, it was necessary to produce a sworn certificate, such as is hereinafter mentioned, of the physician who attended the deceased in his last sickness. The ground taken by the defendants is, that such certificate is a requisite and essential part of the preliminary proof of the death, and made so, not only by the terms and reasonable intendment of the contract contained in the policy, but also by their own usage and understanding, and the usage and understanding of other life insurance companies.

To support this ground of defence, the defendants have introduced (the plaintiff's counsel consenting) a pamphlet issued by them, which they were accustomed to give to claimants on their policies, and which, it is admitted by the plaintiff, was given to him by the defendants at the time when he presented to them his proof of Andrew Taylor's death. Under the head of "Proofs of Death Required," that pamphlet contained, among other required proofs, the following: "1st. A certificate from the physician who attended the party during his last sickness, stating particularly the nature of the disease, its duration, and the time of death." It was also a part of said required proof that the certificate "should be sworn to before a magistrate or other officer qualified to administer an oath or affirmation." As this matter is not contained in the statement of facts, we have taken it into consideration solely upon the consent of the plaintiff's counsel that we might. But, after adding this to the facts regularly agreed upon, we find no defence to the action. The policy does not embody nor refer to any by-law, requisition, usage, or understanding of the defendants as to the kind

of proof, which they should require, of the death of Andrew Taylor. Whatever, therefore, might be such by-law, requisition, usage, or understanding, the plaintiff would not be bound thereby. He is bound only by the policy itself; that is, to furnish "due proof" of the death. If the defendants would have bound the plaintiff by their by-laws, etc., they should have made the policy, in terms, subject to those by-laws, etc., or in some way have made them a part of the contract contained in the policy. *Kingsley v. New England Mutual Fire Ins. Co.*, 8 Cush. 393, 403.

The question, what is due proof, is to be determined by the court, according to the rules of evidence, and not by the defendants nor by any other life insurance companies. We are not informed what proof of death was presented to the defendants, and it is not necessary that we should know; for it is conceded by them that the proof was sufficient, if the physician's certificate was not a requisite part of it.

The usage of the defendants to require certain specified proof of death has been relied on in argument. In the first place, no such usage is duly shown. In the next place, if it were so shown, there is no pretence that the plaintiff had any notice of it when he took the policy. He therefore, for that reason, if for no other, could not be bound by it. . . .

*Judgment for the plaintiff.*¹

¹ In *Braunstein v. Accidental Death Ins. Co.*, 1 B. & S. 782 (1861), *WIGHTMAN, J.*, said:—

"The question in this case is, What effect is to be given to a clause in a deed of settlement, which is incorporated by one of the terms of the policy in the policy itself, 'that before payment of the sum insured by any policy, proof satisfactory to the directors of the company should be furnished by the claimant of the death or accident.' And then there is this addition, 'together with such further evidence or information, if any, as the said directors shall think necessary to establish that claim.'"

"Now it is said that, by virtue of this clause, the directors have the power, if they please, wholly to withhold payment by capriciously, as asserted in the replication, and without any reasonable ground whatsoever, requiring further evidence perfectly immaterial to the matter in dispute. The question is, whether, giving a reasonable construction to the intention of the parties when the clause was introduced by reference into the policy, it can be understood that the assured did agree that, upon any ground whatsoever, capriciously or otherwise, which the directors, who are the parties to the suit, might think fit to urge, their decision should be binding? The clause must receive a reasonable construction, and the parties must be taken to have had in view any further evidence which the directors might *reasonably* require; such a construction would fulfil all the terms of that clause."

And *CROMPTON, J.*, said:—

"The real question in all cases of this nature is that stated by *Ashburst, J.*, in *Hotham v. East India Co.*, 1 T. R. 638, 645,— what was the intention of the parties? Now I cannot conceive that any company would put before a person desirous of effecting an insurance with them a stipulation that, in order to establish the occurrence of an accident insured against, their own directors might require any evidence, however chimerical, capricious, and unjust the asking for it might be. The putting such a construction on a stipulation like this is opposed to the general rule, that when it is agreed that an act is to be done to the satisfaction of a party it must be understood to mean *reasonably* to his satisfaction. The cases where it is agreed between two parties that a disputed matter shall be determined by the certificate of a third person differ from the present, for there the act is to be done by a third person,

whereas here it is to be done by one of the parties. The language of Tindal, C. J., in *Dallman v. King*, 4 Bing. N. C. 105, is very important where he says that stipulations in a contract going to the destruction of the contract are inoperative."

And BLACKBURN, J., said:—

"I quite admit that parties may make what they please a condition precedent, but it must be shown that they so intended. Here the stipulation is the language of one party, the company, and 'verba fortius accipiuntur contra proferentem.' No doubt they might have stipulated that no money should be payable under a policy unless the directors obtained any evidence they chose to ask for, but it would require very distinct language, and much stronger than any used here, to show that the parties so intended."

And see *Cluff v. Mutual Benefit L. Ins. Co.*, 99 Mass. 317, 323-324 (1868); *O'Reilly v. Guardian Mut. L. Ins. Co.*, 60 N. Y. 169 (1875); *Insurance Co. v. Rodel*, 95 U. S. 232 (1877); *Supreme Council v. Forsinger*, 125 Ind. 52 (1890); *Buffalo L. T. & S. Co. v. Knights Templar and Masonic Mut. Aid Assn.*, 126 N. Y. 450 (1891); *Jarvis v. Northwestern Mut. Relief Assn.*, 102 Wis. 546 (1899); *Potter v. Union Central L. Ins. Co.*, 195 Pa. 557 (1900).

On the topic of this section, see also:—

Jackson v. Southern Mut. L. Ins. Co., 36 Ga. 429 (1867);
Semmes v. Hartford Ins. Co., 13 Wall. 158 (1871);
Connecticut Mut. L. Ins. Co. v. Siegel, 9 Bush. 450 (1872);
McFarland v. United States Mut. Acc. Assn., 124 Mo. 204 (1894);
McFarland v. Railway O. & E. Acc. Assn., 5 Wyo. 126 (1894);
Hanna v. Connecticut Mut. L. Ins. Co., 150 N. Y. 526 (1896);
Harrison v. Masonic Mut. Ben. Soc., 59 Kans. 29 (1898);
Kettenring v. Northwestern Masonic Aid Assn., 96 Fed. R. 177 (C. C., N. D. Ill., 1899);
Lewis v. Metropolitan L. Ins. Co., 178 Mass. 52 (1902).—ED.

CHAPTER XI.
WAIVER AND ESTOPPEL.

SECTION I.

Marine Insurance.

ATHERTON v. BROWN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1817. 14 Mass. 152.

ASSUMPSIT on a policy of insurance, whereby the defendant insured \$200 for the plaintiff, on "property on board the Spanish brig 'New Constitution,' from the Havana to her port of discharge in the United States."

In a case stated for the consideration of the court, it was agreed that the plaintiff was interested to the amount insured by the policy in property on board the American brig "Stranger," of Portland, which was at the Havana when news of the war between the United States and Great Britain was received here; that, for the purpose of eluding capture by the enemy, the agent of the owners of the vessel and cargo, through the intervention of a Spanish house, procured papers for said vessel and cargo from the custom-house at the Havana, making the vessel ostensibly Spanish, although still the property, in fact, of her original owners in the United States; and altered her name to the "New Constitution," and put on board her a Spanish captain and crew. On her passage for the United States, she was captured and condemned, with the cargo on board.

It was admitted by the defendant that the plaintiff's agent, who procured the insurance, a credible witness, whose testimony could not be disproved, would testify, if admissible, that, at the time of effecting the insurance, he informed the defendant that the vessel on board of which the property was to be shipped was the brig "Stranger" aforesaid, and that her real American character was not to be changed; but that she was to be rendered ostensibly Spanish, for the sole purpose of avoiding capture by the enemy.

Judgment by default or nonsuit was to be rendered in the action, as the opinion of the court should be on the foregoing statement.

Whitman, for the defendant.

Todd, for the plaintiff.

PER CURIAM. The question is, whether the words in the policy, *viz.*, the Spanish brig "New Constitution," amount to a warranty that the

vessel was Spanish; or whether they may be considered as merely descriptive of the vessel, or as the name of the vessel. We are of opinion that the description of the vessel, as contained in this policy, includes her national character, and that it amounts to a warranty that she was, in fact, a Spanish vessel.

Parol evidence of what was within the knowledge of the underwriters was not admissible.

It being agreed that the vessel was not Spanish, but American, the warranty was not complied with; and the defendant is not liable in this action.

*Plaintiff nonsuit.*¹

SILLOWAY AND OTHERS v. NEPTUNE INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1858. 12 Gray, 73.

ACTION of contract upon a policy of insurance, dated March 6, 1852, insuring "Daniel Silloway & Co. for whom it concerns, payable to D. S. & Co.," \$2,500 on one half of the schooner *Atlantic*, \$2,300 on one half of her cargo, and \$350 on one half of "the freight on board said schooner," at and from Portsmouth, N. H., to Guayama, Porto Rico, and thence to port of discharge in the United States."² . . . Trial at November Term, 1854, before METCALF, J., who reported to the full court the following case:—

¹ *Contra*: *Bidwell v. North Western Ins. Co.*, 24 N. Y. 302 (1862).

See *Weston v. Emes*, 1 Taunt. 115 (1808); *Coles v. Marine Ins. Co.*, 3 Wash. C. C. 159, 163 (1812); *Redman v. Lowdon*, 5 Taunt. 462 (1814), s. c. *sub nom.* *Redman v. Loudon*, 1 Marsh 136.

In *Odiorne v. New England Mut. M. Ins. Co.*, 101 Mass 551 (1869), a policy on a vessel for one year from Feb. 26, 1867, said: "Prohibited from . . . Cape Breton . . . between October 1 and May 1." Within the prohibited months the vessel used a port in Cape Breton and departed in safety. An action was brought because of a subsequent loss. It was held that there could be no recovery and that oral testimony on the part of the plaintiff would not be admissible to prove "that, when the policy was delivered to the plaintiff's agent, he objected to the clause above given, and stated to the president of the defendants that the vessel would probably want to use some of the prohibited ports, and the president replied that the effect of the clause was to exclude risks in such ports only, but not to vitiate the policy, and in that case he could come in and make an agreement for an additional premium, or take the risk himself while in such ports; that a custom exists with the underwriters of Boston to construe said clause as excluding any risks in the prohibited ports, but not that such use vitiates the policy; that for the year previous to Feb. 26, 1867, the plaintiff insured the same vessel with the defendants, by a policy containing the same clause as the one quoted, and, when the insurance was effected, the vessel was in Sydney, a prohibited port, and it was so stated in the application for insurance, and the defendants issued their policy, and at the end of the year demanded and collected of the plaintiff the premium for such year." — ED.

² In reprinting the statement, passages foreign to deviation have been omitted. — ED.

The plaintiffs were permitted . . . to introduce a charter-party of the vessel to them from David S. Poor, the owner. . . .

The vessel was laden in February, 1852, at Newburyport, where the owners resided. . . . She met with an accident in loading at Newburyport, and was despatched thence to Portsmouth, for the purpose of being . . . repaired. The shipwrights who made the repairs testified that a small portion of her sheathing only was taken off; that her butts and seams were found very open; and that in their opinion, in order to make her seaworthy, her whole sheathing should have been removed and all her butts and seams tried and recaulked; that they so informed Currier, one of the plaintiffs. . . . But this evidence was contradicted by witnesses who examined her at Newburyport ten days afterwards, and by her officers and some of her crew, who testified that she was seaworthy when she left Portsmouth. This question was submitted to the jury, who returned a verdict for the plaintiffs.

The vessel sailed from Portsmouth for Guayama on the morning of the 5th of March. The next day Currier applied to the defendants for a policy. . . .

The vessel about nine o'clock in the evening after her departure from Portsmouth encountered strong gales with a dense fog and heavy sea; about midnight she sprung a leak, and half an hour afterwards the master tacked ship, and put into Gloucester in distress, arriving there early the next morning. The master went to Newburyport for orders, and by direction of the owners returned to Gloucester, and sailed on the 7th for Newburyport, arrived there on the 8th, and received some damage in coming to the wharf. A claim was made on the defendants for this loss, which was adjusted by an agent sent by the defendants to Newburyport to investigate the matter, and the amount paid by the defendants; and by indorsement on the policy, "liberty is given for the schooner 'Atlantic' to make her present voyage on a single bottom." The defendants introduced evidence, which was not contradicted, that the vessel could have been repaired at Gloucester as well as at Newburyport.

On the 1st of April, after the vessel had been repaired and her cargo reladen, she again sailed on her voyage. She encountered severe gales, and arrived at Guayama on the 24th of April, much damaged. The cargo, excepting a part of the deck load, which had been lost overboard, was delivered to the consignees; and both the vessel and the cargo, after being surveyed, were sold at auction. . . .

The defendants stated the following points of defence, which were reserved for the determination of the whole court: . . .

2d "That the removal of the schooner from Gloucester to Newburyport was a deviation which discharged the underwriters." . . .

It was agreed that the whole court might draw such inferences as a jury would be warranted in drawing, or submit the case to a jury upon any point, if they should see fit; and that the verdict, if sustained at all, should be reformed, if necessary, by an assessor, upon principles to be settled by the court.

E. Merwin, for the plaintiffs.

S. Bartlett, for the defendants.

BIGELOW, J.¹ . . . We doubt very much whether these facts do constitute even a technical deviation sufficient to discharge the policy. The master was fully justified in seeking a port in consequence of sea damage, but he was not absolutely obliged to remain there and make the needful repairs. If, in the exercise of good judgment and sound discretion, and acting in good faith, he deemed it expedient for the interest of all concerned to go to an adjoining port, the home of the owners, where the vessel could be refitted with greater convenience and less expense, and without incurring any actual increase of risk, we are strongly inclined to the opinion that he might do so without discharging the underwriters on the ground of an unlawful or unjustifiable variance from the course of the voyage; and under similar circumstances that the owners might direct the master to take the vessel into her home port.

But however this may be, we are clearly of opinion that the defendants are estopped in the present case from alleging the supposed deviation as a ground of defence to this policy. It appears by the evidence, that the fact of her having put into Gloucester before she went into Newburyport was fully known to the defendants' agent, who went to the latter place for the purpose of examining the vessel and adjusting the loss which had then happened; and that subsequently to this they not only paid the amount of the loss, but also gave liberty to the owners, by an indorsement in writing on the policy, to proceed to sea with the vessel on a single bottom. The defendants thus recognized the validity of the policy as a subsisting contract, with a full knowledge of the alleged deviation, and they allowed the plaintiffs to send the vessel to sea, not only without any suggestion that they had forfeited their right to hold the insurers liable, but in the belief that she was covered by a policy the validity of which was not denied or doubted by the defendants by reason of any preëxisting fact. The plaintiffs, under these circumstances, had a right to regard any objection on the ground of the supposed technical deviation to have been waived. Certainly it cannot be allowed as a defence to this action, without operating as in the nature of a fraud on the plaintiffs, who have acted on the belief that the policy was in force during the prosecution of the residue of the voyage. . . .

Unless the parties agree on the sum due under the policies, the case must be sent to an assessor to determine the amount according to the rules and principles hereinbefore stated.

*Judgment on the verdict.*²

¹ In reprinting the opinion, passages stating the facts, or dealing with matters foreign to waiver of deviation, have been omitted. One of the omitted passages may be found *ante*, p. 60, *u.* — *ED.*

² Other cases on waiver of deviation are: *Crowninshield v. New York Ins. Co.*, 3 Johns. Cas. 142 (1802); *Coles v. Marine Ins. Co.*, 3 Wash. C. C. 159, 163 (1812);

THEBAUD ET AL., RESPONDENTS, v. GREAT WESTERN INS. CO., APPELLANT.

COURT OF APPEALS OF NEW YORK, 1898. 155 N. Y. 516.

APPEAL from a judgment of the late General Term of the Supreme Court in the first judicial department,¹ entered February 20, 1895, upon an order overruling defendant's exceptions, ordered to be heard in the first instance at General Term, and directing judgments upon a verdict in favor of plaintiff.

The nature of the action and the facts, so far as material, are stated in the opinion.

Prescott Hall Butler, for appellant.

Esek Cowen and *Everett Masten*, for respondents.

O'BRIEN, J. This was an action by the owners of a steamboat upon a policy of marine insurance. The issues in the case were tried before a jury, and the plaintiff recovered.

On the 28th of June, 1884, the steamer "Dos Hermanos" was in process of construction at the port of Philadelphia for use as a river steamer at or near Frontera, Mexico. She was not constructed or intended for use upon the open sea, but for service upon the rivers or other inland waters of the country where she was destined for use. On the day mentioned, the defendant issued to the plaintiff its policy of marine insurance upon this steamer to cover the voyage from Philadelphia, the place where it was built, to Frontera, Mexico, the place where it was intended for use. The policy related only to this voyage, part of which was, as all parties knew, upon the sea. The defendant, by the terms of the policy, undertook to pay to the plaintiffs the sum of \$5,000 in case of loss upon this voyage, including what is known as the mechanic's risk while in port, meaning that at the time of the execution of the contract the steamer had not been completed, and, in fact, the voyage did not commence until the 27th of August thereafter. The policy, by its terms, indemnified the owners against loss from the usual perils of the sea covered by policies of marine insurance. The steamer, while on the voyage, was lost at sea, near the coast of North Carolina, on the night of the 13th of September, 1884.

The defence to the action may be arranged under three general heads: (1) That the steamer was not seaworthy, and, hence, that the implied warranty of seaworthiness, which it is insisted enters into and forms a

Redman v. Lowdon, 5 Taunt. 462 (1814), s. c. *sub nom.* *Redman v. Loudon*, 1 Marsh. 136; *Wiggin v. Boardman*, 14 Mass. 12 (1817); *Glidden v. Manufacturers' Ins. Co.*, 1 Sumner, 232 (1832); *Warren v. Ocean Ins. Co.*, 16 Me. 439 (1840); *Reed v. McLaughlin*, 2 Hannay, N. B. 128 (1870). — ED.

¹ Reported 84 Hun, 1 (1895). — ED.

part of every marine insurance upon a ship or vessel, was broken, and for that reason the plaintiff is not entitled to recover. (2) That in making the voyage there was a voluntary deviation from the usual course of the voyage from Philadelphia to Frontera. (3) That the steamer was not lost by the perils of the sea, or by any casualty covered by the terms of the policy, but in consequence of the unseaworthiness and unfitness of the vessel to make the voyage covered by the contract.

It is no doubt the general rule that in all contracts of marine insurance upon vessels there is an implied warranty that the subject of the insurance was at the time seaworthy, or, in other words, reasonably fit and capable of making the voyage. But in this case both parties knew that the vessel was not intended for service upon the open sea. She was not built or constructed for any such purpose, but, on the contrary, for the river service. Before the defendant entered into the contract the plans and specifications with reference to the construction of the "Dos Hermanos" had been submitted to its agents. They put the defendant in possession of all information concerning the character and construction of the craft. The defendant's marine engineer, who had had considerable experience, assured the broker who took the risk "that she was built for the river trade, and he did not consider that she was just the thing to attempt all weathers on the coast going around there, but if properly handled she might get there, provided she took the inland course as far as possible." The defendant thereupon concluded to write the risk, but exacted therefor double the usual premium for marine insurance on ordinary seagoing vessels. The steamer was not then completed, and hence the provision in the policy covering the mechanic's risk while in port, including the privilege of mechanics to work upon the vessel. Before starting on her voyage for Frontera two trial trips were taken by direction of the engineer, one up and one down the Delaware River. Neither of these trips, however, extended beyond the limits of the port of Philadelphia, and we do not understand that it is seriously claimed that these trips constituted a deviation from the usual voyage. They were merely preliminary in order to test the capacity of the vessel to make the voyage.

It was competent for the jury to find upon the evidence that the vessel was sufficiently provided with a crew and proper equipments. There is evidence tending to show that suitable precautions were taken before leaving Philadelphia for the ocean voyage to make her as seaworthy as a vessel of her class could be made; that her machinery was tried and the boilers inspected in the usual manner. The voyage was commenced, after leaving Philadelphia, by taking what is known as the inside course through the canals and bays, and the sea voyage was not actually commenced until she reached Fort Macon. Before reaching that point, however, it seems that an accident occurred to the vessel by a collision with a submerged stump in one of the canals, and, hence, there was a stop at Baltimore for repairs, where some further precau-

tions were taken in order to protect the steamer from the perils of the sea voyage. Another stop was made at Norfolk, in order to procure a pilot to take her through the Chesapeake and Albemarle canal and other waters to Fort Macon. This was all inside navigation, and on reaching the point last mentioned it became necessary to go outside upon the open sea, and shortly afterwards the steamer was lost.

That the "Dos Hermanos" was not a seaworthy vessel, in the sense in which these terms are applied to seagoing vessels, is made quite clear by the evidence. It was undoubtedly competent for the jury to so find and for the court below to so decide, but in this court the question always is, upon an issue of this character, not upon which side the evidence preponderates, but whether there is any evidence to support the verdict. The parties knew perfectly well that the subject of the insurance was not a seagoing vessel, but, for the purposes of the trip the defendant was evidently willing to take the risk, in consideration of the payment of a double premium, and after inspecting the vessel and acquiring full knowledge as to her construction and capacity. In view of the proof in the case tending to show what was done in order to fit the steamer for her voyage, we do not think it can be said in this court that the verdict of the jury is without any evidence to sustain it. Generally, the question as to whether a vessel, covered by a policy of marine insurance, was, or was not, at the time seaworthy, is one of fact for the jury. *Burges v. Wickham*, 3 Best & Smith, 669; *Clapham v. Langton*, 5 Best & Smith, 729; *Turnbull v. Janson*, 36 L. T. R. 635; *Bouillon v. Lupton*, 15 C. B. (N. S.) 113. It is difficult to see how such a question, from its very nature, can, in practice, be determined otherwise, except, possibly, in a very clear case. But we do not regard that question as controlling, since, as already stated, both parties to the contract knew that the vessel was not a seagoing craft, or suitable for the navigation of the high seas, and, under the circumstances, the implied warranty upon which the defendant relies should not be construed in such a way as to be repugnant to the general purpose which the parties had in view at the time of the execution of the contract. We can discover no reason why the general rule applicable to risks in fire insurance policies does not apply to this case. As was said by this court in the case of *Bidwell v. North Western Ins. Co.* (24 N. Y. 302): "Indeed it is not easy to perceive why an insurance company, by reason of the formal words or clauses (of a general and comprehensive nature), inserted in a policy intended to meet broad classes of contingencies, should ever be allowed to avoid liability on the ground that facts, of which the company had full knowledge at the time of issuing the policy, were then not in accordance with the formal words of the contract, or some of its multifarious conditions. If such facts are to be held a breach of such a clause, they are a breach *eo instanti* of the making of the contract, and are so known to be by the company as well as the insured. And to allow the company to take the premium without taking the risk would be to encourage a fraud."

This rule, which is clearly applicable to express warranties in contracts of insurance, should, in reason and justice, be applicable to the implied warranty of seaworthiness in policies of marine insurance. That such is the well-settled rule in this court, with reference to express warranties in contracts of fire insurance, covering conditions with respect to which the underwriter had full knowledge, cannot now be questioned. *Van Schoick v. Niagara Ins. Co.*, 68 N. Y. 434; *Bennett v. Buchan*, 76 N. Y. 386; *McNally v. P. Ins. Co.*, 137 N. Y. 389; *Forward v. C. Ins. Co.*, 142 N. Y. 382; *Robbins v. Springfield Ins. Co.*, 149 N. Y. 477.

So we think the defendant must fail in defeating the recovery on the ground that there was a breach of the implied warranty of seaworthiness.

Whether the vessel was unseaworthy or not by reason of insufficient crew, or insufficient machinery, or the absence of a pilot during certain parts of the voyage was, under the circumstances, a question for the jury. The master of the vessel was himself a competent navigator, and whether, after reaching Fort Macon and going into the open sea a pilot was usual and necessary for the rest of the voyage, is not a matter of law, but of fact, and the burden of proof showing negligence on the part of the plaintiff in this respect was, we think, upon the defendant. 1 Phil. on Ins. (5th ed.), §§ 712, 713.

Nor do we think it can be said, as matter of law, that there was such a deviation from the usual course of the voyage as to absolve the defendant from the obligations of the contract. A deviation is a voluntary and inexcusable departure from the usual course, and whether the departure amounts to a deviation must be determined by the motive, consequences, and circumstances of the act. Hence, in its nature it is a question of fact. Where the circumstances are such as to leave no alternative to a reasonable and prudent man, exercising a sound judgment, and acting for the best interests of all concerned, it is not a deviation. 1 Arnold on Ins., §§ 151, 152. This proposition covers the argument in behalf of the defendant with respect to the inside voyage through canals and the stops made at the various points already referred to. We have already intimated that the trial trips cannot, in any just sense, be considered a deviation. Moreover, where a vessel is insured for a voyage "at and from" a port a reasonable time will be allowed while there engaged in the business of preparing for her voyage. *Snyder v. Atlantic Mut. Ins. Co.*, 95 N. Y. 196; *Fernandez v. Great Western Ins. Co.*, 48 N. Y. 571.

The subject of the insurance in this case was a new craft, and the trial trips were reasonably necessary in order to determine, before undertaking the voyage, whether the vessel was suitable for that purpose. Hence these trips may reasonably be regarded as a part of the preparation for the voyage.

The delay in commencing the voyage may also be imputed to the same cause, viz., the preparation necessary previous to sailing. The

vessel was not completed when insured. The underwriter is not discharged by a delay incurred for the purposes of the voyage, though its absolute duration be very considerable. There must be a clear imputation of waste of time, and whether the delay be reasonable or not must be determined, not by any positive or arbitrary rule, but by the circumstances existing at the time. *Arnold v. Pacific Mut. Ins. Co.*, 78 N. Y. 16, 17. The defendant knew the condition of the vessel, and could form a judgment for itself as to the time when she would be ready to sail, and the insurance covered the chances of delay. On all the facts the jury had the right to find that the delay was not unreasonable.

The subject of the insurance was a non-seagoing vessel. It is reasonable to suppose that the parties intended that in making the voyage the open sea should be avoided as much as possible; hence, what was called the inside course was taken. Considering the character of the steamer and the purpose for which she was built, it cannot be said, as matter of law, that avoiding the sea until Fort Macon was reached, by the inside course, was a deviation from the usual course for vessels of that character. The ruling of the trial court submitting the question to the jury was quite as favorable to the defendant as it was entitled to. It was for the jury to say whether, under all the circumstances, the delay in the canal at night, the stop at Baltimore and Norfolk, the delay at Fort Macon and the anchoring off Smithville was a deviation.

The defence that the loss was not from the perils of the sea, but through inherent weakness, or defects, or faulty construction, presented upon the proofs a question of fact. On the part of the defendant it was claimed that the steamer foundered in a calm sea; while the plaintiffs insisted that she was lost in a northeast gale. The jury having sustained the plaintiff's contention, we cannot say that the verdict in that respect is unsupported by evidence. The question was for the jury, and the finding is not open for review here. It appears from the evidence that this vessel was ninety feet long, twenty-two feet beam, with from twelve to eighteen inches of freeboard, flat bottom, drawing about three feet of water. It is obvious that it would not require the severest tempest to sink such a craft. The risk was doubtless an unusual one, and for that reason an unusual premium was asked and obtained. It may be that the regular seagoing vessel would have weathered the gale. But the real question presented to the defendant, when the application for insurance was made, was whether this boat, as she was known by both parties to be, could make the transit from the port of departure to her destination. The defendant concluded to take that risk in consideration of a double premium, and to permit it now, after receiving the premium, to defeat a recovery, on the ground that she was not seaworthy in consequence of alleged defects of construction, known to it at the time of taking the risk, would scarcely be consistent with commercial morality.

It seems to us that the question was properly submitted to the jury, and upon a careful examination of the exceptions taken during the

trial, and to the charge, we are of opinion that none of them present any question of law that would warrant us in disturbing the verdict.

The judgment should, therefore, be affirmed.

All concur, except PARKER, C. J., not sitting.

*Judgment affirmed.*¹

¹ Other cases on waiver of unseaworthiness are: *Weir v. Aberdein*, 2 B. & Ald. 320 (1819); *Parfitt v. Thompson*, 13 M. & W. 392 (1844); *Hoxie v. Home Ins. Co.*, 32 Conn. 21, 39-41 (1864); *Marine F. Ins. Co. v. Burnett*, 29 Tex. 433, 445-447 (1867); *Western Assur. Co. v. Southern Cotton Oil Co.*, 30 U. S. App. 376 (Fifth Circuit, 1895), s. c. 16 C. C. A. 67.

In *Quebec M. Ins. Co. v. Commercial Bank*, L. R. 3 P. C. 234, 244 (1870), Lord PENZANCE, for the Judicial Committee, said: —

“The case of *Weir v. Aberdein* did not proceed upon the language that is attributed to Lord Tenterden — whether he was fully and rightly reported or not — but the judgment proceeded, as it appears to their Lordships, distinctly upon the principle that the underwriters had been aware of the unseaworthiness, and had assented to the vessel putting back to the port to cure herself of the defect, and therefore they were held responsible.”

On the topic of this section see also: —

Vos v. Robinson, 9 Johns. 192 (1812);

Morrison v. Universal M. Ins. Co., L. R. 8 Ex. 197 (Ex. Ch. 1873);

Enterprise Ins. Co. v. Parisot, 35 Ohio St. 35 (1878);

Reck v. Phenix Ins. Co., 130 N. Y. 160, 165 (1891). — ED.

SECTION II.

Fire Insurance.

(A) AS TO CONDITIONS APPLICABLE AFTER LOSS.

*McMASTERS AND BRUCE v. WESTCHESTER COUNTY
MUTUAL INS. CO.*

SUPREME COURT OF NEW YORK, 1841. 25 Wend. 379.

THIS was an action on a policy of insurance, tried at the Westchester Circuit, in April, 1840, before the Hon. CHARLES H. RUGGLES, one of the circuit judges.

The plaintiffs were insured against loss by fire to the amount of \$4,000, upon a stock of joiner's tools and other property, in a workshop attached to the state-prison at Sing Sing for the period of one year from the 12th December, 1837. On the 1st July, 1838, the shop took fire, and property insured, to a large amount, was destroyed. On the 13th July, the plaintiffs gave notice of the loss to the defendants. Repeated interviews were had between McMasters, one of the plaintiffs, and certain agents of the defendants, from the time of the fire down to the 26th day of July, when the latter, believing that the ownership in the property had been changed since the policy was effected, by Bruce selling out his interest to McMasters, and the latter transferring the share so acquired to one of his sons, ceased farther intercourse with McMasters, and recommended to him to take such course in the premises as should be advised by counsel. On the 27th July, McMasters served upon the secretary of the company an account of the loss, an affidavit made by him verifying the account, and stating the amount of the loss, and a certificate of the justice of the peace that he was acquainted with the character and circumstances of McMasters (saying nothing as to Bruce), and certifying the loss at \$4,000. A seal was not attached to this certificate, which was given under a condition in the policy in the usual form, requiring an account of loss and a certificate of a magistrate, and that the latter should be under the hand and seal of the magistrate. On the trial of the cause, the above facts were shown, and the plaintiffs also produced a letter from the president of the company, dated 21st December, 1838, addressed to McMasters, in these words: "To yours of the 10th inst., received yesterday, I reply that your letter of the 29th July last, stating that you had sustained damage by fire, was laid before the committee for advisement, and that committee reported that in its opinion your claim was invalid, and ought not to be paid. You are therefore left to pursue such course in the premises as you may be advised." Upon this evidence the plaintiffs rested, and the defendants moved for a nonsuit, on the ground of

the insufficiency of the preliminary proofs ; which motion was denied. Evidence was then given on both sides in respect to the transfer of the interest of Bruce to McMasters, and of the assignment of the same by the latter to his son. The questions arising upon the preliminary proofs were submitted by the counsel of both parties to the jury. The judge charged the jury that the plaintiffs were bound to use due diligence in giving notice of the loss, and submitted to them to determine whether, under the circumstances of the case, there had been an unreasonable delay ; as to the want of a seal to the certificate of the magistrate, he deemed the defect fatal, could it not be considered as waived, and he submitted the question to the jury whether this and all other defects in the preliminary proofs might not be so considered. In relation to the transfer to McMasters, of Bruce's interest in the property insured, he expressed the opinion that if made, it was not such a change of interest as to affect the plaintiffs' right to recover ; but if the property had been subsequently transferred to McMasters' son, the defendants were entitled to the verdict. The judge also submitted the following questions to the jury, and requested that they might be answered separately in the verdict which they should render, viz : 1. Was the notice of loss given in due time ? 2. Was there a waiver by the company of any irregularity in the preliminary proofs ? 3. Was the partnership between the plaintiffs dissolved before the fire ? 4. Did McMasters purchase the whole interest of Bruce ? 5. Did the son of McMasters become a partner with his father ? The jury, on their return into court, answered the two first interrogatories in the affirmative, and the others in the negative, and found a verdict in favor of the plaintiffs for \$4,355.53 damages, including interest. The defendants having excepted to the charge and objected to the questions being submitted to the jury, which had been answered by them, moved for a new trial.

M. T. Reynolds, for the defendants.

T. H. Lee, for the plaintiffs.

By the Court, NELSON, C. J. Whether the learned judge was correct or not, in charging that the plaintiff, McMasters, was entitled to recover for the whole loss in the names of the plaintiffs, if he had purchased the share of his co-partner before the fire, is a question not material to decide ; because he submitted the distinct fact to the jury, upon which the point of law rested, and they have found that no such purchase was made. This finding renders the opinion expressed wholly unimportant in the case.

The course the judge took on the trial in submitting certain questions to the jury, with a view to avoid the necessity of a second trial, was objected to : but such course is not uncommon at the circuits where a doubt is entertained upon the law ; it cannot operate to the prejudice of either party, and frequently avoids the trouble and expense of a new trial. It is in the nature of a special verdict, which the jury may always find. 2 R. S. 421.

I think the judge was right, also, in submitting to the jury whether

the company were not concluded from taking exceptions to the preliminary proofs. Although repeated communications had taken place with the officers and agents of the company, and in some instances, in pursuance of directions from the board, after the preliminary proofs were delivered, no such ground was taken. On the contrary, the fair inference from all the proof in the case is, that other grounds were put forth and mainly relied upon to defeat the recovery. The law is well settled, that if there be a formal defect in the preliminary proofs, which could have been supplied had an objection been made by the underwriters to payment on that ground, if they do not call for a document, for instance, or make objection on the ground of its absence or imperfection, but put their refusal upon other grounds, the production of such further preliminary proofs will be considered as waived. 16 Wend. 401; 10 Pet. 507. There are few cases that come before us presenting stronger claims to the application of this rule than the present one, or that better exemplify its propriety and justice. The agents were neighbors of the assured, in daily communication with him on the subject of his claim; some of them obviously seeking for the means of defeating it by inquiries into the situation and title of the property destroyed, and by interrogation of the parties, and yet no distinct objection taken as to the preliminary steps, that might now be regarded as fatal. Had the objection been made in the course of these interviews, the defects might at once have been remedied, as is obvious from the authorities already referred to.

*New trial denied.*¹

¹ *Acc.*: As to the effect of stating other grounds for refusing to pay: *Tayloe v. Merchants' F. Ins. Co.*, 9 How. 390, 403 (1850); *Phillips v. Protection Ins. Co.*, 14 Mo. 220 (1851); *Bumstead v. Dividend Mut. Ins. Co.*, 12 N. Y. 81 (1854); *Firemen's Ins. Co. v. Crandall*, 33 Ala. 9 (1858); *Noyes v. Washington County Mut. Ins. Co.*, 30 Vt. 659 (1858); *Franklin F. Ins. Co. v. Coates*, 14 Md. 286 (1859); *Peoria M. & F. Ins. Co. v. Whitehill*, 25 Ill. 466, 470 (1861); *Cobb v. Insurance Co.*, *post*, p. 1064 (1873); *State Ins. Co. v. Maackens*, 38 N. J. L. (9 Vroom) 564 (1876); *Walsh v. Vermont Mut. F. Ins. Co.*, 54 Vt. 351, 358 (1882); *Hahn v. Guardian Assur. Co.*, 23 Oregon, 576 (1893); *Home F. Ins. Co. v. Fallon*, 45 Neb. 554 (1895).

Compare *Edwards v. Baltimore F. Ins. Co.*, 3 Gill, 176, 180-181, 186-187 (1845); *Spooner v. Vermont Mut. F. Ins. Co.*, 53 Vt. 156 (1880); *Hicks v. British American Assur. Co.*, 162 N. Y. 284 (1900).

Acc.: As to the effect of silence after receipt of proofs: *Great Western Ins. Co. v. Staaden*, 26 Ill. 360 (1861); *Works v. Farmers' Mut. F. Ins. Co.*, 57 Me. 281 (1869); *Home Ins. Co. v. Cohen*, 20 Grat. 312 (1871); *Taylor v. Roger Williams Ins. Co.*, 51 N. H. 50 (1871); *Jones v. Mechanics F. Ins. Co.*, 36 N. J. L. (7 Vroom) 29, 36-40 (1872); *Hibernia Mut. F. Ins. Co. v. Meyer*, 39 N. J. L. (10 Vroom) 482 (1877); *Kearney v. Home Ins. Co.*, 71 N. Y. 396, 403-404 (1877); *Susquehanna Mut. F. Ins. Co. v. Cusick*, 109 Pa. 157 (1885); *Cayon v. Dwelling House Ins. Co.*, 68 Wis. 510 (1887); *Vangindertaelen v. Phenix Ins. Co.*, 82 Wis. 112 (1892); *Alston v. Phenix Ins. Co.*, 100 Ga. (1897).

See *Patrick v. Farmers' Ins. Co.*, 43 N. H. 62 (1862); *Madsen v. Phoenix F. Ins. Co.*, 1 S. Car. 24 (1868); *Myers v. Council Bluffs Ins. Co.*, 72 Iowa, 176 (1887); *Davis Shoe Co. v. Kittanning Ins. Co.*, 138 Pa. 73 (1890).

In *Citizens' F. Ins. & L. Co. v. Doll*, 35 Md. 89 (1871), it was held that defects in the proofs of loss were not waived by the insurance company's letter, worded thus: "The proofs of loss furnished by you to this company are wholly unsatisfactory, as to

BLAKE v. EXCHANGE MUTUAL INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1858. 12 Gray, 265.

ACTION of contract upon a policy of insurance against fire,¹ . . . any loss or damage "to be paid within ninety days after notice, proof and adjustment thereof in conformity to the conditions annexed to this policy." . . . "It is also declared that this policy is made and accepted in reference to the written and printed application whereon it is issued, and also to the conditions hereto annexed, which are hereby made a part of this policy, and to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for. And it is also agreed and declared by the parties aforesaid, that no condition, stipulation, covenant, or clause hereinbefore contained shall be altered, annulled, or waived, or any clause added to these presents except by writing indorsed hereon or annexed hereto by the president or secretary, with their signatures affixed thereto."

On the third page of the policy were printed "conditions of insurance," . . . and the twelfth condition required persons sustaining loss by fire and claiming indemnity under this policy to give notice and proofs of loss as therein particularly directed.

At the trial in the Superior Court of Suffolk, . . . before NASH, J., the plaintiff . . . proved that the property was destroyed by fire on the 21st of January, 1856, and put in evidence certain notices and preliminary proofs sent by him to the defendants, which the judge ruled were insufficient to comply with the terms of the policy. After the introduction of evidence tending to prove the facts assumed in the following instructions, the judge instructed the jury, that the preliminary proofs could be waived or the defendants estopped to avail themselves of defects in them otherwise than in writing indorsed on or annexed to the policy; that if the by-laws and conditions of insurance required

the amount of the claim, even if the company be responsible at all. The company, however, denies any responsibility by reason of material misrepresentations as to the title and property being untrue, and for other reasons. With a reservation of all objections to your recovering in any form, and without waiving any of the rights of the company under the policy, we leave you to pursue such a course as you may deem expedient." *Contra*, Sun Mut. Ins. Co. v. Mattingly, 77 Tex. 162 (1890).

Other cases on the effect of certain forms of letters are: *Edwards v. Baltimore F. Ins. Co.*, *supra* (1845); *Blossom v. Lycoming F. Ins. Co.*, 64 N. Y. 162 (1876); *Deitz v. Providence Washington Ins. Co.*, 33 W. Va. 526, 532, 536, 544 (1890); *Schmurr v. State Ins. Co.*, 30 Oregon, 29 (1896).

See *Robinson v. Pennsylvania F. Ins. Co.*, 90 Me. 385 (1897); *Phoenix Ins. Co. v. Minner*, 64 Ark. 590 (1898); *Merchants' Ins. Co. v. Nowlin*, 56 S. W. Rep. 198 (Tex. Civ. App., 1900). — ED.

¹ In reprinting the statement and the opinion, passages foreign to the proofs of loss have been omitted. — ED.

certain preliminary proofs and notices to be given in a certain manner, and with certain particulars and details, and certain preliminary proofs and notices were given, not containing all the formal requisites, and, after receiving such proofs and notices, the defendants' president and secretary examined the premises, and had interviews with the plaintiff before the expiration of the time for giving said notices, and neither they then, nor the defendants afterwards, made any objection to the form or sufficiency of the preliminary proofs while any defects therein might have been remedied, and put their refusal to pay on other and distinct grounds, then such conduct might be considered a waiver of any defects in the preliminary proofs, or so far an estoppel that the defendants should not be allowed to avail themselves thereof, notwithstanding the provisions of the policy. . . .

The jury returned a verdict for the plaintiff accordingly, and the defendants alleged exceptions.

C. T. Russell, for the defendants.

R. H. Dana, Jr., and *H. W. Muzzey*, for the plaintiff.

THOMAS, J. . . . 3. The question as to the waiver of any defects in the plaintiff's notice and proofs of loss is one of more difficulty. There can be no doubt that the conduct of the defendants would amount to a waiver, except for the last clause in the policy, by which it is "agreed and declared by the parties aforesaid, that no condition, stipulation, covenant, or clause hereinbefore contained shall be altered, annulled, or waived, or any clause added to these presents, except by writing indorsed hereon or annexed hereto by the president or secretary, with their signatures affixed thereto." There is a previous provision that in case of loss the money is "to be paid within ninety days after notice, proof, and adjustment thereof in conformity to the conditions annexed to the policy." The provisions for notice and proofs of loss are contained in the twelfth of the by-laws. The entire by-laws are printed under the heading "conditions of insurance." The policy is declared to be made and accepted in reference to the conditions thereto annexed, which are made part of the policy. How far the provisions as to the form of the notice and proofs of loss, after a valid contract has been made and a loss taken place under it, can be regarded as conditions of the contract itself, it is not necessary to determine, nor whether their being classed under the designation of conditions of insurance could change the nature and purpose of the stipulations themselves; for it seems to us that the question is not as to the provisions of the contract, but as to the performance of the provisions. The plaintiff is not seeking to set up a contract from which a material provision has been omitted by the oral consent of the officers of the company. The policy contained the usual provisions as to notice and proofs of loss. Upon the happening of the loss, the plaintiff sent to the defendants certain notices and proofs in pursuance of the requisition of the by-laws upon the subject. If the notices were defective, good faith on the part of the underwriters required them to give notice

to the insured. If they failed to do so, if they proceeded to negotiate with the plaintiff without adverting to the defects, if, still further, they put their refusal to pay on other and distinct grounds, they are, upon familiar principles of law, estopped to set up and rely upon the defective notices; the law assumes that the notices were correct, and will not listen to the defendant when he seeks to show the contrary. *Vos v. Robinson*, 9 Johns. 192; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. 401; *Heath v. Franklin Ins. Co.*, 1 Cush. 257; *Clark v. New England Mutual Fire Ins. Co.*, 6 Cush. 342. If the defendant relied upon any exemption from the obligations of the policy, or any modification of them by the agents or officers of the company, or any addition, he must show such exemption, modification, or addition, by indorsement upon the policy. But the question whether a stipulation as to notice and proofs of loss has been fulfilled, or whether the defendant is in a condition to be heard upon that question, must be tested by the ordinary rules of law. There is a time when objections in matters of form must be taken. If they are not then made, they never can be made. The law does not say the procedure was perfect, but that the question is not open. The adherence to and liberal application of this principle are necessary to the maintenance of good faith and fair dealing in judicial proceedings. . . .

The court erred in instructing the jury that no abatement of the amount to be recovered of the defendants could be made.¹ . . .

If the parties cannot agree upon the amount, or upon an assessor to fix it, the case must go to a new trial, limited to the question of damages only.

*Exceptions sustained.*²

¹ The omitted passage dealt with the apportionment of the loss among several policies. — Ed.

² On estoppel and waiver as to conditions applicable after loss, see also: —
Atlantic Ins. Co. v. Wright, 22 Ill. 462, 472-473 (1859);
Patrick v. Farmers' Ins. Co., 43 N. H. 621 (1862);
Cornell v. Milwaukee Mut. F. Ins. Co., 18 Wis. 387 (1864);
Davis v. Western Massachusetts Ins. Co., 8 R. I. 277 (1866);
Daniels v. Equitable F. Ins. Co., 50 Conn. 551 (1883);
Carroll v. Girard F. Ins. Co., 72 Cal. 297 (1887);
Central City Ins. Co. v. Oates, 86 Ala. 558 (1888);
Wainer v. Milford Mut. F. Ins. Co., 153 Mass. 335 (1891);
Warshawky v. Anchor Mut. F. Ins. Co., 98 Iowa, 221, 224 (1896);
Ruthven v. American F. Ins. Co., 102 Iowa, 550 (1897). — Ed.

SECTION II. (*continued*).

(B) AS TO DEFENCES ARISING BEFORE LOSS.

- (a) *The insurer's conduct after the issuing of the policy and after the arising of the defence.*

FROST v. SARATOGA MUTUAL INS. CO.

SUPREME COURT OF NEW YORK, 1848. 5 Denio, 154.

ASSUMPSIT on a policy of insurance, against loss by fire, tried in February, 1847, at the Tompkins Circuit, before Gray, Cir. J. The plaintiff was nonsuited on the trial. The facts are sufficiently stated in the opinion of the court. The plaintiff moves for a new trial on a bill of exceptions.

G. D. Beers, for the plaintiff.

N. Hill, Jr., for the defendants.

By the Court, BEARDSLEY, C. J. A new question is presented in this case, and one, it must be admitted, of some novelty in its application to a case like this, and which has therefore been examined and considered with more than ordinary care and attention.

The contract of insurance between these parties was entered into in September, 1838, and I assume that the plaintiff, by his application for insurance, which was made a part of the contract, engaged that there was no building within less than ten rods of the store insured, except those mentioned in said application. This was in law an express warranty to that effect by the plaintiff, and which is shown to have been untrue in point of fact, for there was at least one building, and it would seem more than one, within the distance stated, of which no mention was made in the application. If this fact, which constitutes a breach of the warranty, is to be taken as a part of the case, the plaintiff cannot recover. Of this no doubt can be entertained. But the plaintiff insists that the defendants, by certain acts on their part, acquiesced in and acted on by him, have precluded themselves from setting up this breach of warranty as a ground for holding the contract of insurance void *ab initio*. The fire occurred in the spring of 1840. In the course of that year, the defendants were fully apprized that the application for insurance did not truly describe all the buildings within the prescribed distance, but had omitted to make mention of one or more such buildings; yet subsequently, and in eighteen hundred forty-one, two and three, the defendants made assessments on the premium note of the plaintiff, given when the policy was issued, and which several assessments were thereupon paid by the plaintiff. This, he insists, should estop the defendants from showing the facts constituting this breach of the warranty on his part, and if they appear by the evidence given in

the case, the defendants should not be allowed to set them up as a defence to an action on the policy.

I regard it is clear that if the policy was originally void, on the ground now taken by the defendants, that is, a breach of the plaintiff's contract of warranty, the premium note was also invalid. The only consideration for the note, as is expressed on its face, was this policy, and if that was void there remained not a scintilla of consideration, and the note, consequently, could not be enforced.

The plaintiff was only liable on this note as a member of the corporation—the Saratoga County Mutual Fire Insurance Company; he not being one of the persons named in the charter, nor the heir, executor, administrator, or assignee of any person who had been a corporator, and he could only become such member “by effecting insurance” in the company. (Laws of 1834, 530, act of incorporation.) For this purpose a valid contract of insurance, including both policy and note, one being the consideration for the other, was indispensable. If, for any cause, one was invalid in its inception, so was the other, and no membership could be acquired. But if both were valid, membership was secured, and the party insured not only was bound to make payment of his premium note as the directors might deem requisite (§ 4), but the property insured also became thereby pledged to the company for the payment of all losses as specified in the act of incorporation (§§ 5, 8). These are burdens to which the member subjects himself; in return for which he has the policy of insurance on his property and the right to his proportion of whatever profits may be made by the company. But the policy being originally void, no membership could be thereby created, and no right to profits could arise. It would seem to follow that in such a case, the premium note must be held invalid for the want of a legal consideration to uphold the promise. The charter of the company contemplates, and good faith and fair dealing require, that the entire contract of insurance, including the premium note on the one hand and the policy of insurance on the other, with all their necessary concomitants and consequences, should exist or fall together. The note cannot be valid unless the policy also was so in its inception; and unless both were so originally in this case, no membership was acquired by the plaintiff. All this I hold to be clear upon the terms and spirit of the charter of incorporation, and the true nature of the contract between the parties.

The defendants, with full knowledge of the facts invalidating the policy, have chosen to act upon the premium note of the plaintiff, as an available security in their favor and which he was bound to pay. Several sums have accordingly been assessed by the directors of the company, and payment thereof required on said note. These payments have been made by the plaintiff, and the question is presented, can the defendants, who have thus affirmed the original and continuing validity of the premium note, in which the plaintiff has fully acquiesced, be allowed to set up that this policy, which formed the only consideration

for the note, was never valid; and that, on the sole ground of a breach of warranty on the part of the plaintiff, the facts constituting such breach of warranty being as well known to the defendants when they exacted and received payments on the note, as they are at the present time? This is the point to be determined, and I should certainly with great reluctance come to the conclusion that the defendants can be allowed to occupy the position they now assume. It is wholly inconsistent with the ground taken by them when they called for payments on the premium note, and I think common justice forbids any change of position in this respect. "It is a question of ethics," as was said in *Dezell v. Odell*, 3 Hill, 225, and morality requires that these defendants should be held strictly to the ground they have chosen to assume for themselves. An estoppel, according to Lord Coke, is where "a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." Co. Lit. 352, a. Estoppels are of three kinds, viz., by matter of record, by deed, and *in pais*; but our present concern is with the latter class only. Such an estoppel arises where one person is induced by the assertion of another, to do that which would be prejudicial to his own interest, if the person by whom he had been induced to act in this manner was allowed to contradict and disprove what he had before affirmed. In the case of *Pickard v. Sears*, 6 A. & E. 469, the principle is thus stated by Lord Denman: "The rule of law is clear, that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." In the case of *Dezell v. Odell*, *supra*, Cowen, J., said: "We then have a clear case of an admission by the defendant intended to influence the conduct of the man with whom he was dealing, and actually leading him into a line of conduct which must be prejudicial to his interest, unless the defendant be cut off from the power of retraction. This I understand to be the very definition of an estoppel *in pais*." The estoppel is allowed to prevent fraud and injustice, and exists wherever a party cannot in good conscience gain-say his own acts or assertions. The authorities upon this point are numerous and all speak the same language. *Gregg v. Wells*, 10 A. & E. 90; *Coles v. The Bank of England*, 10 A. & E. 437; *Sandys v. Hodgson*, 10 A. & E. 472; *Stephens v. Baird*, 9 Cow. 274; *The Welland Canal Co. v. Hathaway*, 8 Wend. 480; 2 Smith's Lead. Cas., 458, 467, notes; 1 Greenlf. Ev. §§ 22, 27, 204, 207. "It makes no difference in the operation of this rule whether the thing admitted was true or false: it being the fact, that it has been acted upon, that renders it conclusive." 1 Greenlf. Ev. §§ 208, 209. Here the defendants in affirming the validity of the premium note, necessarily affirmed that the policy was also originally valid. This affirmation was acted upon by the plaintiff, for he advanced money in consequence of its being made, and the defendants shall not now be allowed to set up any fact de hors the

policy, in order to impeach the original validity of the contract of insurance. *Qui sentit commodum, sentire debet et onus.* The defendants have derived advantage from this contract and they should now bear its burden. I think the nonsuit should be set aside and a new trial ordered.

No objection is made in the points submitted on behalf of the defendants that the declaration was not adapted to the case as proved, although a suggestion to that effect was made at the circuit. I have not examined that question. Looking only at what appears on the face of this policy it is unobjectionable, for nothing there appears to impeach it. The conclusion at which I have arrived does not, however, rest on the idea that the policy was certainly valid in its inception, but on the ground that these defendants have precluded themselves from setting up any fact out of the policy to show that it was originally void.

*New trial ordered.*¹

VIELE v. GERMANIA INSURANCE CO.

SUPREME COURT OF IOWA, 1868. 26 Iowa, 9.

APPEAL from Scott District Court.

Action upon a policy of insurance, which, so far as it is material to an understanding of the case, and is not set out in the opinion of the court, is in the following words:—

“The Germania Fire Insurance Company, the Hanover Fire Insurance Company, the Niagara Fire Insurance Company, and the Republic Fire Insurance Company, all of the city of New York, each acting and contracting for itself, and not one for the other or others, in consideration of one-fourth part of the sum of eight hundred and twenty-five dollars, to each of them paid by the assured hereinafter named, do each insure Charles Viele, of Evansville, Indiana, against loss or damage by fire, to the amount of one-fourth part of the sum of fifty-five thousand dollars, for the term of one year, upon the ‘Le Claire row’ and ‘Post-Office block.’ . . . Each of said companies agrees to make good to the assured, his executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum insured by such company as aforesaid, as shall happen by fire to the property above specified, from the first day of January, 1865, at noon, to the first day of January, 1866, at noon. . . . In witness whereof, the said companies have respectively caused these presents to be signed by their respective

¹ Acc.: *Keenan v. Dubuque Mut. F. Ins. Co.*, 13 Iowa, 375 (1862).

Compare *Allen v. Vermont Mut. F. Ins. Co.*, 12 Vt. 366 (1840); *Neely v. Onondaga Mut. Ins. Co.*, 7 Hill, 49 (1844).

See *North Berwick Co. v. New England F. & M. Ins. Co.*, 52 Me. 336 (1864). — ED.

presidents and attested by their respective secretaries, in the city of New York.

“Countersigned by the agent of the above named companies, at Davenport, Iowa, this first day of January, 1865.

“R. SIMPSON & Co., Agents.

“M. HILGER, President,

“JOHN EDW. PAHL, Secretary,

“*The Germania Fire Insurance Co.*

“DORAS L. STONE, President,

“R. S. WALCOTT, Secretary,

“*The Hanover Fire Insurance Co.*

“JONATHAN D. STEELE, President,

“PETER NOTMAN, Secretary,

“*The Niagara Fire Insurance Co.*

“ROBT. S. HOWE, President,

“D. F. CURRY, Secretary,

“*The Republic Fire Insurance Co.*”

The answer of the defendant admits the issuing of the policy, the loss by fire, notice of loss to defendant, ownership of property in plaintiff, and that there was no further insurance, but sets up the following special defence: That, at the time the policy was issued, the building lost by the fire was used for mercantile purposes, and for “manufacture of materials which were not of an extra combustible nature;” that, after the contract of insurance was entered into, and before the fire, the plaintiff leased portions of the building, to be used for the manufacturing therein of “rustic window-shades,” without having obtained the written consent of defendant, and contrary to the terms of the policy; that, in the manufacturing of said rustic window-shades, pine slats and splinters of wood, benzole, benzine or naphtha, varnish, paints, etc., are used, and large quantities of shavings were constantly being made, and other combustible substances created, greatly increasing the risk and hazard of the building insured in said policy; that such risk and hazard was not covered by the policy, and continued to the time of the fire; that plaintiff paid no additional premium on said policy on account of said increased risk, and defendant waived no rights accruing on account of the same; that, contrary to the terms of the policy, plaintiff permitted benzine to be kept upon the premises; whereby plaintiff lost all right to recover under said policy, and it has become void, etc.

The defendant filed an admission that the burden of proof is on defendant, and that without any proof plaintiff would be entitled to judgment on the pleadings.¹ . . .

Before the trial, plaintiff filed an admission to the effect that, after the execution of the policy, and before the loss, the plaintiff, without the consent of defendants in writing on the policy, leased a part of one

¹ A passage on practice has been omitted. — ED.

of the buildings to be used for the manufacture of rustic window-shades, and that it was so used and occupied at the time of the loss, and the risk was thereby increased. This admission closes with an averment that plaintiffs will rely upon proving matter in avoidance of the defence therein admitted, which will estop defendants setting up the same. This admission, in the body thereof, sets out that it is "for the purposes only of the trial of the cause at the present term, and for no other purpose." Defendant moved to strike from the files this admission, and for judgment thereon, and that parts thereof be stricken out. These motions were severally overruled and exceptions taken thereto.

The instructions given and refused are sufficiently referred to in the opinion of the court.

Upon motion of plaintiff, the following question was submitted to the jury, and they were instructed to answer the same as a special finding, viz. : —

"Did the defendant, by its agent Verder, with knowledge of all the facts claimed by defendant to constitute breaches of the conditions of the policy sued on, by its conduct and language to the plaintiff, or his agent, recognize and treat said policy and the insurance thereby made, as still continuing and in force, and induce the plaintiff, or his said agent, so to regard it?" To which the jury answered: "Yes."

The defendant asked the following questions to be submitted to the jury for special findings, and they were answered accordingly, viz. : —

"1. Was benzine kept on the premises in question, after the policy was made, and without the written consent of defendant, in cans for use?" To which the jury answered: "Yes."

"2. Was any additional consideration paid or agreed to be paid by the plaintiff to the defendant on account of the increase of the risk to the building in question?" Answer: "No."

"3. Was any additional premium paid or agreed to be paid by the plaintiff to the defendant for the privilege of keeping benzine on the said premises after the issuing of the policy?" Answer: "No."

"4. Did the defendant, after the increase of the risk as admitted by the plaintiff, conditionally consent to the continuance of the insurance on the building in question? and, if so, was one of such conditions that a new stove and zinc under it should be put in the room, in said building used as a tobacco factory?" Answer: "Yes."

"5. If such was one of the conditions, was such condition complied with by the plaintiff, before the fire in question?" Answer: "Yes."

"6. Did the defendant, after the increase of the risk as admitted by the plaintiff, conditionally consent to the continuance of the insurance on the building in question? and, if so, was one of such conditions that an iron door should be put in a room occupied by one of the rustic window-shade factories, in the fourth story of the building in question?" Answer: "Yes."

"7. If such was one of the conditions, was it ever complied with by the plaintiff before the fire?" Answer: "No."

The court, upon its own motion, required of the jury answers to the following questions, viz.:—

“ 1. If you answer the first question in relation to keeping benzine on the premises ‘yes,’ then you will also answer the following questions:—

“ 2. Was benzine a necessary or usual article in the manufacture of rustic window-shades?” Answer: “Yes.”

“ 3. Was it kept in small quantities for daily use, or was it kept in large quantities? State the quantities usually kept on hand.” Answer: “In small quantities, from one to two gallons.”

“ 4. Did the agent of the insurance company give any directions as to the manner of keeping benzine, and, if so, was it kept as he directed?” Answer: “Yes.”

“ 5. If you answer the seventh and last question submitted by the defendant ‘no,’ you will then answer the following question: Had said iron door been ordered, and had all reasonable efforts been made to have it put up before the fire?” Answer: “Yes.”

Plaintiff moved the court to set aside the special verdict of the jury upon question No. 6, because the finding is contrary to the evidence, and also moved for judgment on the general verdict. Defendant moved the court to set aside the special findings upon questions asked by plaintiff numbered one, two, four, and five, and upon question five submitted by defendant, and also the general verdict; because, first, such findings are contrary to the evidence; second, because of errors of law in the instructions of the court; third, the verdict and special findings are contrary to law; fourth, because of error in refusing to submit to the jury other questions requested by defendant; fifth, because of error in refusing certain instructions requested by defendant. The defendant also moved for judgment upon the special findings. The motions of defendant were overruled and exceptions taken thereto. The motion of plaintiff to set aside the special finding was also overruled and exceptions taken, and judgment rendered upon the general verdict against defendant for the sum of \$3,421.80.

Plaintiff appeals from the decision of the court upon his motion to set aside the special verdict of the jury in response to question six of defendant.

Defendant appeals from the rulings, orders, and final judgment of the court.

Dasison & True, James T. Lane, and S. B. Paul, for the appellant.

Putnam & Rogers, for the appellee.

BECK, J.¹ . . . III. The solution of one question will dispose of many points made by defendant relating to the admission and exclusion of evidence, and the giving and refusing of instructions to the jury. The question is this: Can the breach of the conditions of the policy against the increase of the risk, without the written consent of

¹ Passages on pleading and practice have been omitted. — ED.

the insurers, whereby the instrument became forfeited, be waived by parol or by the acts of defendant?

The plaintiff admitted the increase of the risk by the use of a part of the building insured for the manufacture of rustic window-shades, but sought to avoid the forfeiture, which otherwise would have resulted, by evidence tending to show the consent of the agent of defendant to such use, his acts and declarations recognizing the contract of insurance, after the increase of the risk, and his admission that the building continued to be covered by the policy. This evidence was given to the jury against the objection of defendant, and the court held, in the instructions to the jury, that such facts, if proved, would operate as a waiver of the forfeiture and entitle plaintiff to recover. The following are among the conditions of the policy:—

“If the above mentioned premises shall be used or occupied so as to increase the risk, or become vacant and unoccupied, or the risk be increased by the erection of adjacent buildings, or by any other means whatever, within the control of the assured, without the assent of the companies indorsed hereon; . . . or if the assured shall keep upon the said premises gunpowder or phosphorus, or petroleum, or rock or earth oils, or benzole, benzine or naptha, or any explosive substance, or shall keep or use upon the said premises camphene, spirits, gas or chemical oils, without written permission on this policy, then, and in every such case, this policy shall be void.”

The question above stated is fairly presented by the record, and is of very great importance, not only in its relation to this case, but to the business of insurance generally. We have endeavored to give it the careful and patient consideration, aided by the able argument of the counsel for the respective parties, which its importance demands.

The policy which is the foundation of this action, though a unilateral contract in form, contains covenants of the assured as well as of the underwriters, and mutual agreements of the parties. Some of these covenants on the part of the assured are in the nature of warranties, and conditions precedent; others are in the nature of obligations imposed by the conditions limiting or measuring the liability of the underwriters. The covenants of the insurers are mostly, if not all, dependent upon the obligations or covenants of the insured, expressed or implied in the policy. The policy, though subscribed only by the underwriters, is evidence of the contract entered into by both parties, and binds both. 2 Parsons' Maritime Law, 27; Parsons' Mercantile Law, 404. Contracts of this character, binding the obligor upon conditions to be performed by the obligee, but subscribed only by the obligor, are not uncommon. Those for the sale of real estate are often in this form. The language used to express the idea that the obligor is not bound to perform his covenant, until the conditions imposed upon the other party are performed, or, in other words, that the obligor's covenants are dependent, is usually a recital of the conditions which are to be performed by the obligee, following with the declaration that if they are not per-

formed, the instrument shall become void, or forfeited. The policy under consideration is in this form. It declares, that if the risk is increased by means within the control of the assured, without the assent of the underwriters, it "shall be void." By the conditions expressed, the assured is prohibited from increasing the risk, and he obligates himself that it shall not be increased in the manner prohibited. This is his undertaking, and, as we have seen, he is bound thereby as though he had subscribed the policy. This is obvious; but a word or two more may express the idea more clearly. The underwriters obligate themselves to pay a certain sum in case of the loss of the building by fire, with the condition, however, that the risk shall not be increased in the manner prohibited. To this condition the assured assents by the acceptance of the contract, and he thus obligates himself and becomes bound by the policy, that the risk shall not be increased. If he permits it to be increased, his covenants are broken. The condition which he is bound to perform is precedent to the underwriters' covenant. The underwriters are, therefore, not liable on the policy, which ceases to bind them, and to that extent the policy becomes void.

Unsound conclusions in the argument of defendant's counsel result from an improper understanding of the expression "shall be void," used in the condition above quoted from the policy. It is insisted, that the instrument, by force of these words, upon the increase of the risk, became absolutely null and void. The phrases and words used to convey the idea are, "*ipso facto* void;" "dead;" "extinct;" "defunct;" "of no effect," etc., etc.; meaning thereby that the instrument has no force or effect, in the sense of these terms when applied to instruments void in law, as the deeds of parties having no legal capacity to contract, or contracts against public policy, etc. But the term "void," as used in the policy, has no such meaning. It simply means that the underwriters, upon the violation of his covenants by the assured, shall cease to be bound by their covenants in the policy; and this is in accordance with the true definition of the word, and its common use in like connections. The policy does not cease to have a legal existence, it is the only competent evidence of the contract it embodies, and in truth is not void except so far that the underwriters are no longer bound thereby. Neither will they be discharged therefrom unless they plead the fact that the insured failed to perform his covenants contained in the policy. Their silence would waive the default of the opposite party.

The position of defendant's counsel, which is supported by several authorities, is to the effect that upon a breach of the conditions of the policy by the assured, which would defeat recovery thereon, it becomes absolutely void — as it were, dead — and that nothing short of a new creation could impart vitality to it. This doctrine is certainly unsound when applied to other contracts; for, on the contrary, after default in the conditions by one party, the other may waive the forfeiture and treat the instrument as of binding force upon himself. No reasons can

be given to except policies of insurance from the operation of this rule. The party in default cannot defeat the contract; the party for whose benefit the conditions are introduced may waive the forfeiture. It follows, therefore, that the instrument is forfeited at the option of the innocent party; and if he waives the forfeiture, the contract stands as if no breach had occurred. In *Williams v. Bank of the United States*, 2 Pet. 102, the doctrine is announced in these words: "If a party to a contract, who is entitled to the benefit of a condition, upon the performance of which his responsibility is to arise, dispenses with, or by any act of his own prevents, the performance, the opposite party is excused from proving a strict compliance with the condition."

We conclude, therefore, that the forfeiture of the policy on account of the breaches of the conditions thereof, could have been waived by the defendant, and if waived, the policy continued of the same binding force which it originally possessed. This view is sustained by the following authorities: *Keenan v. Mo. State Mut. Ins. Co.*, 12 Iowa, 126; *David v. The Hartford Ins. Co.*, 13 Iowa, 69; *Carpenter v. The Prov. Wash. Ins. Co.*, 16 Pet. 509; *Coursen v. Penn. Ins. Co.*, 46 Penn. St. 323; *Atlantic Ins. Co. v. Goodale*, 35 N. H. 328; *Frost v. Saratoga Ins. Co.*, 5 Den. 154; *Clark v. Jones*, 1 Den. 516; *Cartwright v. Gardner*, 5 Cush. 281; *North Berwick Co. v. Ins. Co.*, 52 Maine, 336; *Warner v. Peoria Ins. Co.*, 14 Wis. 323; *Smith v. Gugerty*, 4 Barb. S. C. 614; *N. E. F. & M. Ins. Co. v. Schettler*, 38 Ill. 166; *Viall v. Ins. Co.*, 19 Barb. 440; *Ins. Co. v. Stockbower*, 26 Penn. St. 199; *Buckbee v. Life Ins. Co.*, 18 Barb. 541; *Beal v. Park Ins. Co.*, 16 Wis. 241; *Wing v. Harvey*, 27 Eng. Law & Eq. 140; *Peoria F. & M. Ins. Co. v. Hall*, 12 Mich. 202.

IV. We are next led to inquire as to the manner of the waiver of the forfeiture, whether it must be in writing or may be by parol, and what acts of the defendant will amount to a waiver.

Parol evidence is not admissible to contradict or alter a written instrument, but this rule does not exclude such evidence when adduced to prove that a written contract is discharged, or that the damages for non-performance were waived, or that performance of a part of the contract was dispensed with. 1 *Greenleaf's Ev.* §§ 302-304; 2 *Phil. Ev.* (Cowen & Hill's and Edwards' Notes) 692 and note 505; 2 *Starkie's Ev.* 574; *Fleming v. Gilbert*, 3 Johns. 528; *Merrill v. Ithaca & Oswego R. R. Co.*, 16 Wend. 586.

These exceptions to the rule, or rather the rule admitting parol evidence for these purposes, may not apply to specialties; but a contract of insurance need not be by specialty, or even in writing. It seems to be the better opinion that it may be oral only. *Parsons' Mercantile Law*, 403 and notes; 2 *Parsons' Maritime Law*, 19 and notes; *City of Davenport v. Peoria Ins. Co.*, 17 Iowa, 276; *Commercial Ins. Co. v. Union Ins. Co.*, 19 How. 321; *Baptist Church v. Brooklyn Ins. Co.*, 19 N. Y. 305. We need not, then, inquire whether a policy executed by an incorporation and attested by its corporate seal is a specialty, for

the policy sued on is not sealed by the companies, and is therefore a simple contract and not a specialty. The rule therefore will not in this suit exclude parol evidence for the purposes above mentioned. The cases which we will hereafter cite, in considering what acts may amount to a waiver of conditions or forfeiture on account of breaches of conditions, support this doctrine and will illustrate its application.

It is argued that the condition in the policy, to the effect that an increase in the risk avoids the contract on the part of the underwriters, unless consent thereto be had in writing, implies that such consent can be given in no other way. It will be at once remarked, that this restriction is itself a condition, and is just as capable of being waived or dispensed with as any other condition of the instrument and in the same way. There is nothing in the terms of this condition prohibiting its waiver. But the conditions of the policy became broken by an increase of the risk, without written consent, and there at once happened a forfeiture whereby defendant was discharged from the contract. Now, as a matter of fact, the waiver was not of the written consent, but of the forfeiture.

V. What will amount to or have the effect of a waiver of a forfeiture of the policy, or a dispensation of the performance of its conditions? The party for whose benefit a condition is introduced in a contract may determine whether it shall or shall not be enforced, and, as we have seen, may waive or dispense with its performance. It seems reasonable that the same character of evidence will establish a waiver or dispensation of conditions that is sufficient to prove the existence of a contract. An express agreement to that effect will of course be sufficient. Circumstances proving that the party treated the contract as subsisting and not forfeited, a course of dealing consistent only with that hypothesis, and acts and declarations whereby the other party was induced to believe that the condition was dispensed with or forfeiture waived, will be sufficient to preclude the setting up of the breaches of the condition as a defence to the contract of the party bound thereby. Thus the receipt of premium upon a policy after forfeiture is a waiver thereof. *North Berwick Co. v. Insurance Co.*, 52 Maine, 336; *New York Insurance Co. v. National Prot. Ins. Co.*, 20 Barb. 468; *Liddle v. Market Fire Insurance Co.*, 29 N. Y. 184; *Ames v. New York Union Ins. Co.*, 26 N. Y. 263; *Bochen v. Williamsburgh Ins. Co.*, 35 N. Y. 131; *Goit v. National Prot. Ins. Co.*, 25 Barb. 189; *Viall v. Genesee Mutual Ins. Co.*, 19 Barb. 446; *Frost v. Saratoga Mutual Ins. Co.*, 5 Den. 154; *Lycoming Ins. Co. v. Stockbower*, 26 Penn. St. 199; *Wing v. Harvey*, 27 Eng. Law & Eq. 140.

So the taking of an additional risk on the same policy will waive a forfeiture, existing at the time, for breach of condition. *Rathborn v. City Ins. Co.*, 31 Conn. 193.¹ . . .

It will be observed that the waiver of the condition or forfeiture, under these authorities, is not required to be supported by a considera-

¹ A passage presenting other authorities has been omitted. — Ed.

tion. In the cases where it is held that the payment of premium upon a policy forfeited for breaches of condition is a waiver of forfeiture, the payment was not made in consideration of the waiver, but for the renewal or continuance of the insurance. The waiver or dispensation is not in the nature of a contract which requires the support of a consideration, but rather of an estoppel, whereby the underwriter is precluded from denying the validity of the contract, on account of acts or admissions either recognizing it as of binding force after the forfeiture, or holding out to the assured that the performance of the condition is dispensed with.

It is not an accurate use of terms to say that the condition of a contract must be supported by a consideration. The contract itself must be, but the condition is a mere incident thereto, and its sufficiency, validity, or force is in no way affected or dependent upon the consideration. It is true the condition may influence the parties in fixing the amount of the consideration, but the law will not, in the absence of fraud, inquire into its sufficiency, nor hold a contract invalid because a full or just value has not been received by the obligor. The case of a policy of insurance illustrates the point. The underwriter is bound thereby to pay the assured the amount of any loss by fire which may happen to his property within a certain time. The consideration of this contract is the premium received by the underwriter. The assured is bound not to permit the risk to be increased; this obligation is the condition of the policy, and with it we can associate no idea of consideration. It may enter into the contemplation of the underwriter when fixing the value of the risk which may be worth a greater premium without the condition in the policy, but the adequacy of the consideration, as we have remarked, is not a matter of inquiry, and the consideration itself no element of the condition. We conclude, therefore, that, as the condition is not dependent upon nor supported by the consideration, it may be waived or dispensed with even by an agreement without consideration.

VI. We approach the consideration of the questions involving the power of the agent of the defendant to dispense with the conditions of the policy or to waive the forfeiture resulting from the breach thereof. Defendant's counsel contend that, as shown by the policy, the agent possessed no power to assent to an increase of risk except in writing, and that, in order to bind the company by his acts, declaration, or agreement, dispensing with the conditions or waiving the forfeiture, his authority so to do must be expressly proved.

There was evidence tending to prove that the agent had full power to effect contracts of insurance, to fix rates of premium, to give consent to the increase of risk and change of occupation of buildings insured, to cancel policies in his discretion, and that in the prosecution of their business it was the custom of agents of insurance companies to exercise supervision over property covered by policies issued at their respective agencies during the term of insurance.

The instructions to the jury, and the rulings upon objections to evidence, in effect, hold, that the authority of the agent to waive forfeitures and dispense with conditions may be sufficiently shown by proof of the possession and exercise of the powers above stated, and that express authority need not be shown in order to bind the defendant thereby. This we conceive to be the law.

By proof of the possession of the powers aforesaid, the authority of the agent is shown to be in fact of the broadest and most plenary character. It is difficult to conceive of an act in the prosecution of the business of insurance which the officers of the companies can do that cannot be done by the agent. He is provided with blank policies whereby he is enabled to enter into the contract of insurance. These blank instruments are in no sense contracts until signed by him, for it is expressly provided therein that they "shall not be valid unless countersigned by the duly authorized agent of said companies at Davenport, Iowa."

Such is the express provision of the policy upon which this suit is brought, and there is not one word of limitation upon the authority of the agent contained in it. No attempt was made to prove knowledge on the part of the assured of any limitation of the power of the agent, further than by the policy itself, and a general custom or rule of insurance companies and agents that no change can be made by agents in the printed conditions of the policy. The effect of such limitation will be hereafter noticed. The powers of the agent, then, are those of a general agent, and the companies are bound by his acts which are within the scope of the general authority he possesses, even though he violates limitations upon that authority which are not brought home to the knowledge of the party with whom he deals. *Story on Agency*, §§ 126, 134; *Keenan v. Mo. State Mut. Ins. Co.*, 12 Iowa, 131; *City of Davenport v. Peoria Ins. Co.*, 17 Iowa, 276; *Warner v. Peoria Ins. Co.*, 14 Wis. 318, 323; *North Berwick Co. v. N. E. F. & M. Ins. Co.*, 52 Maine, 336; *Post v. Ætna Ins. Co.*, 43 Barb. 351; *Sheldon v. Atlantic Ins. Co.*, 26 N. Y. 460.

VII. This brings us to inquire what powers may be exercised by the agent within the scope of his general authority. Under this general authority he has power to conduct the business of insurance of his principals at the city of Davenport. This is the aggregation of all his powers, and he possesses implied authority to do all things proper and necessary in the prosecution of that business, subject of course to limitations imposed by his principals and known to those with whom he deals. These incidental powers may be numerous, and their enumeration is not necessary. Among others he has the power to assent to the increase of the risk, and to a change of occupancy of property insured, and to cancel policies on account of increase of risks or for any other reason. In the exercise of these powers he is guided by his own discretion, which it is presumed will be exercised for the best interests of his principals. He has, also, all the powers which by the usages of the

business are properly and ordinarily exercised by agents engaged therein. Story on Agency, §§ 77, 106.

It appears that insurance agents usually exercise supervision over the property insured by them, and this necessarily results from the character of the business and their authority to cancel policies on account of increase of risk. The agent is charged, by the terms of the policy on which this suit is based, with the power to determine whether the risk is increased. If he so determines, he may cancel the policy and put an end to the contract. This involves the necessity of examination of the condition of the insured property during the life of the policy, and constant watchfulness to protect the interest of the underwriters. If he determines that the risk is increased, such determination is final, for it seems the assured has no appeal therefrom and no redress for loss that may be sustained thereby. Such being the great, and in some respects extraordinary, powers of the agent, it follows that he is clothed with the power to dispense with conditions and waive the effects of breaches thereof, in contracts of insurance made by him. These powers are necessary incidents of his general authority, and without their exercise he could not act to its full extent. If he can determine that the conditions of the contract have been broken, surely he can also determine that they have not been broken. If he can put an end to the contract because of the increase of the risk, and the consequent forfeiture, certainly he can waive that forfeiture. If, possessing such full authority to make the contract, determine that it is performed, and to put an end to it, he can not dispense with its conditions after it is executed, the rules of law controlling agents generally, and all kinds of contracts, must be held not applicable to insurance policies and insurance agents. These companies have no way of dealing with their customers and the public, except through their agents. They are incorporations existing under the laws of another State. Practically those powers can only be exercised by agents. They are inherent in the corporations, whose interest as well as fair dealing toward others (as it did in the case before us), may require their exercise. The agents, therefore, must be held to have full authority to dispense with the conditions of policies, after their execution, and to waive forfeitures for breaches thereof.

As we have already intimated, the law, in its application to other kinds of contracts, and to agents transacting other kinds of business, fully sustains the doctrines we have announced. This may readily be illustrated by facts disclosed by the record. The owner of the property upon which the policy in question was issued was a non-resident of the State, and the business was transacted for him by an agent, who, it seems, exercised general powers in all matters pertaining to the property. Now, suppose this agent had executed a contract for the rebuilding of the property burned, or his principal had executed it, and it was delivered by the agent, blanks being filled by him under proper authority, with the name of the other contracting party, sums to be paid, etc. This contract contained many conditions, as we may suppose, for the

benefit of the property owner, and the agent was authorized to assent in writing to the dispensation of certain of them, and the power to put an end to the contract in case of the failure of the other party to comply with its conditions. During the progress of the work, questions arose whether certain things done, or omitted to be done, by the builder, were in violation of the conditions of the contract. The agent, as to whose power not one word of limitation existed in the contract, or was otherwise known to the builder, asserts that the matters in question are not in violation of the contract, and treats it as complied with, or verbally assents to the dispensation of certain conditions. When the building is completed, in accordance with the contract as thus modified, the principal refuses to pay the sum agreed on, because of non-compliance on the part of the builder with the conditions thus waived by the agent. Upon no recognized rules of law could this defence be sustained, and we would have no difficulty in finding ample authorities in support of the doctrine that the waiver of forfeitures by reason of the breaches of the conditions, and the dispensation of the conditions by the agent, were binding on the principal. This supposed case is not distinguishable upon principle from the case disclosed by the record.¹ . . .

While it is true that these companies transact business only through their agents at distant points, it is also true that much of their business is acquired through the diligence, skill, and capacity of these agents, and that parties effecting insurance rely in a great measure upon the representations made by them as to the rights and obligations of the respective parties to the policies, and are controlled in the care of the insured property by their directions. The acts of these agents, in all matters pertaining to the proper business they are appointed to transact, should bind their principals, unless contrary to restrictions of their powers, brought to the knowledge of those with whom they deal.

It is argued that, inasmuch as by the restrictions imposed on the power of the agent by custom, as well as by the rules of the company, he can make no change in the printed conditions of the policy, therefore he had no authority to waive a forfeiture of such terms, or dispense with their performance. Without determining whether this could be done by agreement at the time the policy was issued, we are clearly of the opinion that such restriction of authority in no way affects his power so to do after the policy is issued, in a proper case, and without fraud on his part, or by the assured.

The distinctions between omitting a condition required by the terms of his authority and by custom, to be introduced into the policy, and the waiver of such condition for a proper cause, after the policy had been executed, are obvious.

It has been held that an agent intrusted with blank policies, to be

¹ Passages presenting authorities have been omitted. — Ed.

filled up and countersigned by him, may bind the underwriter by new clauses or conditions inserted by the agent before issuing the policy. 2 Phillips' Ins. 528, § 1877; Gloucester Manufacturing Co. v. Howard, 5 Gray, 497.

VIII. By the terms of the policy the underwriters reserved the right to cancel it upon the risk being increased, or for any other cause, "by paying to the assured the unexpired premium *pro rata*." The point is made by the plaintiff, that if the risk be increased, of which the underwriters have notice, and the right to cancel is not exercised, this amounts to a waiver of the forfeiture incident to a breach of the condition against increase of risk. The decision of this question is not necessary, as the case is determined without it. But, for myself, I am free to admit the force of the position, in view of the peculiar facts of the case, and that I believe it is supported by sound reason.¹ . . .

IX. It is argued by the defendant's counsel, that the waiver of the breach of the condition of the policy, on account of the rustic window-shade manufactory, extended only to the acts in violation of the terms of the policy done before such alleged waiver, and that the condition continued to be daily violated by the continuance of the cause of the increase of risk; and that, as it is not pretended that there was any waiver of the breaches resulting therefrom, the policy is thereby avoided. The error of this argument is apparent. The waiver extended to all breaches resulting from the manufacture of rustic window-shades in the building insured, and the parties in all their intercourse concerning the increase of the risk, and by their acts touching the same, had reference to the continuation of the manufactory, and of course contemplated the waiver of the breaches resulting therefrom, and the dispensation of the conditions of the policy prohibiting it.

X. The policy expressly prohibited the keeping of benzine upon the premises insured. There was evidence tending to prove that this fluid was necessary in the preparation of the paints and varnishes used in the manufacture of rustic window-shades, and that, at the time of the fire, it was kept for that purpose upon the premises, in tin cans, in quantities not exceeding two gallons. The evidence also tended to prove that the agent gave permission for keeping benzine for the purposes and in the manner and quantities aforesaid. This permission was given, as it is claimed, at the time the alleged consent was given to the continuation of the window-shade manufactory. The court instructed the jury, substantially, that a consent to the occupation of the building for the manufactory implied a consent to the use of such articles as were necessary to be used in the business. This instruction was clearly correct. The consent to the manufacture of the window-shades implied a consent to the use of benzine if it was necessary or commonly used in making those articles; otherwise a direct permission to continue the manufactory would be defeated by the prohibition in the policy.

¹ The discussion of this question has been omitted. — Ed.

This permission operated to dispense with the prohibition.¹ . . .

XI. The evidence tended to prove that the agent of the underwriters, at the time he made an examination of the building, directed a certain iron door to be put up, and that either the tenants or the agent of the plaintiff agreed to comply with this requirement. It seems that no time was specified in which it should be done. An order was given for the door, but it was not completed and put up at the time of the fire. Upon this evidence are based the sixth and seventh interrogatories to the jury by the defendant, and the fifth propounded by the court.

The special finding in response to the sixth question of defendant, while it makes the continuance of the insurance conditional upon the door being put in, fixes no time when it was to be done. It simply shows that the agent agreed to carry the risk if an iron door should be put in. The agreement to put in the door was not a condition precedent to the continuance of the insurance. Of course the plaintiff had a reasonable time in which to comply with his agreement, and the response to the fifth question shows that he had used all reasonable efforts to do so before the fire, and had, therefore, sufficiently complied with his part of the agreement. These findings are consistent with each other, and not inconsistent with the general verdict. Plaintiff's motion to set aside the finding upon the sixth question of defendant was properly overruled.

In the light of the doctrines above announced, we find no error in the rulings of the court upon the admission of evidence and the submission of questions to the jury for special findings. It is not necessary to state the special questions raised, or evidence admitted or excluded. Neither do we find error in the giving or refusal to give instructions asked by the parties. Those given are in harmony with the principles of this opinion; those refused are not. It would answer no useful purpose to refer to them more fully. The verdict, as well as the special findings, are well supported by the evidence. The motions to set them aside were properly overruled.

*Affirmed.*²

¹ A passage presenting authorities on this point has been omitted. See *Harper v. Albany Mut. Ins. Co.*, ante, p. 530 (1858); and *Faust v. American F. Ins. Co.*, ante, p. 540 (1895). — ED.

² See *Bersche v. Globe Mut. Ins. Co.*, 31 Mo. 546 (1862); *Pratt v. New York Central Ins. Co.*, 55 N. Y. 505 (1874); *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410, 418-419 (1880); *Oakes v. Manufacturers' F. & M. Ins. Co.*, 135 Mass. 248 (1883). — ED.

PENNSYLVANIA FIRE INS. CO. v. KITTLE.

SUPREME COURT OF MICHIGAN, 1878. 39 Mich. 51.

ERROR to Superior Court of Detroit. Assumpsit. Defendant brings error.

D. C. Holbrook, for plaintiff in error.

Julian G. Dickinson and *Theodore Romeyn*, for defendant in error.

COOLEY, J. No question is made in this case upon the policy issued by the plaintiff in error to Mrs. Kittle, or upon the loss by fire of the property insured. It is claimed, however, that the policy became void by the taking out of another insurance on the same property without the consent of or notice to the plaintiff in error, and also that the proofs of loss are insufficient. Some errors in the admission of evidence are also assigned.

I. The date of the policy in suit was February 4, 1876, and it contained a provision that it should become void in case of subsequent insurance not assented to. The plaintiff below put in evidence a policy covering the same property, issued by the Citizens' Fire Insurance Company of New Jersey, dated November 1, 1876.¹ . . .

III. The court instructed the jury that the taking out of the second policy avoided the first unless the breach of the condition on that subject was waived by the Pennsylvania company afterwards. . . .

IV. The question of waiver was submitted to the jury as one of fact, and they appear to have found that there was a waiver. The facts submitted were that after the loss the adjusting agent of the defendant called upon the plaintiff, and after investigation made an offer to pay, by way of compromise, \$375, at the same time objecting to the taking out of the second insurance; that this offer was declined, and the agent went away, and soon after wrote the plaintiff that she might go on and make out her proofs, and the matter would then be taken into consideration; that subsequent correspondence took place between the agent and the plaintiff respecting the proofs, the former demanding more particularity in what was furnished; and it was not until six months after the offer for a settlement was made that the agent notified the plaintiff, who in the meantime had been endeavoring to make the proofs satisfactory, and to overcome the objections he was making thereto, that "in addition to the objections heretofore made," the defendant would insist upon the forfeiture because of the second insurance.

We think the jury were warranted in finding that the defendant, by calling upon the plaintiff to go on and make out her proofs, and by requiring her to be at the trouble and expense of correcting these to

¹ In reprinting the opinion, several passages foreign to waiver have been omitted. — Ed.

satisfy the criticism made by the agent, without giving her to understand the company would rely upon the forfeiture, should be held to have waived it; and that if it was the purpose all the while to insist upon it, the agent did not act towards her in good faith. We also think the jury would have a right to infer from the final letter of the agent that he understood the objection of forfeiture had not been insisted upon previously. *Gans v. Insurance Company*, 43 Wis. 108. . . .

We think the case was fairly tried and no harmful errors committed, and the judgment must be affirmed with costs.¹

The other justices concurred.

JOHNSON v. AMERICAN INS. CO.

SUPREME COURT OF MINNESOTA, 1889. 41 Minn. 396.

ACTION on a fire insurance policy, brought in the District Court for Rock County, to recover \$2,975.66, the amount of loss as fixed by appraisers chosen by the parties in accordance with the policy. Defence (among others) that the contract was void because (1) when the policy was procured the plaintiff was not sole owner but only part owner of the property, which fact was material to the risk and was concealed from defendant; and (2) that after the issue of the policy the defendant procured other insurance on the property without notice to and consent of defendant. At the trial before PERKINS, J., the plaintiff had a verdict. The defendant appeals from an order refusing a new trial. The second assignment of error was based on an instruction (duly excepted to) to the effect that if one Joles had an interest in the insured property, yet, if defendant, with full knowledge of the facts in relation thereto, required plaintiff to submit to an examination on oath, under the policy, and to enter into an appraisal, the defendant thereby waived any right to claim that the policy was void on account of Joles's interest.

Lusk & Bunn, for appellant.

P. E. Brown, for respondent.

DICKINSON, J. The appellant must be sustained in its first assignment of error. By the terms of the contract of insurance it was provided that "if differences shall arise between the parties hereto touching any loss or damage, . . . the matter shall, at the written request of either party, be submitted to impartial arbitrators, mutually chosen, whose award in writing shall be binding on the parties as to

¹ *Acc.*: *Cannon v. Home Ins. Co.*, 53 Wis. 585, 593-596 (1881); *Silverberg v. Phenix Ins. Co.*, 67 Cal. 36 (1885).

See *Webster v. Phoenix Ins. Co.*, 36 Wis. 67 (1874); *Northwestern Mut. L. Ins. Co. v. Germania F. Ins. Co.*, 40 Wis. 446 (1876); *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410, 418-419 (1880).—Ed.

amount of such loss or damage, *but shall not decide the liability of the company under this policy.*" The charge of the court was, in substance, that an arbitration pursuant to the contract and at the request of the defendant, solely as to the amount of the loss, the plaintiff being thereby subjected to some necessary expense, was effectual as a waiver on the part of the defendant of all right to claim that the policy was void by reason of any facts of which it then had knowledge. This is opposed to the express agreement of the parties, as we construe that part of the policy above referred to. The contract contemplates and gives to either party the right to demand an arbitration and final adjustment of the amount of the loss merely, distinct from any question which may arise as to the legal liability of the insurer, leaving that to be determined in some other manner. The language which we have italicized was employed with obvious reference to an arbitration and award as to the amount of loss or damage, and was intended to have some practical effect in such a case. Yet it would be practically nullified if it were held that the mere fact of submitting the question of the amount of the loss to arbitration would be effectual to preclude the insurer from thereafter bringing in question its legal liability under the policy. It is apparent from the terms of the contract that such was not the intention of the parties. There is no natural or necessary relation between the *amount* of the loss suffered from a fire and the legal construction or the validity of a contract of insurance upon which the sufferer may rely for indemnity; nor is there any reason in the nature of the subject why, if the parties so agree, a disputed claim as to the extent of the damage may not be adjusted by arbitration or otherwise, without either party being thereby precluded from questioning the legal effect or validity of the alleged contract. On the contrary, considerations of expediency might well prompt the parties to agree upon a speedy examination and appraisal by arbitrators as to the amount of the loss merely, at a time and under circumstances which might be most favorable for such purposes, without waiting until a determination could be secured as to the legal rights and obligations of the parties under the contract. The error involved in this instruction may have affected the result, and a new trial must be allowed.

The second assignment of error raises the question of the sufficiency of evidence to justify a finding that, at the time when the defendant required the plaintiff to submit to an examination under oath respecting the loss, the defendant had notice of the fact, now relied upon to avoid the contract, that another person than the assured had a proprietary interest in the property. In view of our decision upon the first assignment of error, we need not say more upon this point than that we think there was evidence proper for the consideration of the jury.

The policy contained a provision that it should be void if other insurance should be secured "without notice to and consent of this com-

pany, in writing hereon." It also contained a clause authorizing the defendant to terminate the contract at any time, at its option, by giving notice and refunding a ratable proportion of the premium for the unexpired term. Other insurance was effected, and there was evidence that notice of this was communicated orally to the defendant's agent long before the fire. The court charged the jury, in substance, that if such were the case it became the duty of the defendant to elect whether it would cancel the policy or continue it in force, and that, if it failed to cancel the policy after such notice, it must be held to have elected to retain the contract in force, and to have waived compliance with the specified condition. This, we think, was not an accurate statement of the law, and may have been misleading. The provision in the policy authorizing the company to terminate the contract at any time, at its option, bore no special relation to that concerning other insurance. By the plain terms of the policy, other insurance without the consent of this company would *ipso facto* avoid the contract; and in the case of a contract thus avoided, it would not be obligatory upon the insurer to repay any of the unearned premium; nor would he be required to give notice that he should insist upon and avail himself of the proper legal effect of the agreement. It required no affirmative act of election on the part of the company to make operative the clause avoiding the contract whenever the specified conditions should occur.¹ Its obligations ceased *unless*, being informed of the fact, it *consented* to the additional insurance, or in some manner waived the forfeiture. It is not, however, contended that consent may not be shown in some other manner than that specified in the policy. The fault in the charge is in the proposition that the failure to cancel the policy by the affirmative action of the company after it had notice of additional insurance, would of itself be effectual as an election to continue the policy in force. *Robinson v. Fire Association*, 63 Mich. 90, 29 N. W. Rep. 521. *Order reversed.*

¹ *Acc.* : *Robinson v. Fire Assn.*, 63 Mich. 90 (1886); *Goldin v. Northern Assur. Co.*, 46 Minn. 471 (1891); *Carey v. German American Ins. Co.*, 84 Wis. 80 (1893); *Home Ins. Co. v. Scales*, 71 Miss. 975, 980 (1894). — Ed.

- (b) *The insurer's conduct after the issuing of the policy and at or before the arising of the defence.* ♦

COBB ET AL. v. INSURANCE COMPANY OF NORTH AMERICA.

SUPREME COURT OF KANSAS, 1873. 11 Kan. 93.

ERROR from Shawnee District Court.

On the 27th of May, 1867, the defendant in error, The President and Directors of the Insurance Company of North America, issued its policy of insurance to one G. F. Bernstein to insure him on his stock of goods in Council Grove to the amount of \$6,000. Afterward the policy was reduced by the agent of the defendant to \$3,000. On the 12th of March, 1868, and during the lifetime of the policy, the goods of Bernstein covered by the policy were entirely destroyed by fire. Bernstein assigned the policy, and his claim thereon, to Cobb, Stribling & Co., on the 27th of June, 1868. This action was commenced in the District Court for Shawnee County on the 10th of March, 1869. The pleadings consisted of the petition, the answer, a reply, and a general demurrer to the reply. The averments of the pleadings sufficiently appear in the opinion of the court. The action was heard upon the demurrer at the June Term, 1870, of the District Court, and judgment upon the pleadings was given in favor of the Insurance Company, and plaintiffs bring the case here on error.

W. P. Douthitt, and C. M. Foster, for plaintiffs.

A. L. Williams and Lewis Hanback, for defendant.

The opinion of the court was delivered by

BREWER, J. The plaintiffs brought their action on a policy of fire insurance issued by defendant. Judgment was entered in favor of the defendant on the pleadings, and of this judgment plaintiffs now complain. Two questions are presented for our consideration. First, Was the action prematurely brought? The policy provided that the loss should "be paid sixty days after due notice and proofs of the same, made by the assured and received at this office." The petition was filed March 10, 1869. The answer alleged that proofs of loss were not received at the company's office until January 26, 1869, less than sixty days prior to the commencement of the suit. The reply admitted this, but averred that subsequently, and on the 19th of February, 1869, the defendant, after consulting with its western agent, denied all liability under the policy, and "refused to pay the loss or any part of it on the ground that the circumstances attending the fire were such as to justify their refusal to pay the same," and also requested that suit be brought in Kansas instead of Philadelphia. That a stipulation like the one in

question is valid, and that, when the company recognizes or does not deny its liability under the policy for the loss, an action before the expiration of the stipulated time is prematurely brought, is well settled. It is simply a contract for so much credit, and is no more to be questioned than a contract for like credit in the sale of goods. It is equally well settled that the right to notice and proofs of loss is a right which the company may waive, and that when the company denies all liability for the loss, and refuses to pay for the same, and places that denial and refusal upon grounds other than the failure to give notice or to furnish proofs, such denial and refusal avoid the necessity of notice and proofs, and are a waiver of them. *Vas v. Robinson*, 9 Johns. 192; *Thomas v. The Ocean Ins. Co.*, 6 Cow. 404; *McMasters v. The Westchester Co. Mutual Ins. Co.*, 25 Wend. 379; *O'Neal v. The Buffalo Fire Ins. Co.*, 3 Comst. 122; *Peoria M. & F. Ins. Co. v. Whitehill*, 25 Ill. 466; *The President and Directors of the Ins. Co. of N. A. v. McDowell*, 50 Ill. 120; *Schenck v. The Mercer Co. M. & F. Ins. Co.*, 4 Zab. 447; *Graves v. The Washington M. Ins. Co.*, 12 Allen, 391; *Allyn v. The Maryland Ins. Co.*, 6 Har. & Johns. 408; *Taylor v. Merchants Fire Ins. Co.*, 9 How. 390. It would seem to follow that when the company by denial of its liability relieves the assured from the necessity of giving notice and proofs, it also waives the right to claim sixty days from notice and proofs for payment. Shall it be permitted to deny all liability under the contract for the loss, and at the same time have all the benefits of the stipulations of the contract as to time and mode of payment? A distinction should perhaps be noticed to guard against misapprehension. A mere waiver by the company of one provision of the policy intended for its benefit is not a waiver of the others. It may for instance formally waive notice of proofs, and still be entitled to the sixty days after such waiver for payment. In such case the waiver stands simply in lieu of the notice and proofs, and the time begins to run from the waiver. In all this the company recognizes its ultimate liability for the loss, and simply relieves the assured from some one or more of the steps necessary to fix that liability. But a denial of all liability places the parties in a different attitude. In effect the company says to the assured, Notwithstanding you give us notice and furnish proofs, and wait the sixty days, and comply with all the provisions inserted in the policy for our benefit, still we shall not recognize your claim, nor pay for the loss. Why compel a party to do that for the company, which when done the company wholly disregards? After having done all, he is no nearer payment than before, and must still appeal to the courts. Counsel seeks to parallel this with the case of a promissory note, and asks if, in case the company had given a note payable in sixty days, an action thereon in thirty days would not have been premature, even though the company, subsequently to the execution of the note, denied all liability thereon. The parallel is not good. The latter is wholly a unilateral contract, with rights and liabilities fixed and determined, and without anything for adjustment, and without occasion for act or waiver by

either party. To change the liability requires a new promise, not a denial or waiver. The decisions have all been in harmony with the views herein expressed. *Columbia Ins. Co. v. Catlett*, 12 Wheat. 383; *Ætna Ins. Co. v. McGuire*, 51 Ill. 312; *Phillips v. Protection Ins. Co.*, 14 Mo. 220; *Allyn v. Maryland Ins. Co.*, 6 Harris and Johns. 408; *The N. & N. Y. Trans. Co. v. Western Mass. Ins. Co.*, 34 Conn. 561, or 6 Blatchf. C. C. 241. Counsel contends that there is a distinction to be drawn between some at least of these cases and the present, in this, that in them the language of the stipulation was "sixty days after proof and adjustment," while in this it is "after due notice and proofs made by the assured and received at the office" — as though the former required mutual action, and the latter only action on the part of the assured. Some of the cases cited are exactly parallel. In the Illinois case the language is, "after the loss shall have been ascertained and proved." In the Missouri case, "after the loss shall have been ascertained and proved, and the proof received at the office." And in the Connecticut case, "after sixty days from notice, and the furnishing of preliminary proofs of loss to the underwriters." But even under the policy in this case there is to be mutuality of action. The proofs are for the purpose of an adjustment. The mere production of these proofs does not determine the amount of the loss. It furnishes a basis for the action of the parties in adjusting this amount as well as the extent of the liability of the company. We conclude, then, that the action was not prematurely brought.¹

Was the liability of the defendant destroyed by the additional insurance taken out on the stock of goods covered by this policy? The policy stipulated that it should be avoided if the assured made any other insurance on the property "without notice to and consent of this company in writing." The answer alleged a subsequent insurance without such notice and consent. The reply admits a subsequent insurance, and then alleges that this policy was originally for \$6,000, but was reduced by defendant to \$3,000; that at the time of such reduction the defendant in consideration thereof requested the assured to take out a policy of \$3,000 in the Home Ins. Co.; that in pursuance thereof the assured took out such policy, which was the additional insurance; that the defendant had due notice thereof, and that this policy was delivered to the defendant's agents for the purpose of having this consent indorsed in writing, and the assured being ignorant of the mode of transacting such business relied wholly upon defendant and its agents to have the business correctly done; and that the defendant and its agents, contriving and intending to cheat and defraud the assured, negligently and fraudulently omitted to indorse the consent in writing. Upon these facts was the policy rendered null and void? It will be noticed that the reply alleges notice, and that the additional insurance was at the request, which implies the consent, of the defendant; so that to this

¹ *Acc. v. Home F. Ins. Co. v. Fallon*, 45 Neb. 554 (1895); *Insurance Co. v. Hancock*, 106 Tenn. 513 (1901). — Ed.

extent the requirements of the policy were complied with. The only thing lacking is the written evidence of the consent. The clause requiring consent in writing is a condition for the benefit of the insurer. Like any other condition of a contract it may be waived by the party in whose favor it exists. By what kind of testimony such waiver must be proved, is a question we need not consider. Certain facts are alleged, and for the purpose of the case, as it now stands before us, must be taken as proved and true. Do these facts amount to a waiver? or perhaps more correctly, is the insurance company estopped by its conduct from insisting on a breach of this condition as a ground of forfeiture? The defendant reduced its policy from \$6,000 to \$3,000, and requested the insured to take out a policy of \$3,000 in a particular company; and when in obedience to this request he had taken out such policy, intending to cheat and defraud him, fraudulently omitted to indorse its consent in writing upon the policy when presented for that purpose. The question of the power of an agent does not come in here, for though some of the acts are alleged to have been done by and through an agent, yet the acts are all charged to have been the acts of the defendant. The case stands as though the transactions were wholly between two individual principals. The company, when it requested the insured to take out the additional insurance, placed itself under obligations to give its consent in writing, and to do all other acts which might be necessary to prevent such additional insurance from injuriously affecting the rights of the insured in its own policy. It could not subject him to the labor, annoyance, and expense of taking out a new policy, and then refusing its consent insist that its policy was avoided, and the premium forfeited. The law will not tolerate such unconscionable dealing; and that which it cannot do directly, by refusal, it cannot do indirectly by fraud. Upon this question therefore we hold against the defendant.¹

These being the only questions presented for our consideration we shall be compelled to order a reversal of the judgment of the District Court, and remand the case for further proceedings. It is perhaps fitting to say that there is another question upon which counsel informs us the decision of the District Court was placed, but which somehow does not appear in the record as it comes to us. Of course, therefore, it would be improper for us to express any opinion concerning it.

The judgment will be reversed.

All the justices concurring.

¹ See Maryland F. Ins. Co. v. Gusdorf, 43 Md. 506 (1875); Westchester F. Ins. Co. v. Earle, 33 Mich. 143 (1876); Allemania F. Ins. Co. v. Hurd, 37 Mich. 11 (1877).

Compare Cleaver v. Traders' Ins. Co. 65 Mich. 527 (1887); Moore v. Hanover F. Ins. Co., 141 N. Y. 219 (1894).—ED.

HOME PROTECTION *v.* AVERY.

SUPREME COURT OF ALABAMA, 1888. 85 Ala. 348.

APPEAL from the Circuit Court of Tallapoosa.

Tried before the Hon. JAMES W. LAPSLEY.

Action on policy of insurance against fire, commenced October 1, 1886; plea of general issue, and special plea of forfeiture; verdict and judgment for plaintiff, under charges of court, which are now assigned as error, with rulings in admission of evidence. The opinion states the material facts, and makes it unnecessary to set out the numerous rulings to which exceptions were reserved.

H. A. Garrett, with whom was *Jas. E. Cobb*, for appellant.*Jno. M. Chilton*, *contra*.

STONE, C. J. It is shown in the record before us that the appellee, a married woman, took out three policies in the appellant corporation, a fire insurance company. Two of them were against losses by fire or lightning, and the third one against losses by storms. Only one of the policies is before us, and it is the foundation of the present action. It bears date November 27, 1883, was to run five years from date, and was based on a gross premium of forty-four dollars, one-fifth of which — \$8.80-100 dollars — was paid in advance, and the remaining four-fifths were to be paid in instalments of the same amount, on the 15th day of March, severally, in the years 1885-6-7-8. This policy insures two separate barns, with their contents of hay and grain, each separately valued. The number of this policy is 50,835. The barns and their contents were destroyed by fire, December 4, 1885. The defence was rested alone on the fact, not disputed, that the assured had failed to pay the instalment of premium — \$8.80-100 — due March 15, 1885.

One clause of the policy of insurance is in this language: "This company shall not be liable for any loss or damage under this policy, if default shall have been made in the payment of any instalment of premium due by the terms of the instalment note. On payment by the assured of all instalments of premiums due under this policy, and the instalment note given thereon, the liability of this company on this policy shall again attach, provided written consent of the secretary of this company be first obtained; and the policy [shall] be in force from and after such payment, unless this policy shall be void and inoperative from some other cause. But this company shall not be liable for any loss happening during the continuance of such default of payment. . . . It is further provided that no attempt by law or otherwise to collect any note given for the cash premium, or any instalment of premium due upon any instalment note, shall be deemed a waiver of any of the conditions of this policy, or shall be deemed in any manner to revive the policy; but upon payment by the assured or his assignee of the full amount due upon such note, and costs, if any there be, this policy shall

thereupon be in full force, unless the same be inoperative or void from some other cause than the non-payment of note."

The application for the policy, and which is made a part of the contract of insurance, contains a stipulation similar to that above.

It is contended for appellee, that the insurance company waived all ground of forfeiture in this case, and several grounds are urged in support of this contention: First, it is claimed that it was the custom of the insurance company to notify its customers when their premium notes fell due, and that it failed to do so in this case; second, that the company never gave notice of any claim that the policy was forfeited until after the destruction of the property by fire; third, that after the company had notice of the loss, it informed the assured, by letter from its secretary, that its adjuster would be around soon and adjust the amount of the damage.

Testimony was offered tending to show it was the custom of the appellant insurance company to give notice to its customers when their instalments of premium would mature. There was testimony that such had been the practice of this company in prior dealings with the appellee and with other persons who held its policies. And there was testimony, not denied, that the Home Protection Company had given notice of the time when premiums would mature on the other two policies held by the appellee, and that such maturing premiums had been promptly paid. It was testified that no such notice had been given as to this policy, and if notified the assured was able and would have paid it. This testimony was not controverted, and no explanation was offered why notice was given in the one case and not in the other. Almost the only questions presented for revision in this case grow out of the admission of the foregoing testimony against appellant's objection and charges of the court based upon it, to which exceptions were also reserved. There were many charges. The substance of them was, that "If, by the statements of its authorized agent after the making of the policy, and by its course of business with plaintiff and others, her neighbors, she was induced to believe that defendant would notify her of the time of payment, and would not insist on a forfeiture in case of an unintentional failure to pay the premium note, and she did unintentionally fail to pay the note, then the defendant cannot in good conscience be allowed to set up the non-payment as a defence."

The rule and its exception are correctly stated in *May on Insurance*, § 356, as follows: "No notice is required from the insurer to the insured that the premium or note given for premium is about to become due unless the custom and course of dealing between them has been such as to justify the insured in the belief that such notice would be given, and induce him to rely upon it to his prejudice." *Helm v. Phila. Life Ins. Co.*, 31 Penn. St. 107; *Union Cen. Life Ins. Co. v. Bernard*, 33 Ohio St. 459. See also, as to waiver of forfeiture, *Boulton v. Amer. Mut. Life Ins. Co.*, 25 Conn. 542; *McAllister v. N. E. Mut. Life Ins. Co.*, 101 Mass. 558; *Buckbee v. U. S. Ins. An. & Tr. Co.*,

18 Barb. 541; *Mut. Life Ins. Co. v. French*, 30 Ohio St. 240; *Brooklyn Life Ins. Co. v. Bledsoe*, 52 Ala. 538; *P. & A. Life Ins. Co. v. Young*, 58 Ala. 476.

It is not our intention to deny that, if a policy stipulate that it shall be void on non-payment of premium, and there is nothing else in the transaction, such forfeiture will be enforced. What we do decide is, that if an insurance company, by its habits of business, create in the mind of a policy-holder the belief that payment may be delayed until demanded, or otherwise waive the right to demand a forfeiture, this is binding on the company, notwithstanding the express letter of the policy may not have been conformed to. *Mut. Ben. Life Ins. Co. v. Jarvis*, 22 Conn. 133; *Amer. Ins. Co. v. Henly*, 40 Ind. 515; *Williams v. Albany Ins. Co.*, 19 Mich. 451; *Amer. Ins. Co. v. Stoy*, 41 Mich. 385; *Howell v. Knickerbocker Life Ins. Co.*, 44 N. Y. 276; *Schmidt v. Peoria Mar. & Fire Ins. Co.*, 41 Ill. 295; *Garlick v. Miss. Val. Ins. Co.*, 44 Iowa, 553; *Taylor v. Mer. Fire Ins. Co.*, 9 How. U. S. 390. See also, as to waiver of written terms of contract, *Liddell v. Chidester*, 84 Ala. 508.

The rulings in this case are in substantial conformity with the principles declared above, and we find no error of which appellant can complain.

*Affirmed.*¹

¹ In *Alexander v. Continental Ins. Co.*, 67 Wis. 422, 427-428 (1886), *TAYLOR, J.*, for the court, said:—

"The insured had taken a policy in which there is a condition that the policy shall terminate if any instalment on the premium note is not paid promptly on or before the day it becomes due. The company has no place in the vicinity of the insured where the money can be paid. The agent says to the insured: 'True, the policy says the liability of the company shall cease immediately if the money be not paid on the day, but I say to you, as agent of the company, that I will give you notice when payment is required.' The insured, relying upon this promise of the agent, does not pay on the day. Two months or more after the day, the agent appears and demands payment, and payment is made. No claim is made that there has been a forfeiture of the policy, or that it is necessary to have the policy renewed by procuring the written consent of the company in the manner prescribed in the contract, and the agent renews his promise to give notice when the next and subsequent instalments should become due, and says he will call upon her personally for payment. No notice is afterwards given, and no one calls for the money. The note is retained by the company, and not presented for payment, nor payment thereof demanded in any way, and in the meantime a loss occurs.

"The condition or forfeiture in the policy having been once waived, and the insured having been led to believe that it would not be thereafter enforced, the company cannot enforce it except by an actual demand of payment of the money due on the note and a neglect or refusal to pay the same, or by a return of the note to the insured with notice that the company insists upon the condition in the policy. See *Marcus v. St. L. Mut. L. Ins. Co.*, 68 N. Y. 625; *Dilleber v. K. L. Ins. Co.*, 76 N. Y. 567; *Sheldon v. A. F. & M. Ins. Co.*, 26 N. Y. 460, 465; *Goit v. Nat. P. Ins. Co.*, 25 Barb. 189; *Devine v. Home Ins. Co.*, 32 Wis. 471, 477; *Howell v. K. L. Ins. Co.*, 44 N. Y. 276, 283."

Compare *Garlick v. Mississippi Valley Ins. Co.*, 44 Iowa, 553 (1876).—ED.

(c) *The insurer's conduct at or before the issuing of the policy and at or before the arising of the defence.*

BARRETT AND OTHERS v. UNION MUTUAL FIRE
INSURANCE CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1851. 7 Cush. 175.

THIS was an action of assumpsit by the plaintiffs, as the commissioners of the sinking fund of the Western Railroad Corporation, against the defendants, a mutual fire insurance company, established in Boston, on a policy of insurance against fire, originally issued in favor of Henry W. Nelson, and payable, in case of loss, to Josiah Quincy, Jr.

The policy witnessed that, in consideration that said Nelson, a member of the corporation, "agreeably to the by-laws of said company, hereunto annexed," had paid a certain sum and had bound and obliged himself to pay all sums assessed upon him, pursuant to the by-laws, he was insured on certain buildings therein described, against loss or damage by fire, under the conditions and limitations expressed in the by-laws, and subject to the lien given by the thirty-seventh chapter of the revised statutes upon the buildings and the land under and belonging to the same, the sum of \$2,600. In the margin of the policy was a memorandum that \$2,600 on the same premises was insured with the State Mutual Fire Insurance Company.

The charter and by-laws of the defendants were annexed to the policy. The fourteenth article of the by-laws provided, in conformity with the Rev. Sts. c. 38, § 28, that "not more than three-fourths of the value of any building shall be insured by this company, and as much less as may be agreed upon." The fifteenth article provided as follows: "All policies which may issue from this company, to cover property previously insured, shall be void, unless such previous insurance be expressed in the policy at the time it be issued."

On the policy was indorsed a relinquishment, by Josiah Quincy, Jr., of his interest therein, and also the following: "Pay the within, in case of loss, to the commissioners of the sinking fund of the Western Railroad Corporation, as mortgagees. H. W. NELSON. Consent, ENOCH HOBART, President."

At the trial before the jury, on the opening of the plaintiffs' case, it appeared that at the time of the execution and delivery of the policy in suit, there was a prior insurance in favor of Henry W. Nelson, then existing and in force, and intended to be kept in force, to the amount of \$2,000.

Upon this fact appearing, the defendants insisted that as it was not

mentioned in this policy, the policy was void by the terms of it, according to the by-laws of the defendants referred to therein.

In answer to this ground of defence, the plaintiffs offered to prove by parol, that the fact of the existence of such prior insurance and its amount, and the understanding of the party insured, that such prior insurance was to stand and remain in force upon the property, were made known to the defendants, and assented to by them, prior to the making of this policy, and pending the negotiation therefor, and down to the time of the execution and delivery thereof; that this policy was prepared by the defendants, and delivered to the assured, as he supposed, in execution of and according to the intention aforesaid; that he did not read the policy at the time of taking it, nor afterwards; that nothing was said to him about the fact of such prior insurance not being stated in it, and that neither he nor the plaintiffs knew that such fact was not stated in the policy, until after the loss; and that the amount agreed to be insured by the defendants and by the State Mutual Company, mentioned on the margin of the policy sued upon, together with the amount of such prior insurance so notified to the defendants, did not exceed the value of the property insured. The defendants objected that such testimony was incompetent and inadmissible.

It was agreed that after the application for insurance in the present case, the president of the defendants, and the president of the State Mutual Fire Insurance Company (which gave a similar policy), examined the buildings to be insured, and informed the applicant that the amount of \$5,200, insured by both policies, was the highest valuation which they could put upon three-fourth parts thereof, and was therefore all the risk which they could take upon the same.

The case was submitted upon the foregoing statement, with the agreement that if the court should be of opinion, that the foregoing evidence would be competent, the case was to be sent to a jury upon the facts; but if the court should be of a different opinion, or that the plaintiffs could not maintain any action on this policy, by reason of their not being in law members of the company, or insured by the policy declared on, or otherwise, then the plaintiffs were to become nonsuit, and judgment be rendered for the defendants.

R. Choate and Ellis G. Loring, for the plaintiffs.

C. G. Loring, for the defendants.

FLETCHER, J. It is maintained by the defendant, that this policy is void, because there is no mention in it of the prior policy of \$2,000, as is expressly required by the fifteenth article of the by-laws to which reference was made in the policy. That the existence of this prior policy was a very material fact, there can be no doubt.

The defendants are restrained by their own by-laws, as also by the statute, from insuring more than three-fourths of the value of any building; for the purpose, and with the design, of leaving the insured his own insurer for the remaining quarter part. It is manifestly important to the insurers, that the insured should thus have a common

interest with them in the preservation of the property. It is therefore expressly provided, by the fifteenth article of the by-laws of the defendants, that all policies issued by them upon property previously insured shall be void, unless such previous insurance is mentioned in the policy at the time it is issued. These by-laws of the defendants are annexed to the policy, and are expressly referred to as proving the conditions and limitations upon which the insurance is made, and thus expressly form a part of the contract of insurance. Now, in point of fact, at the time when this policy was issued, there was a previous insurance which was not expressed, nor in any way mentioned or referred to in the policy. By its own express terms, therefore, this policy is void. The position, that the policy is thus void, upon the facts stated, is sustained by numerous and decisive authorities. *Jackson v. Mass. Mut. Fire Ins. Co.*, 23 Pick. 418; *Liscom v. Boston Mut. Fire Ins. Co.*, 9 Met. 205; *Holmes v. Charlestown Mut. Fire Ins. Co.*, 10 Met. 211; *Roberts v. Chenango County Mut. Ins. Co.*, 3 Hill, 501; *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495; *Jennings v. Chenango County Mut. Ins. Co.*, 2 Denio, 75. In truth, the counsel for the plaintiffs do not deny, but admit, that the policy is void, unless the omission to state the previous insurance in the policy can be supplied or remedied by parol evidence. The principal question, therefore, in this case is, whether or not the parol evidence offered by the plaintiffs for this purpose was admissible. The decision of this question depends upon a very familiar and well-settled principle of law. It is a general rule, that parol evidence can never be received to contradict or materially vary the terms of a written agreement. This is undoubtedly a wise and salutary rule, though if it be understood in too literal and broad a sense, it may exclude the admission of parol evidence, in cases in which it is usually received, to justify a construction which could not otherwise have been adopted. In all cases, where a sensible interpretation can be put upon the policy without the aid of parol evidence, the effect of such evidence is materially to vary the legal construction of the contract of the parties.

The true meaning of the rule excluding parol evidence is, that such evidence shall never be used to show that the intention of the parties was directly opposite to that which their language expresses, or substantially different from any meaning that the words they have used, upon any construction, will admit or convey. In the present case, it is quite clear that the parol evidence is offered to show that the intention of the parties was substantially different from any meaning that the words they have used, upon any construction, will admit or convey. The manifest effect was to substitute an oral contract for that which is contained in the written instrument. The evidence was not offered for the purpose of aiding in putting a construction upon the policy, as it is, according to its true intent and meaning; but to show that the intention of the parties was materially different from any meaning that the words which they have used, upon any construction, will admit of or

import. This would in fact be substituting an unwritten in the place of the written contract; the unwritten differing essentially from the written one.

It was said in the argument, that there was a mistake or fault, on the part of the defendants; that the policy was prepared by the defendants; and that they should have expressed it in the prior policy, and omitted to do so by design or by wilful negligence; and that the assured did not read it, but supposed that the prior policy was expressed. The assured certainly had abundant opportunity to read the policy, and need not have accepted it, if it was not satisfactory to him, according to the agreement of the parties. If the assured accepted the policy, without looking at it, or knowing what it was, he would seem himself to be liable to the charge of culpable negligence made against the defendants. But if from mistake or fraud an agreement is so defective, that instead of conveying the meaning of the parties, it expresses a different or opposite intent, if relief can be given at all, it must be sought exclusively in a court of equity. A court of law must act on the agreement as it is; it cannot strike out or change any part or add anything to it, so as to contradict or vary the agreement contained in the written instrument. The parol evidence offered in this case was therefore clearly not admissible; and taking the policy as it is, the plaintiffs cannot recover. The plaintiffs, being assignees of the policy, can have no better right to recover than the original party insured.

It is unnecessary to decide the question whether the plaintiffs can maintain this action in their own name. But as the plaintiffs had an insurable interest in the property, and took the policy with the consent of the defendants to pay the loss to them, there would not seem to be any reason why they should not recover the loss, in this form of action. But if they could not recover in this form of action on the policy, it would seem that they might recover in their own names upon a proper count upon the express promise of the defendants to pay the loss to them, if the defendants were liable to pay the loss to any one.

*Plaintiffs nonsuit.*¹

¹ *Acc:* Jennings v. Chenango County Mut. Ins. Co., 2 Denio, 75 (1846), (but, for the present doctrine in New York, see the later cases in this subdivision); Dewees v. Manhattan Ins. Co., 35 N. J. L. (6 Vroom) 366, 371-376 (1872); Franklin Ins. Co. v. Martin, 40 N. J. L. (11 Vroom) 568, 573-581 (1878); Batchelder v. Queen Ins. Co., 135 Mass. 449 (1883); Bennett v. St. Paul F. & M. Ins. Co., 55 N. J. L. (26 Vroom) 377 (1893); Thomas v. Commercial Union Assur. Co., 162 Mass. 29 (1894); Northern Assur. Co. v. Grand View Building Assn., 22 S. C. Rep. 133 (1902).

Compare Carson v. Jersey City Ins. Co., 43 N. J. L. (14 Vroom) 300 (1881).

In Batchelder v. Queen Ins. Co., *supra* (1883), HOLMES, J., for the court said:—

“The policy sued upon was conditioned to be void in case of other insurance, and the plaintiff’s evidence showed that there was other insurance outstanding when the policy was delivered. But there was also evidence tending to show that the breach of condition was known to the defendant at the same time; and the plaintiff argues that he was at least entitled to ask the jury to find that the breach had been waived. However the law may be elsewhere, it is settled the other way in Massachusetts. A breach of condition, happening after a policy is issued, may be waived, no doubt; but

PLUMB v. CATTARAUGUS COUNTY MUTUAL INS. CO.

COURT OF APPEALS OF NEW YORK, 1858. 18 N. Y. 392.¹

APPEAL from the Supreme Court. The plaintiff was the assignee of one Henry, to whom a policy had been issued upon an application filled out by Ide, the surveyor and agent of the defendant. The policy referred to the application as forming a part of the contract. The application was a printed form. It contained this interrogatory: "5. Relative situation as to other buildings; distance from each within ten rods; for what purpose occupied?" The answer to this interrogatory enumerated and described several buildings, and said: "All of the exposures within ten rods are mentioned." Upon the trial, which was before Mr. Justice JOHNSON, the defendant proved

when the breach exists at the moment when, if ever, the contract comes into existence, it must be waived at that moment, if ever, and at that very instant the writing purports to establish and insist upon the condition.

In *Bennett v. St. Paul F. & M. Ins. Co.*, *supra* (1893), BEASLEY, C. J., for the court, said:—

"The suit is on a policy of fire insurance, the declaration being in the usual form. To the cause of action thus laid the defendant, in its second plea, defends on the ground that the policy declared on was subject to a certain condition, to wit, that "this entire policy, unless otherwise provided by agreement indorsed thereon, or added hereto, shall be void if the insured now has, or shall hereafter make or procure any other contract of insurance, whether valid or not, on the property," &c. This statement is followed by an averment "that at the time said policy was made" the plaintiff held another policy on the property. In answer to this the plaintiff, in substance, stated that at the time the policy was made and the premium paid the defendant had notice and knew of the antecedent insurance indicated in the plea, and with this knowledge issued the policy sued on. The demurrer before us is to this replication.

"In looking over the arguments urged in the brief of the counsel of the plaintiff in support of the replication here challenged, it is obvious that they all proceed on the theory that the written contract embodied in this policy can be altered by parol testimony coincident with its inception. The written agreement declares that the policy shall be void in case the assured has any existing insurance on the property. This stipulation is neither obscure nor uncertain, and yet it is now urged that the court should circumscribe its expressed force. This contention is based on the idea that neither of the parties could have intended that the policy should be void by reason of the existence of an insurance that was then known to both of them. But the conclusive answer to this is that such is their agreement so plainly expressed that a doubt upon the subject would be absurd. It is true that the stipulation is so unreasonable that if the language were at all ambiguous or uncertain, or were it inconsistent with any part of the context, a court might well struggle to eliminate it by construction. But a contract clearly expressed in writing must be enforced in a court of law according to its terms, and this without reference to the real but unexpressed intentions of the parties to it. If it is, in any respect, to be modified, resort must be had to a court of equity."—ED.

¹ The statement has been partly rewritten. For some facts the original statement referred to *Chaffee v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 376 (1858), and *Brown v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 385 (1858). Those facts have been inserted in the statement given here.—ED.

that there were several buildings situated within less than ten rods of the property insured, and which exposed it to injury and loss by fire, which were not mentioned in the application for insurance, and also that one of the buildings therein described as distant eight rods was in fact but six rods distant; and that another, a planing mill and turning-shop, described as two rods distant, was in fact distant but eighteen feet. The plaintiff, under exception by the defendant, was permitted to prove the following facts: Ide was the agent and surveyor of the defendant, and he resided at Gowanda, where the buildings were situate; and it was Ide's business, as such agent, to solicit insurances, to sign applications, and to forward them to the office of the defendant in Ellicottville, receive policies from the defendant and deliver them to the applicants, and take their premium notes and the cash per cent thereon, and as such surveyor to survey the property and premises proposed to be insured, to take the measurement of the distances from all other buildings contiguous and within ten rods therefrom, to take the size of the buildings proposed to be insured, the number of chimneys, etc., and ascertain the relative situation of the buildings insured to any other buildings, for what purpose occupied, and generally to ascertain all about the property to be insured, material to the risk. The plaintiff also gave evidence tending to prove that in making out the application Ide acted as the agent and surveyor of the company; that he called upon Henry, with a printed blank application, and solicited him to effect insurance with the defendant's company; told him that he was going to the office of the company that day and that it was necessary to make out the application that day; Henry replied that his clerks were all absent and he was alone in the store and could not attend to the business; that if Ide insisted on taking the application that day he must get along alone and act on his own responsibility. Ide replied that that was what he was appointed agent and surveyor for, and that all Henry had to do was to say what property he wanted insured, and he (Ide) would take care of the rest and fill out the blank. Henry suggested that some measurements ought to be taken, and furnished a tape line for that purpose, which Ide took and went out of the store. He soon returned, filled out the application, and stated to Henry that it was all right and just as it should be. Henry looked over it hastily and without any particular examination as to the statement of the distance and relative situation of other buildings; told Ide that upon his representations and statements he should sign it, and thereupon did sign and paid the premium required. To the admission of all this evidence the defendant's counsel took an exception. Neither party desired that any question of fact should be submitted to the jury, and the judge directed a verdict for the plaintiff, to which direction the defendant took an exception. The judgment thereupon entered having been affirmed at general term in the eighth district, the defendant appealed to this court. The cause was submitted on printed arguments.

A. G. Rice, for the appellant.

C. C. Torrence, for the respondent.

PRATT, J. As no point was made upon the trial or upon this appeal that the agent Ide was not clothed with all the power which he professed to have, it may be assumed that what he did in making the survey and measurements and in filling out the application was strictly within the line of his duty as surveyor and agent of the company. If, therefore, he acted within the scope of his authority in making these surveys and measurements and in preparing the applications, I do not see why the question is not the same in principle as if the same thing had been done by the company itself. Suppose an individual insurer had himself assumed to make the survey and measurements, and, as in this case, had filled up a blank application and had represented to the applicants that his survey and measurements were correct, and that upon the faith of such representations, and with no knowledge of the facts themselves, the insured had signed the application and thus made the statements their own. Although they had thus been led into a warranty of what was not true, they could not, undoubtedly, change the contract by parol testimony. The writing must still be held to express the contract between the parties. And neither party can insist that the contract is other than what the writing expresses.

But when the party through whose acts and representations the other party was induced to enter into the contract claims the right to show that the facts were different from what he had represented them to be, for the purpose of showing a breach of the warranty, and thus avoiding what would otherwise be a binding contract, and escaping its obligations, I cannot discover why the doctrine of estoppel may not justly be applied to him, and he be precluded from denying what he once asserted. It presents, I think, the precise case for the application of the doctrine of *estoppel in pais*, as defined in the cases. Lord Denman, in *Pickard v. Sears*, 6 Ad. & E. 469, 474, says: "The rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that behalf, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

Substantially the same rule, but in still more explicit terms, was laid down by Bronson, J., in *Dezell v. Odell*, 3 Hill, 215, 222: "It must appear, (1) That he has made an admission which is clearly inconsistent with the evidence he proposes to set up; (2) That the other party has acted upon the admission; and (3) That he will be injured by allowing the truth of the admission to be disproved." The same rule was laid down by Nelson, J., in *Welland Canal Co. v. Hathaway*, 8 Wend. 480, 483. The rule thus laid down precisely fits this case, and surely the equities of a cause never called more persuasively for the application of the rule than they did in this case. I think, therefore, the court were right in ordering a verdict for the plaintiffs upon

the evidence, and the judgment of the Supreme Court should be affirmed.

JOHNSON, C. J., DENIO and STRONG, JJ., dissented for reasons stated in the opinion of the latter in *Brown v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 385.

Judgment affirmed.

WHITE v. CONNECTICUT FIRE INSURANCE CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1876. 120 Mass. 330.

CONTRACT upon a policy of insurance against fire. At the trial in the Superior Court, PITMAN, J., by agreement of the parties, after verdict for the plaintiff, reported the case to this court, the verdict to stand, if upon the evidence reported the jury would be authorized to return such verdict; otherwise, judgment for the defendant. The evidence sufficiently appears in the opinion.

S. Hoar, for the defendant.

A. Wellington, for the plaintiff.

COLT, J. The policy in this case was obtained for the plaintiff by Hunt, an insurance broker, through the defendant's general agent, Darling. It contained provisions, among others: 1st, That the company should not be liable by virtue of the policy until the premium therefor was actually paid; 2d, That the insurance might be terminated by the company on notice to that effect, and on refunding a ratable proportion of the premium for the unexpired term of the policy; 3d, That any person who had procured the insurance, other than the assured, should be deemed to be the agent of the assured, and not of the company, "in any transaction relating to this insurance;" and 4th, That nothing less than a distinct agreement, indorsed on the policy, should be construed as a waiver of any restriction or condition contained in it.

The defence is that there had been no actual payment of the premium, made necessary by the terms of the policy as a condition precedent to its validity; and that the risk was terminated before the fire by notice from the company.

The defendant offered no evidence, and the only question is whether the plaintiff's evidence, as reported, would justify a jury in finding a verdict in the plaintiff's favor. If so, as agreed at the trial, judgment must be entered for him.

We are of opinion that there is evidence derived from the relations of the several parties, the transactions between them, the course of business and the delivery of the policy, which would justify a finding that the company accepted the credit given to the broker, Hunt, individually, as a payment of the premium, within the meaning of the

terms of the policy. It was according to their course of business for the general agent of the company to deliver policies to Hunt without requiring cash payment of premiums. Instead of that, he charged Hunt in account individually, and rendered to him monthly bills, deducting an agreed commission allowed him for obtaining risks for this company. The policy in this case was so delivered, without demand for payment of money. A large number of the defendant's policies containing these same clauses had, with the defendant's knowledge, been issued by Darling to insurance brokers in the same way, without objection on the part of the defendant, and losses had been paid on many of them, but no cases were shown where the loss happened before an actual payment of premium. There was evidence from Hunt, that, in his monthly settlements with Darling, he paid the premiums charged to him, whether he had collected them or not, and offered to pay this premium at his settlement in January, next after the date of the policy, and after the fire; that he had been in the habit of obtaining insurance for the plaintiff and keeping his policies for him, and frequently had funds of the plaintiff in his hands, and had never demanded of him the payment of this premium, although the evidence was that he had informed the plaintiff, before the fire, that his insurance had been procured, and he would call on him the first of the following month, with the assurance that he need have no uneasiness about the matter. The company notified Darling, before the fire, that it did not wish the risk at the rate taken, but said nothing as to payment of premium.

It is a fair inference from all this, that the duly authorized agent of the company had accepted the individual credit of Hunt as a payment of the required premium. It is not a question of waiver, by parol agreement, of an express stipulation in a written contract within the cases cited by the defendant. It is rather a compliance with the condition required to give validity to the policy, within a large class of cases in which it is held sufficient. *Tayloe v. Merchants' Ins. Co.*, 9 How. 390, 402; *Miller v. Life Ins. Co.*, 12 Wall. 285, 303; *Sheldon v. Atlantic Ins. Co.*, 26 N. Y. 460; *Sheldon v. Connecticut Life Ins. Co.*, 25 Conn. 207; *Bouton v. American Life Ins. Co.*, 25 Conn. 542.¹

Assuming that the contract of insurance was perfected, so that the risk attached, the defendant fails to show a termination of the insurance before the fire, in accordance with the terms of the policy. The provision is that "the insurance may be terminated at any time at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy." The letter of the general agent to Hunt, giving him notice that the company did not wish the risk at the rate named, and demanding a

¹ *Acc.*: *Sheldon v. Atlantic F. & M. Ins. Co.*, 26 N. Y. 460 (1863); *Washoe Tool Mfg. Co. v. Hibernia F. Ins. Co.*, 66 N. Y. 613 (1876); *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246 (1890).

Compare *Wood v. Poughkeepsie Mut. Ins. Co.*, 32 N. Y. 619 (1865).

For life insurance cases, see *post*, p. 1109, n. — Ed.

return of the policy, without an offer to return any part of the premium, was not sufficient. The facts do not conclusively show that Hunt was the agent of the plaintiff to receive notice of a termination of the risk, and the provision in the policy making the person who procures the insurance "the agent of the assured in all transactions relating to the insurance," cannot be construed to mean that such person shall be agent to receive notice of the termination of the insurance at any time during the life of the policy; it plainly refers to the original transactions connected with obtaining it.

Judgment on the verdict.

VAN SCHOICK, RESPONDENT, *v.* NIAGARA FIRE
INSURANCE CO., APPELLANT.

COURT OF APPEALS OF NEW YORK, 1877. 68 N. Y. 434.

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, in favor of plaintiff, entered upon an order denying a motion for a new trial and directing judgment upon a verdict.

The nature of the action and the facts appear sufficiently in the opinion.

Wm. C. Ruger, for the appellant.

T. F. Bush, for the respondent.

FOLGER, J. This was an action upon a policy of fire insurance. It contained this condition: "Any interest in property insured not absolute, or that is less than a perfect title, or if a building is insured that is on leased ground, the same must be specifically represented to the company, and expressed in this policy in writing, otherwise the insurance shall be void." The fact is, that part of the property described in the policy, as subject of the insurance, was a building on leased ground. That fact was not expressed in writing in the policy. The defendant claims that thereby the insurance was void, and puts itself thereon as a defence to the action. It is to be observed of this condition, that it is not one of those which are subsequent to the formation of the contract, a breach of which may occur after there has been a valid contract made and entered into, and continued in existence for a part of its prescribed term. It is a condition precedent, lying at the threshold of the making of the contract, and which if not then performed, or not then obviated, prevents the formation of an enforceable contract. It is obvious, that this building being on leased ground, the very moment that the policy passed from the defendant to the plaintiff, the insurance on it was void, if the condition holds. They were concurrent acts, the delivery of the contract, and a breach of this condition; so that at the same instant

that the defendant said we insure this building, at the same instant the condition was broken and the insurance was void. So that if nothing is shown to break the rigid effect of this condition, there never was any insurance by this defendant upon that building. We would scarce expect two parties to go through so senseless and trifling an act, if the facts were known to each at the time, but would rather conclude that they had by words or act agreed that the condition should not be considered as binding. "If these defendants were an entity, and could have stood near to that building, when the oral negotiation for insurance was made and completed, and have seen" and known that it was upon leased ground; "could it fairly be contended that they would have offered to the plaintiff, or that he would knowingly have received, as the correctly written evidence of the contract, this policy, with the condition in question, contained in it as an operative and binding clause? We cannot suppose that either plaintiff or defendant would do the utterly absurd thing of making, with deliberation and knowledge, a contract that was void from inception, and was in contradiction of the facts and statements of the negotiation." It is plain that the plaintiff and the agent meant to contract and did contract for the insurance of that building, as a building on leased land. *Cone v. Niag. F. Ins. Co.*, 60 N. Y. 619. Hence we are not surprised; that the plaintiff claims that the fact that the building was on leased ground, was made known to the defendant when the policy was applied for; and that the policy was delivered and the premium accepted by them, without insisting upon the fact and the condition. He makes that action of the company, with that knowledge, his reply to their defence based on that condition and its breach.

We must first inquire, whether the plaintiff is right as to the fact of the prior knowledge of the defendant that the building was upon leased ground. It is shown that at a time previous to the issuing of this policy, the facts in relation to the title of the property, just as they were (that the land was owned by one person, and the building by another, and the contract between them), were told to one Lewis, an insurance agent. This Lewis, when the policy in suit was issued, having this information, and with a view to this insurance, asked if there was any change in the property, and was told that there was not. So that at the time of the issuing of this policy, Lewis was informed of the fact, that this building was within the scope of this condition. It is now to learn, if Lewis was the agent or substantially so of the defendant. It is shown that one Doolittle was the commissioned and ostensible agent of the defendant, but that Lewis and he were in partnership in the business of soliciting and procuring insurance; that Lewis did with assent of Doolittle so act as to this defendant; that such action was known to defendant and not disapproved of by it; that a joint commission had for some time been promised by the defendant to those two as its agents, which was delayed, but finally issued before the delivery of this policy. *Bodine v. Exchange F. Ins. Co.*, 51 N. Y. 117. We think that the facts

bring the case within that decision. So that, as the information of the agent is the information of his principal, the defendant when it accepted this risk, had information that this building stood upon leased ground. Besides that, in stating these facts, as they appeared to him, on the motion of the defendant that the court direct a verdict for it, the learned judge who held the circuit assumed or found that Lewis had the relations of an agent to the defendant. No objection was made by the defendant to this, nor any request to go to the jury upon it as a question of fact. So it must be taken as a conceded fact in the case. *Tallman v. Atlantic Ins. Co.*, 3 Keyes, 87.

And so again comes up the oft-recurring and still vexed question, between insurance companies and their policy-holders; whether a fact, thoroughly well known and comprehended by both sides to the contract before it is delivered, may, by force of some condition, crouched unseen in the jungle of printed matter with which a modern policy is overgrown, make a defence for the company, after the catastrophe and damage has happened against which it professes to guard. It is to be confessed, that the decisions in this State do not, upon a cursory perusal at least, seem strictly in harmony in regard to it. There are cases which hold that where an application is made a part of the policy by the terms of it, and some false assertion has been inserted in the application by the agent, when the truth has been at the same time well known to him, that the insured shall not be prejudiced thereby. *Rowley v. The Empire Ins. Co.*, 3 Keyes, 557; *Plumb v. Catt. Ins. Co.*, 18 N. Y. 392; *Ames v. N. Y. Ins. Co.*, 14 N. Y. 253. There are others, where the fact fell within the condemnation of some condition of the policy; yet as the fact as it existed was known to the company, it was held to be estopped from setting up the condition against a recovery. 14 N. Y. *supra*; *Bidwell v. N. W. Ins. Co.*, 24 N. Y. 302; *Bodine v. Exchange Ins. Co.*, 51 N. Y. 117. There are others, in which there was a suit in equity, seeking a reformation of the contract, and it was held that the facts showed unmistakably that the parties never meant to enter into a contract with such a condition or description in it as was set up against a recovery. *Cone v. Niagara Ins. Co.*, 60 N. Y. 619; *Mahar v. Hibernia Ins. Co.*, 67 N. Y. 283. In the latter case, the facts made a clear *estoppel en pais* against the company. It has also been held, that a warranty, part of the printed matter of the policy, has been dispensed with by the oral agreement of the parties made before the delivery of the policy. *McCall v. Sun Mut. Ins. Co.*, 66 N. Y. 505. On the other hand, in an action at law, it has been held, that where the terms of the policy are clear and unambiguous, parol proof is inadmissible to vary them, or to show that either or both parties were not aware that they were exchanging a contract such as was requested, and as agreed with the facts in the situation of the property. *Pindar v. Resolute Ins. Co.*, 47 N. Y. 114; see also *Rohrback v. Germania Ins. Co.*, 62 N. Y. 613. And so it has been held that parol proof is not admissible to show that both parties knew that a statement in an application for a policy was not true.

Ripley v. Ætna Ins. Co., 30 N. Y. 136. Other cases bearing upon the subject might be cited — *quantum suff.*

There is no doubt but that, ordinarily considered, this condition in the policy was a warranty that the building did not stand upon leased land; and that the truth of that warranty became a condition precedent to any liability on the part of the defendant. Yet there is no doubt, too, that a condition in a policy may be waived by the insurer, or, as some cases put it, he be estopped from setting it up, and that such result may be worked by parol, or by act without words. It has been held over and over, that the customary clause in a policy, that it will not be binding upon the insurer until the premium is paid in fact, may be waived by parol, or by act, and the policy may be delivered and become a binding contract upon the insurer, without payment in hand of the premium. Trustees, etc. v. Br. Ins. Company, 19 N. Y. 305; Sheldon v. Atlantic F. Ins. Co., 26 N. Y. 460; Wood v. Po. Ins. Co., 32 N. Y. 619; Boehen v. Wms. B. City Ins. Co., 35 N. Y. 131; Bodine v. Ins. Co., 51 N. Y. 117. As to other waivers, see Ludwig v. Jersey City Insurance Company, 48 N. Y. 384, and cases there cited; Shearman v. Niagara Fire Insurance Company, 46 N. Y. 532. Now, in this first class of cases, it has been thought that the fact that the insurer delivered to the insured the written contract, as the consummated agreement between them, and did not then exact present payment of the premium as a necessary precedent to delivery, was too plainly in contradiction with the condition for prepayment, for it to be supposed that it was meant by the insurer or supposed by either party that it was intended to make that condition a potent part of the contract. Such a provision, it is said, could have no effect upon the delivered and perfect contract in which it was contained (19 N. Y. *supra*). It would be imputing a fraudulent intent to the defendant in this case to say or to think that they did not mean, when they delivered this policy to the plaintiff, to give him a valid and binding contract of insurance, or that they did not mean that he should believe that he had one, or that they did not suppose that he did so believe. And such imputation can be avoided only by supposing that it had overlooked this condition, and so forgotten to express the fact as to the building, in writing, upon the policy; or that it waived the condition, or held itself estopped from setting it up. The condition of prepayment of premium is, like this under consideration, one at the threshold of the making of the contract, and if it is not observed, no valid contract is made unless it is stepped over or thrust aside. It is consistent with fair dealing and a freedom from fraudulent purpose to hold that one or the other was done; that is, that there was waiver, or is estoppel.

There are other conditions precedent which may be waived. Thus, in Myers v. Life Insurance Company, 27 Penn. St. 268, it is said that the countersigning by the agents is under some circumstances not essential, though required by condition. The ground there stated is, that on an equitable interpretation of the whole contract, it may become the

duty of the court to dispense with a portion of the forms of the contract, if it can find any reliable substitute for them; on the principle that cures defective execution of powers, where the intention to execute is sufficiently plain. The contract was to be complete when delivered by the agents, and countersigning by them was to be the appointed evidence of its proper delivery. There may be other evidence, to be regarded as equivalent. So here, it was not that the defendant would not at all insure a building on leased lands. They did agree to take a risk upon it. But to have it insured by them, the fact of it being on leased land must be expressed to them. This was done. As evidence that it was done, it must, they said in the policy afterwards delivered, appear in writing on the policy. This is, like countersigning by agent, but one of the forms of making the contract. That the policy was delivered, and the premium received, with full purpose of insuring that building, with full purpose of making a valid and obligatory contract, is evidence that through neglect or forgetfulness one of the forms was not observed; or that it was waived by the parties.

This case is to be distinguished from that of *Pindar* (47 N. Y. 114). There, *Pindar* asked a policy in a certain form of words. The insurer issued it to him in a different form, and in such form as would not cover certain classes of goods, and as, by the presence of those classes in the store, rendered the whole policy void. It was not proposed to show that the insurer knew that the very class of goods on which insurance was sought was in the store, and that the policy was delivered with the purpose to insure that class, and with the mutual understanding that by the policy it was insured. Hence that case differs from this, and it was properly held that *Pindar* was bound by his contract. In *Rohrbach's Case* (*supra*), the decision went upon the effect of a peculiar clause in the policy, and in that fact is quite different from this. *Chase v. Hamilton Insurance Company*, 20 N. Y. 52, is put upon a ground very like that in *Rohrbach's Case*; that it was printed in the application that the company would not be bound by knowledge of the agent, and that the company could not be held thereby, unless there was fraud, or prevention of the application from making a true statement. *Ripley v. The Ætna Insurance Company*, 30 N. Y. 136, is to be distinguished from this in hand. There the representation or warranty was promissory. It was an agreement by the applicant that he would thereafter keep a watchman in his mill, of nights. This looked to the future conduct on his part. It was not a part of the form of the contract. And though the agent of the insurer knew the custom of the applicant had not been to keep a watchman in his mill from midnight on the last day of the week till midnight of the first day of the next week, that did not affect his promise thereafter to do differently. It is also said in that case, that there may be a waiver of conditions, but only on an agreement founded on a valuable consideration, or when the act relied upon as a waiver is such as to estop a party from insisting on the condition. In the case in hand, there is a consideration in the premium paid, which

would not have been done with an understanding that the condition should remain and be enforced, thus making the payment futile. In the purview of some of the cases there is also an estoppel.

It is difficult to make all the cases upon this subject harmonize; but by the force of authority, we are constrained to hold, that such a condition as this may be waived by the insurer, by express words to that effect, or by acts done under such circumstances as would otherwise impute a fraudulent purpose, and as will estop him from setting up the condition against the insured.

There is another defence relied upon by the defendant. It arises in this wise: When the defendant decided upon taking the risk, it was with this condition, that the plaintiff would agree to keep a certain quantity of water in the building and under conditions to keep it from freezing, and that this was made known to the plaintiff at or before the issuing of the policy.

The facts of the case do not sustain this ground of defence. Though the defendants put upon their agents the duty of affixing to the contract the requirement that water should be kept standing in the building, there is no proof that it was made known to the plaintiff as a requirement. It never came to the personal knowledge of the plaintiff. If it ever came to the knowledge of Stanton, and Stanton is to be regarded as the agent of the plaintiff at that time, it did not come to him as a requirement, conditioned upon the observance of which the policy was to be valid. It reached him as a request, obedience to which was not obligatory, but gratuitous or courteous. It is quite doubtful, if as such even, it reached him before the issuing of the policy and the delivery of it to the plaintiff.

We, therefore, conclude that the judgment appealed from should be affirmed.

CHURCH, C. J., ANDREWS and MILLER, JJ., concur; ALLEN, RAPALLO, and EARL, JJ., dissent.

*Judgment affirmed.*¹

¹ *Acc.*: Atlantic Ins. Co. v. Wright, 22 Ill. 462 (1859); Peoria M. & F. Ins. Co. v. Hall, 12 Mich. 202, 214 (1864); Franklin v. Atlantic F. Ins. Co., 42 Mo. 456 (1868); Commercial Ins. Co. v. Spankneble, 52 Ill. 53 (1869); Pitney v. Glens Falls Ins. Co., 65 N. Y. 6 (1875); Pechner v. Phoenix Ins. Co., 65 N. Y. 195 (1875); Union Ins. Co. v. McGookey, 33 Ohio St. 555 (1878); Bennett v. North British and Mercantile Ins. Co., 81 N. Y. 273 (1880); Insurance Co. v. Williams, 39 Ohio St. 584 (1883); Bennett v. Agricultural Ins. Co., 106 N. Y. 243 (1887); Germania F. Ins. Co. v. Hick, 125 Ill. 361 (1888); Crescent Ins. Co. v. Camp, 71 Tex. 503 (1888); Insurance Co. v. Brodie, 52 Ark. 11 (1889); Crouse v. Hartford F. Ins. Co., 79 Mich. 249 (1890); Michigan Shingle Co. v. State Investment & Ins. Co., 94 Mich. 389 (1892); Mesterman v. Home Mut. Ins. Co., 5 Wash. 524 (1893); McMurray v. Capital Ins. Co., 87 Iowa 453 (1893); Morotock Ins. Co. v. Pankey, 91 Va. 259 (1895); Liverpool and London and Globe Ins. Co. v. Farnsworth, 72 Miss. 555 (1895); Rhode Island Underwriters' Assn. v. Monarch, 98 Ky. 305 (1895); Wood v. American F. Ins. Co., 149 N. Y. 382, 385-386 (1896), s. c. in part, ante, p. 632; Robbins v. Springfield F. & M. Ins. Co., 149 N. Y. 477 (1896); Schultz v. Caledonian Ins. Co., 94 Wis. 42 (1896); Hartford F. Ins. Co. v. Keating, 86 Md. 130 (1897); St. Clara Female Academy v. Northwestern National Ins. Co., 98 Wis. 257 (1898); Riss-

GRAY AND ANOTHER, RESPONDENTS, v. GERMANIA FIRE
INSURANCE CO., APPELLANT.

COURT OF APPEALS OF NEW YORK, 1898. 155 N. Y. 180.

APPEAL from a judgment of the late General Term of the Supreme Court in the second judicial department, entered February 27, 1895, affirming a judgment in favor of plaintiffs entered upon a verdict.

The action was upon a policy of fire insurance for one thousand dollars, issued by the defendant October 1, 1892, insuring the goods of the plaintiffs in their store at Haverstraw, N. Y. It was a New York standard policy, and prohibited other insurance unless the consent of the company was indorsed thereon. It also provided that none of its agents should have power to waive any of its provisions except by a written indorsement on the policy.

The defendant's agent applied to the plaintiffs to insure their goods. They informed him of their intention to procure insurance to the amount of three thousand dollars in three different companies, and permitted him to write a policy for one thousand dollars in the defendant company. When the policy was delivered the agent, in answer to an inquiry of the plaintiffs, stated that it was correct. They subsequently obtained two other policies upon the property insured, one for seven hundred dollars and the other for one thousand dollars. The defendant's agent had power to issue policies and to indorse permission for other insurance. But no such indorsement was made upon the policy in suit.

Iler v. American Central Ins. Co., 150 Mo. 366 (1899); *Clapp v. Farmers' Mut. F. Ins. Co.*, 126 N. Car. 388 (1900); *Insurance Co. v. Hancock*, 106 Tenn. 513 (1901).

See *Harper v. Albany Mut. Ins. Co.* *ante*, p. 530 (1858), and cases cited thereunder; *Couch v. City F. Ins. Co.*, 37 Conn. 248 (1870).

Compare *North American F. Ins. Co. v. Throop*, 22 Mich. 146, 149-152 (1871); *Blooming Grove Mut. F. Ins. Co.*, 102 Pa. 335 (1883).

In *Pitney v. Glens Falls Ins. Co.*, *supra* (1875), DWIGHT, Com., for the majority of the court, said:—

"It has been plausibly objected that the view of the subject herein taken . . . is opposed to the rule that parol evidence is inadmissible to affect a written instrument. The objection, however, proceeds upon a misconception of the effect of that rule. That is but a canon of construction applied to ascertain the meaning of an instrument conceded to be valid. This has no bearing upon the point now under discussion. That concerns the validity or existence of an instrument. The defendant urges that there is a condition precedent in the instrument which, by reason of non-performance, makes the contract utterly void. The plaintiff says, in substance: 'That I admit, but it has been dispensed with, and the instrument is valid.' The question is accordingly not one of construction, but of validity. Nothing is better settled than that the existence of a written instrument may be established or overturned by parol evidence. There is no question of construction in such a case. It is a preliminary one, whether there is any contract to interpret or construe. It is of the nature of a condition precedent to be subject to waiver, and that may be in general either oral or written. When the waiver is established, the contract takes effect free from the condition."—ED.

Ernest Hall, for appellant.

Sidney H. Stuart, for respondents.

MARTIN, J. The only question we are called upon to determine in this case is whether the knowledge of the defendant's agent that the plaintiffs intended to procure other insurance upon the property covered by the defendant's policy constituted a waiver of the provision therein prohibiting other insurance without the indorsement upon the policy of an agreement to that effect. The courts below have so held. This conclusion was based upon the theory that as the defendant's agent knew that the plaintiffs intended to procure other insurance when the policy in suit was issued, and delivered it with that knowledge, it constituted a waiver of its provision as to other insurance. Manifestly, this theory cannot be sustained. It is well settled in this State that where an insurance company issues a policy, with full knowledge of facts which would render it void in its inception if its provisions were insisted upon, it will be presumed that it by mistake omitted to express the fact in the policy, waived the provision or held itself estopped from setting it up, as a contrary inference would impute to it a fraudulent intent to deliver and receive pay for an invalid instrument. *Van Schoick v. Niagara F. Ins. Co.*, 68 N. Y. 434; *Whited v. Germania F. Ins. Co.*, 76 N. Y. 415; *Richmond v. Niagara F. Ins. Co.*, 79 N. Y. 230; *Woodruff v. Imperial F. Ins. Co.*, 83 N. Y. 133; *Short v. Home Ins. Co.*, 90 N. Y. 16; *Forward v. Continental Ins. Co.*, 142 N. Y. 382; *Wood v. American F. Ins. Co.*, 149 N. Y. 382; *Robbins v. Springfield F. & M. Ins. Co.*, 149 N. Y. 477, 484.

But it is manifest that that principle has no application to the facts in this case. When the defendant's policy was delivered neither of the other policies had been issued, but were subsequently obtained. Consequently, the defendant's policy was valid in its inception. If it became invalid it was by the act of the plaintiffs in subsequently procuring additional insurance, without obtaining an indorsement upon the policy of the defendant's consent. As the defendant issued to the plaintiffs a policy which was valid when delivered, the fact that they informed the defendant's agent of their intention to subsequently procure other insurance was insufficient to justify the courts below in holding that there was a waiver of that condition, or that the defendant was estopped from insisting upon it. *Baumgartel v. Providence-Washington Ins. Co.*, 136 N. Y. 547; *Moore v. H. F. Ins. Co.*, 141 N. Y. 219; *McNierney v. Agricultural Ins. Co.*, 48 Hun, 239.

The distinction between the knowledge of an existing fact which renders a policy void when delivered and the omission of the insured to give notice of and procure the required consent to a subsequent act, which, by its conditions invalidated it, although previously consented to, was clearly pointed out in the authorities cited.

The decisions of the courts below are at variance with the principle that written contracts cannot be controlled or varied by oral evidence, and that a written instrument must be regarded as the receptacle of the

entire contract between the parties, and merges all previous oral agreements in it.

Nor do we think the contention of the respondents, that they were entitled to recover upon a parol contract of insurance, made with the agent, can be sustained. There was no proof that the defendant's agent ever agreed to issue a policy different from the one delivered, or that he agreed that other insurance might be procured without the indorsement required. It is manifest that this action was upon the policy issued by the defendant, and was not based upon any other agreement between the plaintiffs and the agent of the defendant.

The judgment of the General Term and of the trial court should be reversed and a new trial granted, with costs to abide the event.

All concur, except GRAY, J., absent.

*Judgment reversed.*¹

¹ *Acc.*: Hartford F. Ins. Co. v. Davenport, 37 Mich. 609 (1877).

See Walton v. Agricultural Ins. Co., 116 N. Y. 317 (1889); England v. Westchester F. Ins. Co., 81 Wis. 583 (1892); Connecticut F. Ins. Co. v. Tilley, 88 Va. 1024 (1892).

Compare Harper v. Albany Mut. Ins. Co., *ante*, p. 530 (1858), and cases cited thereunder; Michigan Shingle Co., v. State Investment and Ins. Co., 94 Mich. 389 (1892); Mitchell v. Mississippi Home Ins. Co., 72 Miss. 53 (1895); Liverpool and London and Globe Ins. Co. v. Farnsworth, 72 Miss. 555 (1895). — ED.

SECTION III.

Life Insurance.

WING v. HARVEY.

CHANCERY, 1854. 5 De G., M. & G. 265.

THIS was a claim which came on to be heard originally before their Lordships by arrangement. The plaintiff was the assignee of a policy for £300, on a life which had determined, and he sought payment of the insurance moneys, or a return of his premiums. The policy was effected in 1829, by William Bennett, of Rougham, on his own life, with "The Norwich Union Society," which was represented by the defendant.

On the policy was indorsed the following condition:—

"If the party upon whose life the insurance is granted shall go beyond the limits of Europe without the license of the directors, this policy shall become void: the insurance intended to be hereby effected shall cease. and the money paid to the society become forfeited to its use."

The policy was effected at a branch office at Bury St. Edmunds, at which a Mr. Lockwood was the agent of the society, and the premium, on effecting it, was paid to Mr. Lockwood. In October, 1829, the policy was assigned by Mr. Bennett to the plaintiff, as a security for an annuity.

A subsequent grant of an annuity was made by Mr. Bennett to the plaintiff, and another policy effected and assigned to the plaintiff, and notice of the assignment given at the branch office. The annual premiums of £6 6s. and £4 5s. 6d., payable on the policies, were regularly paid by the plaintiff or his solicitor to Mr. Lockwood, who transmitted them to the head office at Norwich. In June, 1835, Mr. Bennett went to Canada, where he continued to reside till July, 1849, when he died. Upon Mr. Lockwood applying for some of the premiums upon the policies, after June, 1835, the plaintiff informed him of Mr. Bennett's residence in Canada, and asked whether it would be safe to pay the premiums. Mr. Lockwood answered that the policies would be perfectly good provided the premiums were regularly paid. The premiums were accordingly paid and transmitted to the head office at Norwich, whence, in the years 1842 and 1847, certificates of bonuses declared in respect of the policies were forwarded to the plaintiff, as the owner of them, through Mr. Lockwood.

In 1847, Mr. Lockwood died, and Mr. John Thompson was appointed in his place by the society, as their agent at Bury St. Edmunds. He also received and transmitted to the head office the premiums paid

by the plaintiff. Mr. Bennett's absence was stated to Mr. Thompson, on his applying for the premiums. Mr. Bennett died in 1847, whereupon the plaintiff demanded the insurance moneys with the bonuses, which had been appropriated to the policies. The society refused payment on the ground of Mr. Bennett's residence in Canada. They offered, however, to repay the premiums which had been paid since Mr. Bennett left Europe, with interest at £4 per cent.

The present claim was then filed, seeking payment of the insurance moneys and bonuses, or in the alternative the repayment of all the premiums which had been paid from the beginning upon the policies, with interest at £5 per cent.

The above facts were verified by affidavits, and affidavits were also filed in support of the claim, to show that the head office at Norwich had notice, independently of the notice given to their local agent, that Mr. Bennett was residing in Canada. By them it appeared that a will of a person named Younge, who died in Canada, was produced at the head office, and appeared to have been attested there by Mr. Bennett, described as formerly of Rougham; and further, that in 1848, the secretary of the society at the head office received a letter, in which Mr. Bennett was referred to as the only person from Bury St. Edmunds whom the writer knew in Canada.

Mr. Glasse and Mr. Fooks, for the plaintiff.

Mr. Malins and Mr. Rogers, for the defendant.

THE LORD JUSTICE KNIGHT BRUCE. If the directors, represented by the defendant, had themselves personally received the premiums which Mr. Lockwood received, with the same knowledge that he had, there certainly would have been a waiver of the forfeiture, and the defence in this case would have been ineffectual. But he was their agent for the purpose of receiving premiums at least on subsisting policies. The premiums in question were paid to him on the faith of the policies continuing valid and effectual notwithstanding Mr. Bennett's departure for Canada and residence there, — a faith in which Mr. Lockwood knowingly acquiesced, and to which he expressly acceded. The premiums thus paid having been transmitted by Mr. Lockwood from time to time to the directors, and retained by them without objection, I think that whether Mr. Lockwood informed or did not inform them in fact of the true state of circumstances in which the premiums were paid to him, the directors became, and that they are, as between them and the plaintiff, as much bound as if he had paid the premiums directly to themselves, they knowing at the time, on each occasion, the place of Mr. Bennett's residence. The directors, taking the money, were and are precluded from saying that they received it otherwise than for the purpose and in the faith, for which and in which Mr. Wing expressly paid it. See *Story Agency* (6th ed.), §§ 140, 451; 2 *Lead. Cas. in Eq.* (3d Am. ed.), 146 *et seq.*, 163, 164, and cases cited. If, however, it were important for any purpose of this suit to determine whether it ought to be inferred, that the directors received from Mr.

Lockwood some at least of the premiums, with actual, direct, and personal notice of Mr. Bennett's foreign residence, I should hold, upon the materials before the court, an affirmative answer to be the correct answer to that question.

It is unnecessary to refer to the case of the Duke of Beaufort *v.* Neeld (2 Cl. & Fin. 248) as decided by the House of Lords, I think, in 1845, though perhaps the principles on which that decision proceeded are not inapplicable to the present controversy.

The Lord Justice TURNER.¹ . . . The office undoubtedly received the money from their agents to whom it had been paid upon express terms and conditions, and the office, having held out Mr. Lockwood and Mr. Thompson to the world as their agents for the purpose of receiving the premiums, I think it became the duty of Mr. Lockwood and Mr. Thompson, and not that of the plaintiff, to communicate to the head office at Norwich the circumstances under which those premiums had been paid to and received by them, and the representations which were made on the occasions of such payments and receipts. Upon these grounds my opinion is, that these policies must be considered to have been continuing policies, and that this claim must therefore be allowed.²

INSURANCE COMPANY *v.* WILKINSON.

SUPREME COURT OF THE UNITED STATES, 1871. 13 Wall. 222.

IN error to the Circuit Court for the District of Iowa: the case being thus:—

The Union Mutual Insurance Company, of Maine, insured the life of Mrs. Malinda Wilkinson in favor of her husband. Both husband and wife, prior to the rebellion, had been slaves, and the husband came to Keokuk, Iowa, from Missouri. The company did business in Keokuk (where the application was made and the policy delivered), through an agent, one Ball, to whom it furnished blank applications. The mode of doing business appeared to have been that the agent propounded certain printed questions, such as are usual on applications for insurance on lives, contained in a form of application, and took down the answers; and when the application was signed by the applicant, the friend and physician forwarded it to the company, and if accepted, the policy was returned to this agent, who delivered it and collected and transmitted the premiums.

¹ After discussing the facts. — ED.

² See *Armstrong v. Turquand*, 9 Irish C. L. 32, 45-61 (1858); *Hodsdon v. Guardian L. Ins. Co.*, 97 Mass. 144 (1867); *Walsh v. Aetna L. Ins. Co.*, 30 Iowa, 133 (1870); *Rice v. New England Mut. Aid Assn.*, 146 Mass. 248 (1888); *McGurk v. Metropolitan L. Ins. Co.*, 56 Conn. 528 (1888). — ED.

On this form of application were the usual questions to be answered by the person proposing to effect the assurance; and by the terms of the policy it became void if any of the representations made proved to be untrue.

Among the questions was this one:—

“Has the party ever had any serious illness, local disease, or personal injury; if so, of what nature, and at what age?”

And the question was answered:

“No.”

So, too, after an interrogatory as to whether the parents were alive or dead, — they being, in the case of Mrs. Wilkinson, both dead, — were the questions and answers:

“*Q.* Mother’s age, at her death?”

“*A.* 40.”

“*Q.* Cause of her death?”

“*A.* Fever.”

Mrs. Wilkinson having died, and the company refusing to pay the sum insured, Wilkinson, the husband, brought suit in the court below to recover it. The defence was that the answers as above given to the questions put were false; that in regard to the first one, Mrs. Wilkinson, in the year 1862, had received a serious personal injury, and that in regard to the others, the mother had not died at the age of forty, but at the earlier age of twenty-three, and had died not of fever but of consumption.¹ . . .

As to the other matter, the age at which the mother died and the disease which caused her death, evidence having been given by the defendant tending to show that she died at a much younger age than forty years, and of consumption, the plaintiff, in avoidance of this, was permitted (under the plaintiff’s objection and exception) to prove that the agent of the insurance company, who took down the answers of the applicant and his wife to all the interrogatories, was told by both of them that they knew nothing about the cause of the mother’s death, or of her age at the time; that the wife was too young to know or remember anything about it, and that the husband had never known her; and to prove that, there was present at the time the agent was taking the application, an old woman, who said that she had knowledge on that subject, and that the agent questioned her for himself, and from what she told him he filled in the answer which was now alleged to be untrue, without its truth being affirmed or assented to by the plaintiff or the wife.

This the jury found in their special verdict, as they had the other facts, and found that the mother died at the age of twenty-three; did not die of consumption; and that the applicant did not know when the application was signed how the answer to the question about the mother’s age and the cause of her death had been filled in. . . .

¹ Passages on the personal injury have been omitted in reprinting the statement and the opinion. — ED.

On the second branch — that relating to the age of the mother — the court said to the jury, that if the applicant did not know at what age her mother died, and did not state it, and declined to state it, and that her age was inserted by the agent upon statements made to him by others in answer to inquiries he made of them, and upon the strength of his own judgment, based upon data thus obtained, it was no defence to the action to show that the agent was mistaken, and that the mother died at the age of twenty-three years.

Verdict and judgment having gone for the plaintiff, the insurance company brought the case here on error.

Messrs. *G. G. Wright, Gilmore, and Anderson*, for the plaintiff in error.

Messrs. *McCrary, Miller, and McCrary, contra*.

Mr. Justice MILLER delivered the opinion of the court. . . .

Passing then to the second branch of the case. The defendant excepted to the introduction of the oral testimony regarding the action of the agent, and to the instructions of the court on that subject; and assigns the ruling of the court as error on the ground that it permitted the written contract to be contradicted and varied by parol testimony.

The great value of the rule of evidence here invoked cannot be easily overestimated. As a means of protecting those who are honest, accurate, and prudent in making their contracts, against fraud and false swearing, against carelessness and inaccuracy, by furnishing evidence of what was intended by the parties, which can always be produced without fear of change or liability to misconstruction, the rule merits the eulogies it has received. But experience has shown that in reference to these very matters the rule is not perfect. The written instrument does not always represent the intention of both parties, and sometimes it fails to do so as to either; and where this has been the result of accident, or mistake, or fraud, the principle has been long recognized that under proper circumstances, and in an appropriate proceeding, the instrument may be set aside or reformed, as best suits the purposes of justice. A rule of evidence adopted by the courts as a protection against fraud and false swearing, would, as was said in regard to the analogous rule known as the statute of frauds, become the instrument of the very fraud it was intended to prevent, if there did not exist some authority to correct the universality of its application. It is upon this principle that courts of equity proceed in giving the relief just indicated; and though the courts, in a common law action, may be more circumscribed in the freedom with which they inquire into the origin of written agreement, such an inquiry is not always forbidden by the mere fact that the party's name has been signed to the writing offered in evidence against him.

In the case before us a paper is offered in evidence against the plaintiff containing a representation concerning a matter material to the contract on which the suit is brought, and it is not denied that he signed the instrument, and that the representation is untrue. But the

parol testimony makes it clear beyond a question, that this party did not intend to make that representation when he signed the paper, and did not know he was doing so, and, in fact, had refused to make any statement on that subject. If the writing containing this representation had been prepared and signed by the plaintiff in his application for a policy of insurance on the life of his wife, and if the representation complained of had been inserted by himself, or by some one who was his agent alone in the matter, and forwarded to the principal office of the defendant corporation, and acted upon as true, by the officers of the company, it is easy to see that justice would authorize them to hold him to the truth of the statement, and that as they had no part in the mistake which he made, or in the making of the instrument which did not truly represent what he intended, he should not, after the event, be permitted to show his own mistake or carelessness to the prejudice of the corporation.

If, however, we suppose the party making the insurance to have been an individual, and to have been present when the application was signed, and soliciting the assured to make the contract of insurance, and that the insurer himself wrote out all these representations, and was told by the plaintiff and his wife that they knew nothing at all of this particular subject of inquiry, and that they refused to make any statement about it, and yet knowing all this, wrote the representation to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement, would be an act of bad faith and of the grossest injustice and dishonesty. And the reason for this is that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract; and that it was made by the defendant, who procured the plaintiff's signature thereto.

It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, estoppels *in pais*. The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim. It has been applied to the precise class of cases of the one before us in numerous well-considered judgments by the courts of this country.¹ Indeed, the doctrine is so well understood and so often enforced that, if in the transaction we are now consider-

¹ *Plumb v. Cattaraugus Ins. Co.*, 18 N. Y. 392; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Woodbury Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 526; *Combs v. The Hannibal Savings and Ins. Co.*, 43 Mo. 148. — REP.

ing, Ball, the insurance agent, who made out the application, had been in fact the underwriter of the policy, no one would doubt its applicability to the present case. Yet the proposition admits of as little doubt that if Ball was the agent of the insurance company, and not of the plaintiff, in what he did in filling up the application, the company must be held to stand just as he would if he were the principal.

Although the very well-considered brief of counsel for plaintiff in error takes no issue on this point, it is obvious that the soundness of the court's instructions must be tested mainly by the answer to be given to the question, "Whose agent was Ball in filling up the application?"

This question has been decided differently by courts of the highest respectability in cases precisely analogous to the present. It is not to be denied that the application, logically considered, is the work of the assured, and if left to himself or to such assistance as he might select, the person so selected would be his agent, and he alone would be responsible. On the other hand, it is well known, so well that no court would be justified in shutting its eyes to it, that insurance companies organized under the laws of one State, and having in that State their principal business office, send these agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hands to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who is in this manner induced to take out a policy, rarely sees or knows anything about the company or its officers to whom it is issued, but looks to and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company, in all that is said or done in making the contract. Has he not a right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy, the argument being that, as to all other acts of the agent, he is the agent of the assured. This proposition is not without support in some of the earlier decisions on the subject; and, at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine, in its full force, to the system of selling policies through agents, which we have described, would be a snare and a delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance corporations receive the benefits, and the parties supposing themselves insured are the victims. The tendency of the modern decisions in this

country is steadily in the opposite direction. The powers of the agent are, *prima facie*, co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals.¹ An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal.²

In the fifth edition of *American Leading Cases*,³ after a full consideration of the authorities, it is said: —

“By the interested or officious zeal of the agents employed by the insurance companies in the wish to outbid each other and procure customers, they not unfrequently mislead the insured, by a false or erroneous statement, of what the application should contain, or, taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn, and will meet the requirements of the policy. The better opinion seems to be that, when this course is pursued, the description of the risk should, though nominally proceeding from the insured, be regarded as the act of the insurers.”⁴

The modern decisions fully sustain this proposition, and they seem to us founded in reason and justice, and meet our entire approval. This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it.

*Judgment affirmed.*⁵

¹ *Bebee v. Hartford Ins. Co.*, 25 Conn. 51; *The Lycoming Ins. Co. v. Schollenberger*, 8 Wright, 259; *Beal v. The Park Ins. Co.*, 16 Wis. 241; *Davenport v. Peoria Ins. Co.*, 17 Iowa, 276. — *REP.*

² *Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517; *Horwitz v. Equitable Ins. Co.*, 40 Mo. 557; *Ayres v. Hartford Ins. Co.*, 17 Iowa, 176; *The Howard Ins. Co. v. Bruner*, 11 Harris, 50. — *REP.*

³ Published A. D. 1872, vol. ii. p. 917. — *REP.*

⁴ *Rowley v. Empire Ins. Co.*, 36 N. Y. 550. — *REP.*

⁵ *Acc. v. Insurance Co. v. Mahone*, 21 Wall. 152 (1874); *New Jersey Mut. L. Ins. Co. v. Baker*, 94 U. S. 610 (1876); *Miller v. Phoenix Mut. L. Ins. Co.*, 107 N. Y. 292 (1887).

See *Parsons v. Bignold*, 13 Sim. 518 (1843); *Massachusetts L. Ins. Co. v. Eshelman*, 30 Ohio St. 647 (1876); *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va., 622, 661-665 (1885); *Follette v. United States Mut. Acc. Assn.*, 107 N. Car. 240 (1890), *s. c.* at a later stage, *sub nom. Follette v. Mutual Acc. Assn.*, 110 N. Car. 377 (1892); *Bawden v. London, Edinburgh and Glasgow Assur. Co.*, [1892] 2 Q. B. 534 (C. A.); *Bennett v. Massachusetts Mut. L. Ins. Co.*, 64 S. W. Rep. 758 (Tenn. 1901). — *ED.*

RYAN v. WORLD MUTUAL LIFE INSURANCE CO.

SUPREME COURT OF CONNECTICUT, 1874. 41 Conn. 168.

ASSUMPSIT on a policy of insurance on the life of Patrick Ryan, for the benefit of the plaintiff; brought to the Superior Court in New London County, and tried to the jury before FOSTER, J. Verdict for the plaintiff, and motion for a new trial by the defendants for error in the rulings of the court and on the ground that the verdict was against the evidence. The case is sufficiently stated in the opinion.

W. P. Prentice, of New York, and *S. C. Dunham*, in support of the motion.

Pratt and Ripley, contra.

CARPENTER, J. This is an action on a policy of life insurance. The policy is expressed to be "in consideration of the representations, declarations, and covenants contained in the application therefor, to which reference is here made as a part of this contract," etc. It is further declared that "This policy is issued and accepted on the following express conditions and agreements: First, That the statements and declarations made in the application therefor, and on the faith of which it is issued, are in all respects true," etc. The application therefore is a part of the policy; and the plaintiff's agreements therein contained are warranties, and, if not true, she cannot recover, unless there has been a waiver by the defendants or under the circumstances they are estopped from denying their truth.

In the application are the following questions and answers:

"12. Has the party ever had any of the following diseases"—(naming a long list of diseases, and among them,) "bronchitis, consumption, spitting of blood, or any serious disease?"—"None of these."

"17. Has the party had during the last seven years any severe sickness or disease? If so, state the particulars, and the name of the attending physician who was consulted and prescribed."—"No."

"25. Has the party employed or consulted any physician? Please answer this yes or no. If yes, give name or names and residence."—"No."

"27. Has any previous examination or application been made for assurance on the life proposed?"—"No."

"Has any company declined to issue a policy for the party?"—"No."

Upon the trial the plaintiff offered to prove, not that the above answers were true, but that different answers were in fact given, both by herself and the insured, and that the answers were wrongly written by the local agent of the defendants without the knowledge or consent of the plaintiff or her husband. Aside from the claim that the defend-

ants are responsible for the conduct of their local agent, this is merely an attempt to substitute for a part of the written contract declared on, a different parol contract; for the representations and warranties of the plaintiff contained in the written agreement, oral representations and warranties of an entirely different character. It requires no argument to show that this cannot be done.

But the plaintiff claims that truthful answers having been given to each interrogatory, and the incorrect answers contained in the application being there by the sole act of the agent, the defendants are bound by the answers as written, and are precluded from denying their truth. Whether this is so or not depends upon the extent of the agent's authority.

It must be admitted that the express authority of the agent was limited to receiving the application, forwarding it to the home office, receiving, countersigning, and delivering the policy, and collecting the premiums. The courts in this State have construed the powers of these agents liberally, and extended them somewhat by implication. Thus it has been held that in writing the application, and explaining the interrogatories and the meaning of the terms used, he is to be regarded as the agent of the company. In *The Union Mutual Ins. Co. v. Wilkinson*, 13 Wall. 222, it was held where an agent by mistake, or acting upon information derived from others which proved to be incorrect, inserted an answer not true in fact, that it was the act of the insurers and not of the insured.

In this case we are asked to go further than any case has yet gone, and clothe the agent with an authority not given him in fact, and to hold the principal responsible for an act which could not by any possibility have been contemplated as being within the scope of the agency. In most, if not in all, of the cases in which the act of the agent has been regarded as the act of the principal, the act has been the natural and probable result of the relations existing between the parties, or so connected with other acts expressly authorized as to afford a reasonable presumption that the principal intended to authorize it. But it cannot be supposed that these defendants intended to clothe this agent with authority to perpetrate a fraud upon themselves. That he deliberately intended to defraud them is manifest. He knew well that if correct answers were given no policy would issue. Prompted by some motive he sought to obtain a policy by means of false answers. His duty required him not only to write the answers truly as given by the applicant, but also to communicate to his principal any other fact material to the risk which might come to his knowledge from any other source. His conduct, in this case, was a gross violation of duty, in fraud of his principal, and in the interest of the other party. To hold the principal responsible for his acts, and assist in the consummation of the fraud, would be monstrous injustice. When an agent is apparently acting for his principal, but is really acting for himself, or third persons, and against his principal, there is no

agency in respect to that transaction, at least as between the agent himself or the person for whom he is really acting and the principal.

The principal reason urged for holding the defendants liable in this case is the one suggested in the argument, that when one of two innocent persons must suffer by the fraud, negligence, or unauthorized act of a third, he who clothed the third with the power to deceive or injure must be the one.

Our answer is, in the first place, that this is not exactly a case in which one of two innocent persons must necessarily suffer. There is no absolute loss for us to determine on whom it shall fall. If the plaintiff fails to recover she sustains no pecuniary loss, except the premium paid, nor that even if she is innocent and the law is so that she can recover it back on the ground that there was a failure of consideration. It is unlike a case of fire insurance. Nearly all property may be insured at some rate, if not in one office in another. But in this case the plaintiff's husband was not an insurable subject. His situation was such that one company had rejected him, and but for the aid of fraud neither this nor any other company would have accepted him. Had the truth been stated no policy would have issued, and as she would have had no better success probably with other companies we cannot see that she has been misled to her prejudice except in relation to the premium, which is comparatively a small matter.

In the second place, if the rule is to be applied to this case it is by no means certain that it will aid the plaintiff. The fraud could not be perpetrated by the agent alone. The aid of the plaintiff or the insured, either as an accomplice or as an instrument, was essential. If she was an accomplice, then she participated in the fraud, and the case falls within the principle of *Lewis v. The Phoenix Mutual Life Ins. Co.*, 39 Conn. 100. If she was an instrument, she was so because of her own negligence, and that is equally a bar to her right to recover. She says that she and her husband signed the application without reading it and without its being read to them. That of itself was inexcusable negligence. The application contained her agreements and representations in an important contract. When she signed it she was bound to know what she signed. The law requires that the insured shall not only, in good faith, answer all the interrogatories correctly, but shall use reasonable diligence to see that the answers are correctly written. It is for his interest to do so, and the insurer has a right to presume that he will do it. He has it in his power to prevent this species of fraud and the insurer has not.

But more than this. The conduct of the plaintiff at the time and subsequently, is not entirely free from suspicion. There is some evidence tending to prove that she knew of the deception. She testifies that her husband, at the time the application was signed, told the agent several times that he had been rejected by the Massachusetts Mutual, but that the doctor told him to say nothing about it. After the doctor had paid the premium, she hesitated about repaying him, fearing that

the policy would not be good, and even sent her daughter to request him to take the policy away. Thereupon the doctor and the agent assured her that it was all right in the application. Upon that assurance she paid the premium. This, if it falls short of proving actual collusion, shows clearly that she comprehended the importance of the answers, and exhibits her negligence in a stronger light. On the whole we think that she, quite as much as the defendants, clothed this agent with the power to perpetrate the fraud. Courts should never extend by implication the power of an agent except to carry into effect the probable intention of the parties, or to prevent third persons dealing with the agent from being misled to their injury. In this case there is no ground for the supposition that the defendants ever intended to authorize the agent to act directly contrary to their interests; and if the plaintiff has been deceived her own negligence at least materially contributed to it.

We need not enlarge upon the evils necessarily resulting from holding insurance companies liable for such acts of their agents. The question is vital to the insurance interests of the country. The insured no less than the insurers are deeply interested in it. If this verdict is sustained it will tend to establish a principle fraught only with mischief. Every life insurance company in this country, and to some extent the fire insurance companies, will be at the mercy of their agents. A door will be open to fraud, collusion, and legal robbery, unprecedented in the history of jurisprudence. In view of the probable consequences of such a principle — evils co-extensive almost with the magnitude of the interests involved — we ought to pause and consider well before extending the doctrine of some of the modern cases to a case like this.

We are constrained therefore to hold that a limited agency in a case of life insurance will not be extended by operation of law to an act done by the agent in fraud of his principal, and for the benefit of the insured, especially where it is in the power of the insured by the use of reasonable diligence to defeat the fraudulent intent.

The court very properly instructed the jury that "an untrue or fraudulent statement or denial made by the applicant of a fact material to the risk to induce the issuance of a policy will prevent the policy from taking effect as a valid contract, unless the insurer has in some way waived or estopped himself from relying upon such misstatement to avoid the policy. This waiver, to be effectual, must be made by an officer of the company authorized to make it. If there has been no evidence of any waiver except by a medical examiner of the company, or by a local agent, there must be additional proof of specific authority given them or the company will not be bound."

Some of the cases cited by the plaintiff are cases of fire insurance, in which the agents were intrusted with blank policies, signed by the president and secretary, and had full power to fill up and issue the same without referring the application to the home office. In such

cases the corporation contracts solely by its agent. The acts and knowledge of the agent are the acts and knowledge of the corporation, and there is a manifest propriety in holding the corporation liable accordingly.

This court has held that in writing the answers to the interrogatories in the application, the agent is to be regarded as the agent of the company rather than the agent of the insured. We do not question the propriety of those decisions, considering the circumstances of the cases in which they were made; but we cannot regard them as establishing an inflexible rule of law applicable to all cases.

A brief reference to some of the cases will illustrate the distinction which we make. When the applicant stated fully and truthfully the circumstances relating to the title to the property insured, and the agent, knowing all the facts, but for the sake of convenience, stated the title incorrectly and issued a policy, it was held that the company could not take advantage of it. The court regarded the transaction as equivalent to an agreement that, for the purpose of the insurance, the title should be considered as it was stated to be by the agent. *Peck v. New London County Mutual Insurance Company*, 22 Conn. 575. See also *Woodbury Savings Bank v. Charter Oak Insurance Company*, 31 Conn. 517.

When the applicant answered the interrogatory, "Is a watch kept on the premises during the night?" by stating the facts, and the agent wrote the answer, "Watchman till 12 o'clock," which answer was not strictly true, it was held that the company was bound by it. *Malleable Iron Works v. Phoenix Ins. Co.*, 25 Conn. 465. See also *Beebe v. Hartford County Mut. Fire Ins. Co.*, 25 Conn. 51; *Hough v. City Fire Ins. Co.*, 29 Conn. 10.

The case before us is a case of life insurance. The power of the agent was in fact limited. He had no power to issue policies. The terms of his agency conferred no authority to waive conditions or forfeitures, or to agree to false and fraudulent answers to any of the interrogatories, or to make any other contract to bind the company. Presumptively the insured and the plaintiff knew all this before paying the premium; for the printed policy, which was in their hands for several days, contained at the bottom this note: "The president and secretary are alone authorized to make, alter, or discharge contracts, or to waive forfeitures." The jury then were correctly told that "there must be additional proof of special authority given them," (the local agent and the medical examiner,) "or the company will not be bound."

The jury found such special authority. But we look through the record in vain to find any evidence to support such a finding.

The verdict was manifestly against the evidence, and justice requires that it should be set aside and a new trial awarded.¹

¹ *Acc. v. New York L. Ins. Co. v. Fletcher*, 117 U. S. 519 (1886).

See *National L. Ins. Co. v. Minch*, 53 N. Y. 144 (1873); *McCullum v. Mutual L.*

MAYER v. MUTUAL LIFE INSURANCE CO.

SUPREME COURT OF IOWA, 1874. 38 Iowa, 304.

APPEAL from Clinton District Court.

Action for the recovery of one thousand dollars upon a policy of insurance on the life of Michael Mayer, who died on the 26th day of August, 1872. The premium upon the policy became due on the 22d of August, and was unpaid at the time of his death. Upon this ground the defendant seeks to avoid liability. Jury trial. Verdict and judgment for plaintiff for one thousand dollars. Defendant appeals. The material facts are stated in the opinion.

Walter I. Hayes, George B. Young, and J. T. McGuire, for appellant.

W. E. Leffingwell & Bro., for appellee.

DAY, J. The policy bears date of the 22d of November, 1869, and insures the life of Michael Mayer for the term of fifty-six years, in consideration of an annual premium to be paid to said company on or before, or within thirty days after the 22d of November. This policy amongst other conditions contains the following:—

“2. That this policy shall not take effect until the payment of the premium hereon has been made during the lifetime of the person whose life is hereby insured, or if any premium note given on account of this policy be not paid, with interest, on or before the date when due, then this policy shall cease and determine; and in every case in which this policy shall cease and determine, all payments thereon shall be forfeited to said company, and the company shall not be liable for the payment of the sum insured thereon, nor any part thereof, except as hereinafter provided.”

“5. That if, after the payment of two or more full annual premiums on this policy, the same shall cease and determine, by default in the payment of any subsequent premium when due, yet, notwithstanding such default, this policy shall continue and hold good, subject to all the above conditions and agreements, except as to further payments of premiums, for an equitable portion of the amount originally insured, provided application for the same be made within thirty days after said premium was due and not paid.”

The policy contains a provision that the annual premium may, by permission of the company, be paid semi-annually in advance with interest. Immediately after the policy was effected the parties, by

Ins. Co., 55 Hun. 103 (1889); s. c. affirmed without opinion, *sub nom.* McCollum v. New York Mut. L. Ins. Co., 124 N. Y. 642 (1891).

Compare *McArthur v. Home L. Assn.*, 73 Iowa, 336 (1887); *O'Brien v. Home Benefit Society*, 117 N. Y. 310 (1889); *Bawden v. London, Edinburgh and Glasgow Assur. Co.*, [1892] 2 Q. B. 534 (C. A.).—Ed.

agreement, changed the time of the payment of the premiums to quarter-annual payments, to be paid upon the same terms and conditions, and with the same force and effect as the semi-annual premiums mentioned in said policy. George Oatman was hired by Leadbetter, the general agent of the defendant at Clinton, as book-keeper and clerk, and received his pay from defendant.

He was instructed by Leadbetter to collect premiums and take insurance. He collected the last five premiums which were paid upon the policy in suit, and delivered receipts therefor, which he countersigned with the name of Leadbetter, the general agent. These five payments were made as follows: the one due May 22, was paid on the 13th day of June; that due August 22, was paid August 25; that due November 22 was paid November 28; and those due February 22 and May 22, 1872, were paid when due. Two other receipts were in evidence, showing that the premium due 22d of November, 1870, was paid on the 24th of November, and that the one due 22d of February, 1871, was paid on the 13th of February. Oatman testified substantially as follows: "At the time I collected the money expressed in receipt No. 10, May 22, 1872, Mayer said, 'I suppose my notices go to Clinton, as my policy is dated there, and I want it changed to Lyons.' I told him that was not necessary, as we had a complete record in the office, and when a policy holder changed his post-office address, we noted it. I told him not to be uneasy, as I would be around to collect it. I did not do so, as I quit work the week after collecting said premium above mentioned."

The witness further testified that he never told any one connected with defendant that he had this conversation with Mayer, and that he made no note of the change of residence in the register, but that the fact of such change was understood in the office.

It was also proved that the custom of defendant as to notifying policy holders at and around Clinton of the time premiums became due, was to send notices from the general office to Clinton, and from there to the policy holders. The notice for the August premium was sent to Mayer at Clinton, and being uncalled for, was returned.

The court gave the following instructions, which were excepted to, and the giving of which is assigned as error:—

"2. The policy in suit was delivered at the city of Clinton, and that city, at the time of such delivery, it is admitted, was the residence and post-office of the plaintiff and the deceased, and such residence was then noted on the books of defendant's agent at the said city of Clinton. If it was the custom of the agent of the defendant at Clinton to advise by letter through the post-office or otherwise, parties insured at that agency, of the time when their premiums would become due, in order that they might be paid in season, and the policy thus preserved from forfeiture, and such had been the custom with respect to this particular policy, then the plaintiff, unless otherwise advised by the defendant, had the right to expect that the custom would be observed in regard to

the payment due August 22, 1872, and to be advised of such payment in season to make it. And if you find that the plaintiff and the deceased, previous to the 22d of August, had removed to the city of Lyons, in said county, and the deceased about the time of, or shortly after such removal, informed a clerk who was then in the office and in the employment of the agent at Clinton, and who previously collected premiums on this policy of the deceased, then this would be notice to defendant of this change of residence; and it would be the duty of the defendant to either address or send word to the plaintiff at Lyons, and a letter addressed in Clinton would not be sufficient; and if the failure to pay the premium at the time it was due, was owing to the fact that defendant had failed to give the deceased its usual and customary notice, then the non-payment of the premium at the time it was due, would not work a forfeiture of the policy, or the right to recover on it."

"3. If you find that the witness Oatman was employed in the office of the general agent at Clinton, and had been in the habit, with the knowledge and assent of such general agent, of collecting premiums on this particular policy, and had, by the said general agent, been permitted by the said agent to procure insurance risks, &c., and the said Oatman received from the deceased premiums several days after they had become due, without any objection, and as though such payments had been made on the day of their maturity, and the payments as made were authorized by the defendant, without any objection communicated to the deceased or the plaintiff, then it may be fairly inferred that the said Oatman was acting with the concurrence of the defendant, and as its agent. So, too, if before the maturity of the premium payable on the 22d of August, 1872, the said Oatman, while employed in the office of the said general agent, had informed the deceased that he would call at the residence or place of business of the deceased and collect such premium, and deceased depended on such call being personally made on him, this would excuse the deceased from going to such office and paying such premium the day that it was due, if, in addition to this promise on the part of the said Oatman, you find that he had at various times called upon and collected from the deceased previous premiums on said policy, with the authority to collect such premiums. If, however, the said Oatman left the employment of the said general agent previous to the said 22d day of August aforesaid, and this was known to the deceased or to the plaintiff, then the plaintiff can claim no advantage from the promise or offer so made."

"5. If you find that the premium due August 22 was offered to and refused by the defendant on the 26th of August, the defendant would be justified in then refusing it, unless you find from the other facts in the case that the defendant, by the declaration and conduct of its agent, had given the deceased or the plaintiff reasonable grounds to believe that it waived a strict performance with respect to time of payment, and if you find that such declarations and conduct were such as would reasonably lead the deceased or plaintiff to believe that these

strict conditions would be waived and not be insisted on, then the offer to pay would be in time, although the assured was then dead.

These instructions, we think, are right. The vast increase in the business of insurance, and the many interests which it involves, have demonstrated that many of the decisions heretofore made respecting it are unwise, and have created a necessity for innovation. Every law should be reasonable, and it is reasonable only when it is adapted to human conduct. Courts should not so administer the law as to require of individuals a course of conduct which, to a majority of reasonable and right-minded men, is unusual and unnatural. Indeed, it would be impossible long to maintain a law which is at variance with the judgment and sense of justice of a majority of those upon whom it operates.

Now it must strike every reasonable mind, that a majority of ordinarily prudent persons, who had been customarily notified of the time when premiums upon their policies became due, and who had received no notice of an intention to abandon the customary course, would in a particular case expect and await a like notice. And if such is the reasonable and natural result of the previous dealings of the company, it must govern its future conduct so as to accord with the reasonable expectation thus created.

That is, having furnished a policy holder reasonable ground for expecting that he will be advised when his premium becomes due, the company must continue to give such notice until it furnishes the assured notice that he need no longer expect it. Any other construction would make the law a trap to ensnare the unwary.

For a person thus accustomed to notice and, not accustomed to charge his memory with the day when his premium became due, would be very likely, in the absence of notice, to allow the day for making payment to pass by, in utter forgetfulness of the premium, or to suppose that the local office had received no estimate from the general office of the amount due, and hence was not ready to receive it. See *Buckbee v. United States Ins. Co.*, 18 Barb. 541; *Thompson v. St. Louis Mutual Life Ins. Co.*, *Ins. Law Journal*, 1873, p. 422.¹

And the foregoing remarks are all applicable to so much of the third instruction as refers to the habit of receiving premiums on this policy after they became due, as well as to the fifth instruction.

As to the remainder of this instruction it is conceded that the tendency of late decisions is to hold insurance companies liable for the acts of their agents. *Viele v. Germania Ins. Co.*, 26 Iowa, 9; *Miller v. the Mutual Ins. Co.*, 31 Iowa, 216. It is claimed, however, that Oatman was not in such sense an agent of the company that he could bind it by his acts. We think otherwise. He was employed in the office of the general agent and paid by the company. He called in person upon the deceased and collected from him the last five premiums. Three of these he collected after the day fixed for their payment. No question

¹ s. c. 52 Mo. 469 (1873). — Ed.

was ever made as to his authority to act in this capacity. The company by so holding him forth and permitting him to act, has recognized him as its agent for the collection of premiums at least. It is clear that if he had appropriated to his own use the premiums paid, the assured could have claimed the benefit of the payments made. He had the receipts of the company, countersigned by the general agent, and thus was, by the direct act of the company, clothed with the insignia of agency. And whilst engaged in the business of the company, and within the scope of his employment he had, it seems to us, authority to bind the company by his agreement that he would do respecting the premium falling due August 22, 1872, as he had done with reference to the five preceding ones, namely, call at the residence or place of business of the deceased and collect it.

Objection was made to the testimony of the witness Oatman, as to the custom of defendant respecting notice to policy holders, also with reference to what passed between him and Mayer at the time the last premium was paid.

We have already determined the admissibility of this evidence, in what we have said respecting the instructions.

*Affirmed.*¹

CLEMENT v. INSURANCE CO.

SUPREME COURT OF TENNESSEE, 1898. 101 Tenn. 22.

APPEAL from Chancery Court of Obion County, JOHN S. COOPER, C. *Caldwell & Lowe*, for Clement.

Turley & Wright and *Moore & Wells*, for Insurance Co.

WILKES, J. This is an action upon a policy of insurance for \$8,000 upon the life of Mattie Lee Wright. The policy was issued on October 11, 1893, and was payable to the executors, administrators, and assigns of the insured. On October 19, 1893, it was assigned to R. H. Clement and W. B. Kerr upon consideration that they pay the pre-

¹ *Acc.*, as to the effect of habitually giving notice of premiums: *Insurance Co. v. Eggleston*, 96 U. S. 572 (1877).

See *Leslie v. Knickerbocker L. Ins. Co.*, 63 N. Y. 27 (1875); *Phoenix Ins. Co. v. Doster*, 106 U. S. 30 (1882); *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156 (1886).

Compare *Insurance Co. v. Mowry*, 96 U. S. 544 (1877); *Thompson v. Ins. Co.*, 104 U. S. 254 (1881).

Acc., as to the effect of habitually receiving premiums when overdue: *Dilleber v. Knickerbocker L. Ins. Co.*, 76 N. Y. 567 (1879).

See *Howell v. Knickerbocker L. Ins. Co.*, 44 N. Y. 276 (1871); *Eury v. Ins. Co.* 89 Tenn. 427 (1890).

Compare *Marston v. Massachusetts L. Ins. Co.*, 59 N. H. 92 (1879); *French v. Hartford L. & Annuity Ins. Co.*, 169 Mass. 510 (1897); *Union Central L. Ins. Co. v. Hook*, 62 Ohio St. 256 (1900); *Union Central L. Ins. Co. v. Buxer*, 62 Ohio St. 385 (1900). — Ed.

miums as they should accrue, as well as the premiums upon a policy of \$2,000 issued simultaneously by the assured upon his life for the benefit of his wife, and the further consideration of \$25 paid to the assured himself. The assured died December 27, 1894, or one year two months and sixteen days after the policy issued, he being about twenty-six years of age. After his death, W. B. Kerr assigned \$2,228.10 of his part and interest in the policy to the Jerome Hill Cotton Company, to satisfy an attachment which had been levied upon it, and afterwards, but before this suit was instituted, assigned the remainder of his interest under the policy to his two sons, the complainants, W. A. and E. B. Kerr.

Upon the hearing of the cause in the court below, upon a voluminous record and a vast volume of proof, the Chancellor was of opinion that complainants were not entitled to recover upon the policy, nor to any relief, and he dismissed the bill at their cost, and they have appealed and assigned errors.

The learned Chancellor, in his decree, set out in full his finding of facts and conclusions of law thereon. We are satisfied, from an examination of the entire record as it is presented, that the Chancellor was, in the main, correct in finding the facts as follows:—

When the policy was issued, the insured was not a fit and suitable subject for insurance, because of ill health and bodily infirmities of a serious character, which was well known to him and concealed by him in making his application, and he procured the policy by fraudulent misrepresentations as to his physical condition. It also appears that prior to the delivery of the policy, and doubtless prior to the application, the said R. H. Clement and W. B. Kerr had agreed with the insured, that, for the consideration heretofore stated, he would transfer the policy for \$8,000 to them, and the policy was procured in conformity to, and in pursuance of, such agreement, said Clement and Kerr paying the cash premium to the agent, but not until after the transfer was made and policy delivered to them. The terms of the transfer recite that Clement and Kerr were creditors of the insured, but such does not appear to be the fact from the record, except so far as that relation may be said to have arisen out of the agreement referred to, nor were they in any way related to him, nor did they have any insurable interest in the life of the deceased, but had knowledge of his physical condition. The Chancellor was therefore of opinion that the transaction was a gambling or wagering contract upon the life of the insured, that to recognize or enforce it would be contrary to some public policy, and that the subassignees or transferees of W. B. Kerr could stand upon no other or higher ground than he could.

Unquestionably the findings of the Chancellor are correct, and his conclusions correct, upon the record as presented to us, unless they are controlled and neutralized by the provisions of the policy in regard to the right of the company to contest its liability in case of death. The provision referred to is as follows:—

“*Incontestability*. — After this policy shall have been in force one full year, if it shall become a claim by death, the company will not contest its payment, provided the conditions of the policy as to payment of premiums have been observed.”¹ . . . The provision in this case is very broad in its terms. There is only one condition upon which the validity of the policy can be questioned, after the lapse of a year, and that is the nonpayment of premiums. The meaning of the provision is that if the premiums are paid, the liability shall be absolute under the policy, and that no question shall be made of its original validity. No reasonable construction can be placed upon such provision other than that the company reserves to itself the right to ascertain all the facts and matters material to its risk, and the validity of their contract for one year, and if, within that time, it does not ascertain all the facts, and does not cancel and rescind the contract, it may not do so afterward upon any ground then in existence.

The practical and intended effect of the stipulation is to create a short statute of limitation in favor of the insured, within which limited period the insurer must, if ever, test the validity of the policy.

It has been held that an agreement limiting the time within which an action may be brought upon a policy of insurance by the beneficiary is not against public policy, and may be enforced, though less than the usual time imposed by law has been fixed. If this be so, it is difficult to see why a similar limitation upon the right of the insurer to contest should be against public policy, and why it should not be enforced by the courts.

It is said, however, that fraud appearing in the origin of the contract must, as in any other case, render it null and void from the beginning. It is true that fraud vitiates all agreements and undertakings based upon it, and they may be set aside at the instance of the party defrauded. So, in this case, fraud in obtaining the policy would vitiate it at the option and upon the motion of the party defrauded, but, under the provision in question, the party must within the year exercise his right to repudiate and rescind it. The effect of this agreement not to contest is to put the company in the attitude of being unable to set up any fraud or false swearing in obtaining the policy, or any other defence to it, save the one excepted, so far as its original validity is concerned. Unless the language be thus construed, it is impracticable to put any reasonable interpretation on it. Unless it is the object and purpose of the provision to cut off all defences arising out of the false statements of the applicant to obtain it, it is difficult to see what practical benefit the insured is to derive from it. . . .

Objection was made by the complainant to any testimony relating to the truth or falsity of the representations made or fraud practised by the assured or the transferees in obtaining this policy, but such objections were overruled, and much testimony *pro* and *con* was taken on this point, and this is now assigned as error. . . . When the suit is

¹ The greater part of the opinion has been omitted. — Ed.

brought by a transferee, and the Chancellor was of opinion that such transferee did not hold in good faith, and that the transfer was but a mere evasion of the rule against wagering policies, then the evidence was admissible on the question of fraud or good faith on the part of the transferee. . . . /

While the court is disposed to give to the assured, and parties taking under him in good faith, the full benefit and advantage of the noncontestable clause, by shutting off inquiries into the truth or falsity of the statements made in the application, and this because of the contract between the parties, it can see no reason why the like advantage and benefit should be extended to one who has no insurable interest in the assured, who does not take or claim in good faith, and whose entire connection with the matter is shown to have been for a speculative and fraudulent purpose, and no sound public policy can be subserved by so holding, but on the contrary, such holding would sanction wagering insurance contracts, to the great detriment of the public morals and public good. We are therefore of opinion the decree of the Chancellor is correct in its results, and it is affirmed, and the bill dismissed at complainant's cost.¹

¹ *Acc.*. Manufacturers' L. Ins. Co. v. Anctil, 28 Can. S. C. 103 (1897), s. c. affirmed, *sub nom.* Anctil v. Manufacturers' L. Ins. Co., [1899] A. C. 604 (P. C.).

On incontestability, see also *Wood v. Dwarris*, 11 Exch. 493 (1856); *Holland v. Chosen Friends*, 54 N. J. L. (25 Vroom) 490 (1892); *Welch v. Union Central L. Ins. Co.*, 108 Iowa, 224 (1899); *Murray v. State Mut. L. Ins. Co.*, 22 R. I. 524 (1901).

On waiver of formal proof of death, see *Greenfield v. Massachusetts Mut. L. Assur. Co.*, 47 N. Y. 430 (1872); *McComas v. Covenant Mut. L. Ins. Co.*, 56 Mo. 573 (1874); *O'Reilly v. Guardian Mut. L. Ins. Co.*, 60 N. Y. 169 (1875); *Goodwin v. Massachusetts Mut. L. Ins. Co.*, 73 N. Y. 480, 492-496 (1878); *Prentice v. Knickerbocker L. Ins. Co.*, 77 N. Y. 483 (1879).

On waiver of cash for first premium, see *White v. Connecticut F. Ins. Co.*, *ante*, p. 1078 (1876). *Acc.* are these life insurance cases: *Sheldon v. Connecticut Mut. L. Ins. Co.*, 25 Conn. 207 (1856); *Miller v. Life Ins. Co.*, 12 Wall. 285 (1870); *Jones v. New York L. Ins. Co.*, 168 Mass. 245 (1897); *Stewart v. Union Mut. L. Ins. Co.*, 155 N. Y. 257 (1898); *Berliner v. Travelers' Ins. Co.*, 121 Cal. 451 (1898). And see *Bouton v. American Mut. L. Ins. Co.*, 25 Conn. 542 (1857). Compare *Hoffman v. John Hancock Mut. L. Ins. Co.*, 92 U. S. 161 (1875).

On the topic of this section, see also: —

Phoenix L. Ins. Co. v. Raddin, 120 U. S. 183 (1887);

Brown v. Metropolitan L. Ins. Co., 65 Mich. 306 (1887);

Fidelity and Casualty Co. v. Teter, 136 Ind. 672 (1894). — Ed.

CHAPTER XII.

ASSIGNEES AND BENEFICIARIES.

SECTION I.

Marine Insurance.

WAKEFIELD v. MARTIN AND TRUSTEES.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1799.¹ 3 Mass. 558.

WILLIAM C. MARTIN, being indebted to James Scott in the sum of \$5,000, and having shipped a parcel of goods on board the ship —, upon which he had effected a policy of insurance, in order to secure Scott, assigned the bills of lading and the policy to him by a blank indorsement. A total loss happened. The plaintiff, a creditor of Martin, summoned Welles, one of the underwriters, as trustee of Martin, Welles having no knowledge of the assignment to Scott.

The question was, whether this assignment to a creditor, without notice to the underwriters, was good so far as to vest a property in the assignee, and thus preclude an attachment.

Mr. *Parsons*, for Scott, contended that the assignment was good and perfect as between the assignor and assignee, and vested an equitable right in the latter; and although, if the underwriters had actually paid the loss to Martin without notice of the assignment, they would have been discharged, yet that an attaching creditor was in no better condition than the assignor himself.

Mr. *Ames*, for the plaintiff, contended that a policy of insurance was not assignable; that it was a mere *chose in action*, and by law no property vested in the assignee; that the assignor might revoke the authority, or might release and discharge the underwriters; that the attaching creditor stepped in with the authority of the law, and effected this revocation; and that a contrary doctrine would introduce great frauds.

The COURT, after taking time, pronounced their opinion unanimously, that the assignment, though without the knowledge or assent of the underwriter, vested an equitable right in the assignee; and, therefore, they discharged the trustees.

¹ The date is somewhat uncertain. — Ed.

POWLES AND OTHERS v. INNES.

EXCHEQUER, 1843. 11 M. & W. 10.

THIS was an action of assumpsit on a policy of insurance on ship. The declaration stated that the policy was made by the plaintiffs as agents for Robert Page and Robert Chamberlain; that Page and Chamberlain, and one Sarah Banks, were, during the risk and until and at the time of the loss, interested in the ship to the amount of the money insured; and that the ship was totally lost. The defendant pleaded, first, payment of £75; secondly, as to the residue, non-assumpsit; thirdly, except as to £75, that although Chamberlain was interested in the ship during the risk and at the time of the loss to the amount of £400, in respect of which the plaintiffs were entitled to recover the said sum of £75, yet that, save as aforesaid, Chamberlain and Page were not interested in the ship during the risk, and that the policy was not made by the plaintiffs as agents for Sarah Banks or for her benefit, nor did she give any order for effecting the same; and fourthly, except as to £75, that although Chamberlain was interested during the risk to the amount of £400, etc., yet, save as aforesaid, Chamberlain, Page, and Banks were not interested in the ship during the risk, *modo et forma*. On these pleas issues were joined.

The cause was tried before Lord ABINGER, C. B., at the Middlesex Sittings after Trinity Term, 1840, when a verdict was found for the plaintiff, subject to the opinion of the court, upon the following case:

On the 22d of January, 1838, the plaintiffs, who are insurance agents, by directions from, and on account and for the benefit of, Robert Page and Robert Chamberlain, in respect of their two-thirds of the vessel, effected a policy of insurance on the ship "Commerce." The premiums were charged to and paid by Page and Chamberlain. The policy was subscribed by the defendant for £150. At the time of the insurance and at the time of the loss, the vessel was of the value of £1,200. At the time of effecting the insurance, Chamberlain, Page, and Sarah Banks were each interested in one-third of the vessel. The vessel was lost in January, 1839, within the time mentioned in the policy. Before the loss, Page, by bill of sale, conveyed his share to Sarah Banks. From the time of the said bill of sale down to the time of the loss, Chamberlain and Sarah Banks were owners of the "Commerce," the former of one-third and the latter of two-thirds of that ship. On the day after the sale, Sarah Banks ordered a policy for £600 to be effected in respect of her two-thirds for twelve months, which was accordingly effected in the Alliance Office, and upon which she received as for a total loss.

The question for the opinion of the court is, whether the verdict should be entered for the plaintiffs or for the defendant, and for what amount, if any, and upon which of the several issues joined between the parties. The pleadings are to form a part of the case, and the

court are to be at liberty to draw such conclusions as they shall think the jury ought to have drawn.

W. H. Watson, for the plaintiffs. The question in this case is one which, although often considered, has never been expressly determined; namely, whether, where a person, being the owner of a vessel, after effecting a policy of insurance upon it, sells his interest in the vessel, by such transfer of his interest the policy is at an end. The plaintiffs contend that it is not, but that it continues in force, and the party who recovers upon it is a trustee for the purchaser. [Lord ABINGER, C. B. The form of declaration is, that the plaintiff was interested "during the risk and until and at the time of the loss." Unless the policy be expressly assigned to the purchaser, why should it pass any more than any other wager on the vessel?] The policy is merely an accessory to the principal, the ship. [PARKE, B. If the policy were handed over at the time of executing the bill of sale, that would be evidence of the intention of the parties that the seller should be a trustee for the purchaser. The question really is, is it an incident to the vessel?] In *Sparkes v. Marshall*, 2 Bing. N. C. 761, 3 Scott, 172, Tindal, C. J., says: "If the plaintiff have an insurable interest at the time the policy was effected, whatever change may have taken place in the property since can have no effect in relieving the underwriters from their liabilities, as the plaintiff may sue on the policy for the benefit of the party to whom such property has passed." [PARKE, B. In that case the plaintiff was interested both at the time of the insurance and of the loss. Lord ABINGER, C. B. That judgment must be taken to mean that the assignment of the goods makes no difference, provided the parties keep the contract of insurance alive for the benefit of the assignee. PARKE, B. The contract of insurance is a contract of indemnity.] Yes, but it is a contract to indemnify anybody who may be interested in the subject-matter; it is an indemnity in respect, not of the underwriter, but of the subject-matter of insurance; and though it is necessary to allege an interest in the declaration, it is not necessary to allege it to have existed down to the time of the loss. [Lord ABINGER, C. B. I never saw it otherwise.] In *Perchard v. Whitmore*, 2 Bos. & P. 155 n., which was an action on a policy of insurance on goods, the declaration averred that P. M. and N. M., until and at the time of the loss, were interested in the goods, and that the insurance was made for them and on their account. It appeared on the evidence upon the *voir dire* of a witness called for the plaintiffs, that since the policy was effected he had become a partner with P. M. and N. M., and had taken a share of the goods insured; and upon objection that this evidence disproved the allegation of interest in the declaration, Buller, J., ruled that the plaintiff ought not to be nonsuited, for that the witness was not interested at the time of making the policy, "to which the averment of interest related, and the plaintiff brought the action for those who were interested at the time.

Greenwood, *contra*, was stopped by the court.

LORD ABINGER, C. B. I am clearly of opinion that the defendant is entitled to our judgment. The last authority that has been cited is a mere note of a *nisi prius* case, the correctness of which I greatly doubt. The contract of insurance was originally only a contract of wager, that the vessel should arrive at her destination; since the Legislature has adopted it, it is a contract of indemnity only, and nobody can recover in respect of the loss who is not really interested. The policy is but a chose in action, and cannot pass merely by the assignment of the ship.

PARKE, B. I am of the same opinion. The plaintiff can only recover an indemnity. Then what has this party lost, if he has sold his interest in the ship, irrespective of the policy? Banks's interest is not protected, because she gave no authority to effect the insurance. Unless, therefore, there was some understanding that the policy should be kept alive for her benefit, the plaintiffs, suing on behalf of Page, have lost nothing. If the policy had been handed over with the bill of sale, or there had been an order to the brokers to hand it over, the case would be different; then the parties might sue as trustees for the purchaser; but we cannot infer that, no facts being stated in the case to warrant such an inference.

GURNEY, B., concurred.

*Judgment for the defendant.*¹

¹ In *North of England Oil-Cake Co. v. Archangel Maritime Ins. Co.*, L. R. 10 Q. B. 249 (1875), Vagliano Brothers, the owners of a cargo, procured insurance on a cargo on the brig "Fanny," then at Constantinople, for a voyage from Constantinople to a port of discharge in the United Kingdom, including all risks of lighters to and from the brig, the policy being expressed to be with Vagliano Brothers and their assigns. While the brig was on the voyage, Vagliano Brothers sold the cargo to the plaintiff company, agreeing to deliver it at any designated port in the United Kingdom. Payment was to be made fourteen days after the cargo was ready for delivery; and in case of damage by sea or otherwise the price was to be adjusted by arbitration. Vagliano Brothers indorsed bills of lading, but no agreement was made as to insurance. The plaintiff company designated a port, and the brig arrived. The cargo was landed by means of public lighters employed by the plaintiff company. One of the lighters, filled with part of the cargo, arrived at the plaintiff company's wharf and was there sunk. Thus part of the cargo was lost, and part damaged. Vagliano Brothers made a claim upon the underwriters, and later assigned the policy to the plaintiff company. The cargo was eventually paid for in accordance with the terms of sale, but the time of the payment did not appear. The case having been stated by consent and submitted to the court with power to draw inferences, judgment was given unanimously for the defendants; and COCKBURN, C. J., said: "We are agreed upon one point, which entitles the defendants to judgment, viz., that the policy not having been assigned until after the interest of the assignors had ceased, an effective assignment was impossible. If there had been a stipulation in the contract of sale that the policy should be assigned for the benefit of the plaintiffs, the vendees, it might have been otherwise; but not only is there no express stipulation to that effect, but the implication from the nature of the contract is the other way. This is not like the common case of the sale of a floating cargo, where the seller parts with and the buyer takes at once the property and all risks. In such a case, the policy, according to the established practice, passes as part of the shipping documents, and on assignment the vendee can sue upon it in case of loss. And there is no hardship in this on the insurers, because they insured the safety of the cargo to the end of the voyage, and it is immaterial to them in whom the interest vests at the time of the loss; and there is great convenience in the practice, as

it obviates the necessity of the vendee getting a fresh policy and facilitates the sale of cargoes at sea. But this is not an out-and-out sale; on the contrary, although the sale might at once transfer the property to the vendees, yet an essential term of the agreement was that payment was only to take place on the right delivery of the cargo, so that the interest, a substantial real interest, remained in the sellers. If the cargo had perished at sea, the sellers would not have got one shilling; therefore, until delivery to the plaintiffs, the buyers, the interest in the policy remained in the sellers. But on the delivery to the plaintiffs the sellers became entitled to payment and their interest in the policy ceased; and the policy was at an end. Consequently, although an actual assignment may be good after the loss, in the present case the assignment was not in consequence of a previous agreement before the policy dropped, and therefore the sellers had no interest in the policy, and nothing to assign."

As to policies "on account of whom it may concern," see *Newson v. Douglass*, 7 H. & J. 417, 450-452 (1826); *Watson v. Swann*, 11 C. B. n. s. 756 (1862); *Hooper v. Robinson*, 98 U. S. 528 (1878).

On the topic of this section, see also:—

- Earl v. Shaw*, 1 Johns. Cas. 313, 317 (1800);
- Rousset v. Ins. Co. of North America*, 1 Binn. 317 (1800);
- Cleveland v. Clap*, 5 Mass. 201 (1809);
- Carroll v. Boston M. Ins. Co.*, 8 Mass. 515, 517 (1812);
- Spring v. South Carolina Ins. Co.*, 8 Wheat. 268, 282 (1823);
- Buffalo Steam Engine Works v. Sun Mut. Ins. Co.*, 17 N. Y. 401 (1858);
- Ralli v. Universal M. Ins. Co.*, 4 De G., F. & J. 1 (1862);
- Hitchcock v. Northwestern Ins. Co.*, 26 N. Y. 68 (1862);
- Lloyd v. Fleming*, L. R. 7 Q. B. 299 (1872).—Ed.

SECTION II.

Fire Insurance.

(A) ASSIGNEES.

LYNCH AND ANOTHER, APPELLANTS, v. DALZELL AND OTHERS,
RESPONDENTS.

HOUSE OF LORDS, 1729. 2 Park on Ins. 8th ed. 978.¹

On the 28th of July, 1721, one Richard Ireland took out from the Sun Fire Office a policy of insurance, whereby it was witnessed that whereas the said Ireland had agreed to pay, or cause to be paid to the said office, the sum of five shillings within fifteen days after every quarter-day, for the insurance of his house, being the Angel Inn at Gravesend, with his goods and merchandise as thereafter expressed only, and not elsewhere, viz.: the dwelling-house, not exceeding £400 and for the goods in the same only, not exceeding £500; and for the stable only, not exceeding £100 all then occupied by James Peck, from loss and damage by fire; and so long as the said Richard Ireland should duly pay or cause to be paid five shillings a quarter, as therein mentioned, the said society did bind themselves, their heirs, executors, administrators, and assigns, to pay and satisfy the said Ireland, his executors, administrators, and assigns, within fifteen days after every quarter-day, in which he should suffer by fire, his loss not exceeding £1,000 according to the exact tenor of their printed proposals. The policy was subscribed the 28th of July, 1721, by three of the trustees of the society. Some considerable time afterwards, Richard Ireland died, having made his will, and Anthony, his son, sole executor; who brought the policy to the office, and had an endorsement made thereon, that the same then belonged to him: and afterwards, namely, at or about Christmas, 1726, he the said Anthony paid the office a premium of twenty shillings for one year's insurance, from Christmas, 1726, to Christmas, 1727, as by an article in the proposals he was at liberty to do. On the 24th of August, 1727, a fire happened at Gravesend, which, among others, destroyed the house mentioned in the policy; and some time afterwards the appellants applied to the office, and alleged that they had purchased the house and goods of Anthony Ireland; that the same were their property at the time of the fire, and that they had an assignment of the policy made to them, at the same time that the house and goods were assigned; and they produced an affidavit made by the appellant Roger Lynch, in which he swore that his loss and damage by burning the said house amounted

¹ s. c. 4 Bro. P. C. (Toml. ed.) 431.—Ed.

at a moderate computation to £500 and upwards; and upon this affidavit was indorsed a certificate of the minister, churchwardens, and other inhabitants of Gravesend, that they verily believed, according to the best of their information, the appellants had sustained a loss of £500 and upwards. But neither in the affidavit or certificate was any mention made of any loss being sustained by the appellants by the burning of any goods in the said house; nor was any affidavit made by Anthony Ireland, in whom the property of the policy was, that he had suffered any loss. The appellants, however, insisted that the office should pay them £1,000 for their loss sustained by the burning of the house and goods; and they accordingly filed a bill in Chancery, setting forth that Anthony Ireland agreed to sell and assign to the appellants the house, stables, and goods, and also at the same time agreed to assign the policy; and that by indenture of the 24th of June, 1727, for £250. Ireland did assign to the appellants a lease he had of the house and stables for the residue of a term of seventy years, which commenced at Midsummer, 16 Car. 2; but the goods, for which the appellants, as they alleged, were to pay £500, being intended for one Thomas Church, who was to hold the inn under the appellants, Ireland, by deed poll of the same date, sold the same to Church for his own use. The bill also stated, that by another writing of equal date, Ireland assigned the policy, and all money and benefit thereof, to the appellants. That although the bill of sale of the household goods was made to Church, yet as the appellants paid the purchase-money for the same, Church assigned his bill of sale to them, for securing the money they had paid for the goods; and afterwards, by another writing, released to the appellants his benefit and interest in the policy. The bill prayed satisfaction.

The respondents put in their answer, in which they set forth the nature and method of the insurances made by the office, and admitted the policy in question, and the appellants' application for £100 loss: but said that the affidavit produced was not agreeable to the proposals; and that they had been informed and believed, that no assignment of the policy was made to the appellants, nor any assignment of goods made to them by Church, till after the fire. They insisted, that the policies issued by the office were not, in their nature, assignable, the same being only contracts to make good the loss which the contracting party himself should sustain: and the policy in question was first made to Richard Ireland, to pay his loss, and was afterwards declared by indorsement to belong to Anthony Ireland; and that no other person was entitled to the benefit of it. The cause proceeded to issue, and witnesses were examined on both sides; and upon the appellants' own evidence it appeared, that the first discourse between the appellants and Mr. Ireland about the policy was after the execution of the assignment of the house, and that the agreement (if there was any) about the policy was not at the time when the appellants agreed to purchase Ireland's term in the house. It appeared further, that the assignment of the

policy, though bearing date before, was not made and executed till some time after the fire ; so that the agreement for assigning the policy was a voluntary concession of Ireland without any consideration, and independent of the bargain for the house, and never made till after Ireland's interest in the policy, as to the house, was determined, by his selling his interest in the thing insured, and not carried into execution till the thing was lost. As to the appellants' property in the goods, they proved an assignment from Church to them, as a security for £300, but omitted, in their interrogatories, the material question, when this assignment was made : though the respondents, by their answer, put the time plainly in issue, by insisting that it was after the fire ; and it did not appear that the appellants ever had any property in goods. The respondents on their part proved that the office did not insure any persons longer than they continued their property in the thing insured ; and that persons dealing with them might not be mistaken, such notice was usually given.

Lord Chancellor KING. These policies are not insurances of the specific things mentioned to be insured ; nor do such insurances attach on the realty, or in any manner go with the same as incident thereto, by any conveyance or assignment : but they are only special agreements with the persons insuring against such loss or damage as they may sustain. The party issuing must have a property at the time of the loss, or he can sustain no loss ; and consequently can be entitled to no satisfaction. There was no contract ever made between the office, and the appellants for any insurance on the premises in question. Not only the express words, but the end and design of the contract with Ireland do, in case of any loss, limit and restrain the satisfaction to such loss as should be sustained by Richard Ireland only ; and the indorsement on the policy declared that right to his executor, Anthony Ireland, only. These policies are not in their nature assignable ; nor is the interest in them ever intended to be transferable from one to another, without the express consent of the office. The transactions in the present case, by changing their property backwards and forwards, and rendering it uncertain whose the property is, raise a suspicion, and fully justify the caution of the office, in preventing the assignment without consent of the managers, which method is pursued by all the insurance offices. Besides, the appellants' claim is at best founded only on an assignment never agreed for till the person insured had determined his interest in the policy, by parting with his whole property, and never executed till the loss had actually happened.

His Lordship therefore dismissed the bill.

Upon this decree there was an appeal to the House of Lords ; and after hearing counsel on both sides, it was ordered and adjudged that the case should be dismissed, and the decree therein complained of affirmed.

SADLERS' COMPANY v. BADCOCK, TRUSTEE OF THE HAND-IN-HAND FIRE OFFICE.

CHANCERY, 1743. 1 Wils. 10.¹

MRS. STRODE, lessee of a house, insured the same for seven years from fire, to the value of £400; her term therein expired (before the policy), viz., at Midsummer, 1740; on the 6th of January following the house was burned down; on the 23d of February following Mrs. Strode assigned the policy to the plaintiffs, who are the ground landlords, and now a bill is brought against the insurance office for the £400.

Lord Chancellor.² The question is, whether by the assignment the plaintiffs are entitled to recover the £400. And I am of opinion that the party insured ought to have a property in the thing insured at the time of the insurance made, and at the time of the loss by fire, or he cannot be relieved. Mrs. Strode had no property at the time of the fire; consequently no loss to her; and if she had no interest, nothing could pass to the plaintiffs by the assignment.

Interest or no interest must be inserted in policies of insurance of ships, or the insured must prove he had interest on board.

If the insured was not to have a property at the time of the insurance or loss, any one might insure upon another's house, which might have a bad tendency to burning houses. Insuring the thing from damage is not the meaning of the policy; it must mean insuring Mrs. Strode from damage, and she has suffered none.³

*Bill dismissed without costs.*⁴

¹ 1 s. c. 2 Atk. 554. — ED.

² Lord HARDWICKE. — ED.

³ In 2 Atk. 554, part of the opinion is reported thus: —

"It has been said for the plaintiffs, that it is in the nature of a wager laid by the insurance company, and that it does not signify to whom they pay, if lost. . . .

"By the first clause in the deed of contribution in 1696, the year this society, called the Hand-in-Hand office, incorporated themselves, the society are to make satisfaction in case of any loss by fire.

"To whom, or for what loss, are they to make satisfaction?

"Why, to the person insured, and for the loss he may have sustained; for it cannot properly be called insuring the thing, for there is no possibility of doing it, and therefore must mean insuring the person from damage.

"By the terms of the policy, the defendants might begin to build and repair within six days after the fire happens.

"It has been truly said, this gives the society an option to pay or rebuild, and shows most manifestly they meant to insure upon the property of the insured, because nobody else can give them leave to lay even a brick, for another person might fancy a house of a different kind."

For the passages omitted near the beginning of this quotation, see *ante*, p. 5, u. (3). — ED.

⁴ In *Wilson v. Hill*, 3 Met. 66 (1841), the owners of a building and machinery therein obtained insurance payable in case of loss to creditors who held a mortgage on the machinery. The owners sold and conveyed the property, subject to certain mortgages, and apparently continued to be liable to all the creditors secured by the

FOGG AND ANOTHER v. MIDDLESEX MUTUAL FIRE INS. CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1852. 10 Cush. 337.¹

ASSUMPSIT upon a policy of fire insurance on a stock of goods, originally issued to Daniel Leland and James Luke, Jr. Daniel Leland, Jr., who became the owner of the goods and the assignee of the policy, sold the goods to the plaintiffs, and about a year after this sale he wrote on the policy: "For value received, pay the within in case of loss to Jesse Fogg and Samuel F. Hearsey." The defendant company assented thus: "Received, recorded, and assented to. Attest, N. Brooks, Secretary." Afterwards, and within the term of the policy, there was a loss by fire.

By the charter of the company it was provided that when property insured should be alienated the policy should thereupon be void, but that the grantee, having the policy assigned to him, might have the policy confirmed to him for his own benefit upon application to the directors, within thirty days after the alienation, on giving security for such part of the deposit note as might remain unpaid; and by the by-laws it was provided that an assignment of the policy in consequence of alienation should not be considered valid unless a deposit note of the assignee be left with the secretary or an agent and approved by the board of directors, and that no assignment made more than thirty days after alienation should be accepted.

mortgages. The property was subsequently destroyed by fire, and the insurance company paid the full amount of the insurance to the creditors to whom its policy had been made payable. The original owners afterwards became insolvent, and their assignee claimed, and, after a judgment taken by default, collected from these creditors the amount in excess of their claims. For this amount the purchaser of the property brought action against the assignee. It was held that he could not recover. *SHAW*, C. J., for the court, said: "The claim of the plaintiff to recover in this action is founded upon an entire misapprehension of the nature and legal effect of a contract of insurance. An insurance of buildings against loss by fire, although in popular language it may be called an insurance of the estate, is in effect a contract of indemnity, with an owner, or other person having an interest in the preservation of the buildings, as mortgagee, tenant, or otherwise, to indemnify him, against any loss which he may sustain in case they are destroyed or damaged by fire. If, therefore, the assured has wholly parted with his interest, before they are burnt, and they are afterwards burnt, the underwriter incurs no obligation to pay anybody. The contract was to indemnify the assured; if he has sustained no damage, the contract is not broken. If, indeed, on a transfer of the estate, the vendor assigns his policy to the purchaser, and this is made known to the insurer, and is assented to by him, it constitutes a new and original promise to the assignee, to indemnify him in like manner, whilst he retains an interest in the estate; and the exemption of the insurer from further liability to the vendor, and the premium already paid for insurance for a term not yet expired, are a good consideration for such promise, and constitute a new and valid contract between the insurer and the assignee. But such undertaking will be binding, not because the policy is in any way incident to the estate, or runs with the land, but in consequence of the new contract." — *ED.*

¹ The statement has been rewritten. — *ED.*

The evidence tended to prove that the assignees delivered a deposit note to Pond, the defendant company's agent through whom the policy was procured, but that it never reached the secretary or the president, and that at the time of the assent to the assignment the officers of the company knew nothing of the sale of the stock of goods.

At the trial, before BIGELOW, J., there were divers objections to rulings and instructions. After the jury had retired, they returned to the court-room and asked whether the plaintiffs would be entitled to recover if the jury were satisfied that a deposit note was given to said Pond by the plaintiffs, but that the defendants never received it or knew such note was given, and assented to said indorsement upon the policy in ignorance of the existence of any such note. To which the judge replied that, if the jury found such to be the facts, the plaintiffs were not entitled to recover. The verdict was for the defendants, and the propriety of the rulings and instructions was reserved for the whole court.

G. M. Browne, for the plaintiffs.

A. H. Nelson, and *J. P. Converse*, for the defendants.

SHAW, C. J. Fire insurance has become so important in the business of the community, that it is much to be regretted that the practical management of the business is not conducted with more care and skill in its details, so as better to secure the rights of the parties, as they are intended to be established by the contract, when rightly made, and rightly understood.¹

The plaintiffs sue as assignees, and if they can recover at all, it must be in that capacity, and upon that title.

As a policy of insurance is not a negotiable instrument, it cannot be legally transferred so as to enable the assignee to maintain a suit in his own name, without the consent of the other party. But in general, at the common law, where one party assigns all his right and interest in the contract, and the assignee gives notice to the other party to the contract, and he agrees to it, this constitutes a new contract between one of the original parties and the assignee of the other, the terms of which are regulated and fixed by those of the original contract. This rule applies to policies as well as other contracts, and it is often convenient and desirable to apply it; and there are two cases where this application frequently happens.

The first is, when the insured property is alienated or sold by the assured. After such sale, if nothing more is done, — no surrender or change of the policy, — and the goods should be burnt, nobody could recover on the policy; not the original assured, for he has sustained no loss; the property was not his, and the loss of it was not his loss; not the purchaser, because he has no contract with the company. And although in popular language, the goods are said to be insured against loss by fire, yet, in legal effect, the original assured obtains a

¹ In reprinting the opinion, passages stating the case and discussing the evidence have been omitted. — Ed.

guaranty by the contract that he shall sustain no damage by their destruction by fire. But in case of such sale or alienation of the insured property, the original assured having no longer any interest in the policy, except to claim a return of premium, if he will assign his policy, or his contract of insurance to such purchaser, and the company assent to it, here is a new and original contract, embracing all the elements of a contract of insurance between the assignee and the insurers. The property having become the purchaser's, is at his risk, and if burnt, it is his loss, and he has a good original contract, upon a valid consideration, to guarantee him against such loss. Accordingly, provision is made in the charter and by-laws, and also by the terms of the policy, for an assignment of the contract; the company returns no part of the premium, but the assignee has the benefit of it, upon such terms as he and his assignor may determine; the assignment is indorsed on the policy, and presented to the president of the company, who ordinarily is authorized to give the assent of the company to the assignment; the old deposit note is surrendered, and a new deposit note given by the assignee. In the regulations of this company in a circular of instruction to agents, a form is given for such transfer, notifying the sale of the property, naming the purchaser, and assigning to such purchaser, his executors, etc., the policy of insurance, and in case of loss, directing the amount to be paid to the said purchaser, his heirs, etc. Upon each assignment perfected, there is an entire change in the contract, in the party contracted with, in the insurable interest in the property at risk, and it becomes an insurance on the property of the assignee, and ceases to be a contract of insurance of the property of the assignor.

But there is another species of assignment, or transfer it may be called, in the nature of an assignment of a chose in action; it is this: "In case of loss, pay the amount to A. B." It is a contingent order or assignment of the money, should the event happen upon which money will become due on the contract. If the insurer assents to it, and the event happens, such assignee may maintain an action in his own name, because, upon notice of the assignment, the insurer has agreed to pay the assignee instead of the assignor. *Mowry v. Todd*, 12 Mass. 281. But the original contract remains; the assignment and assent to it form a new and derivative contract out of the original. But the contract remains as a contract of guaranty to the original assured; he must have an insurable interest in the property, and the property must be his at the time of the loss. The assignee has no insurable interest, *prima facie*, in the property burnt, and does not recover as the party insured, but as the assignee of a party who has an insurable interest and a right to recover, which right he has transferred to the assignee, with the consent of the insurers.

The plaintiffs, to recover in the present case, must prove themselves assignees of the contract, because they prove an alienation of the property, and a sale to themselves, long before the fire, so that all

insurable interest in the original assured had ceased, and no loss was sustained by them by the fire, payable to anybody. The plaintiffs having acquired the property, so that it was at their risk, the question is, whether they have proved such an assignment of the contract as to bring themselves within the provisions of the charter and by-laws, as assignees, holding in all respects the rights of the original assured.

In order to prove their title as assignees, the plaintiffs offered the original policy, made in 1845, to Leland and Luke, Jr., the subsequent transfer of Daniel Leland, Jr., who had become the assignee of the policy, and the sole owner of the stock; and a sale in March, 1847, of the whole stock to the plaintiffs. There are several indorsements on the policy, but none affecting the present case, until the one said to have been made and indorsed April 1, 1848, in the words following: "For value received, pay the within, in case of loss, to Fogg and Hearsey." By the twelfth section of the act of incorporation, the "grantee or alienee of the property insured, having the policy assigned," may have the same ratified, etc., to his own proper benefit, on application to the directors, and with their consent, within thirty days next after such alienation, on giving proper security, etc. Here, it is manifest that no assignment to the plaintiffs of any kind was made till more than a year after the time of the sale of the stock. But if the directors had been notified of such sale and alienation of the stock insured, and had been informed that a full and complete transfer of the contract, and all interest in it, had been made, although at a time more than thirty days after the sale, and had then expressed their full assent to it, it might be a waiver of the mere point of time. Waiving that point, therefore, the question is, whether the indorsement in question was an assignment of the policy, and was so understood and assented to by the company. It is in few and brief terms, and *prima facie*, we should be inclined to think that it was not an assignment of the contract, but only of a right to the money in case of loss. But it was strongly urged by the plaintiffs that it was intended by one party as a transfer and assignment of the entire policy, and was so understood by the other, and that the circumstances which preceded, attended, and followed it, would be sufficient to show that it was so intended and understood. When words are doubtful, it is competent for parties to go into proof of the relation in which the parties stood to each other, the acts mutually done by them, and generally, the surrounding circumstances, in order the better to understand the meaning of the language used by them, and thus ascertain their intent; and under this rule, the evidence was admitted. But we think the ruling was sufficiently favorable to the plaintiffs, in permitting them thus to go into evidence *aliunde*, to explain the terms of the transfer.

The plaintiffs, in order to satisfy the court and jury that their circumstances were such as usually attend a full assignment of the contract, were permitted to prove, if they could: 1. That there was an actual alienation of property by the assignee of the original assured to the

plaintiffs; 2. That this fact was known to the president when he gave the assent of the directors to the transfer as it was actually made and presented to the company; 3. That the plaintiffs, as assignees, filed their own deposit note, in place of the deposit note originally given by the assured; 4. That this fact was known to the president and secretary of the company, when they gave the assent of the company in behalf of the directors. There was some evidence tending to show that a new deposit note was made by the assignees, and placed in the hands of Pond, now deceased, who had been the agent of the company for receiving proposals, through which this policy was originally made; but the evidence failed to show that he had any authority to receive deposit notes, on the assignment of a policy, and the evidence was very strong that no such note was deposited with the then treasurer, or any resident agent of the company, by Pond or otherwise. We think, therefore, that the jury were rightly instructed that if such a note had been left with Pond, but he never transmitted it to the company, or notified the proper officers of the company of his having it, it could not be considered proof that the plaintiffs had complied with that requisition of the law which requires a new deposit note before the assignment is complete.

Again; as to the knowledge of the president at the time he assented to the assignment as made, to pay to the assignees in case of loss. The extent of a simple assent to a statement or proposition must depend on the terms of such proposition. If the most natural construction of the terms of this assignment was, that it was the assignment of a right to the assignees to recover the money in case of loss, which, but for such assignment, would be due to the original assured, then the conclusion would be, that they assented to that proposal. But if the plaintiffs would show that the assured had at the time sold their property to the assignees, and that the assignees had duly given a new deposit note, in order to draw the conclusion that the officers of the company knew and understood that this was an assignment of the contract, and assented to it with that understanding, the burden of proof was upon them to show that these officers had that knowledge. . . .

*Judgment on the verdict for the defendants.*¹

¹ See *Foster v. Equitable Mut. F. Ins. Co.*, 2 Gray, 216 (1854); *Smith v. Union Ins. Co.*, 120 Mass. 90 (1876). — ED.

CUMMINGS v. CHESHIRE COUNTY MUT. F. INS. Co.

SUPERIOR COURT OF NEW HAMPSHIRE, 1875. 55 N. H. 457.

ASSUMPSIT, on a policy of insurance issued by the defendant to Stephen Pettigrew, dated May 11, 1868, for the term of five years ending May 11, 1873, insuring said "Pettigrew, his heirs, executors, administrators, and assigns," in the sum of \$1,425, "on his buildings and other property situated in Claremont, owned and occupied by himself; that is to say, — on dwelling-house, woodshed, and carriage-house, \$500; on furniture and clothing therein, \$200; on provisions in said house, \$100; on the east barn, \$175; on hay and grain therein, \$150; on south barn, \$200; on hay and grain therein, \$100."

The property insured was burned June 13, 1872. The land and buildings were sold by Pettigrew to Paul Cummings, the plaintiff, March 12, 1870. On the same day Pettigrew executed the following assignment, using a printed blank upon said policy for that purpose:

"Having sold and conveyed the buildings within insured, and the land whereon they stand, to Paul Cummings, I hereby assign to him the policy of insurance within written; to hold the same, subject to all the liabilities and entitled to all the rights and privileges to which I am liable or entitled by virtue thereof.

"STEPHEN PETTIGREW.

"The directors consent to the above assignment.

"ALBRO BLODGETT, Agent.

"May 12, 1870."

Pettigrew did not sell his furniture and clothing to Cummings, but removed them; and Cummings moved his furniture and clothing into the house; and it was Cummings's furniture and clothing that were burned.

The action was brought to recover for loss of the furniture and clothing that Cummings brought to the house. Pettigrew never owned it, nor did Cummings ever own the furniture originally insured. The plaintiff claimed that this was an insurance on the furniture and clothing that might be in the house at any time during the existence of the policy. The defendant claimed that a naked assignment of the policy, without also assigning or conveying the property insured, or some interest therein, is not a valid assignment.

The loss upon the buildings has been paid.

The action was tried by the court; and it was agreed that, if upon the foregoing statement of fact the superior court should be of the opinion that this action can be maintained, judgment shall be rendered for the plaintiff for \$157, and interest from the time the same became payable, and costs; otherwise, judgment to be rendered for the defendant for his costs.

Wait and Parker, for the plaintiff.

Allen and Wheeler, for the defendants.

FOSTER, C. J., C. C.¹ What is the nature of the contract of insurance? In *Lucena v. Craufurd*, 2 Bos. & Pul. (N. R.) 300, Mr. Justice Lawrence gives precedence to the definition of Grotius in his "Introduction to the Jurisprudence of Holland," published in 1631, the English translation of which definition is, — "Insurance is a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, prejudice, or damage by the happening of the perils specified to certain things which may be exposed to them."

This definition commends itself to the judgment of Mr. May, "alike by its brevity, its logic, and its comprehensiveness." May on Insurance, § 1. These commendable qualities, however, seem to me even more conspicuous in the language of Sir Wm. Blackstone: "A policy of insurance is a contract between A. and B., that, upon A.'s paying a premium equivalent to the hazard run, B. will indemnify or insure him against a particular event." 2 Bl. Com. 458.

Insurance, then, is a contract of indemnity, and it appertains to the person or party to the contract, and not to the thing which is subjected to the risk against which its owner is protected. It is not a contract running with the land, in the case of real estate, nor running with the personalty, so to speak, in the case of a chattel interest of the insured. *Carpenter v. Ins. Co.*, 16 Pet. 495. "The principle of indemnity," says Mr. Angell, "is the general principle which runs through the whole contract of insurance. A contract of indemnity is given to a *person* against his sustaining loss or damage, and cannot properly be called one that insures the *thing*, it not being possible so to do; and, therefore, as Lord Hardwicke has said, it must mean insuring the person from damage; that is, damage to the *thing* or to his property." Angell on Insurance, § 1; May on Insurance, §§ 2, 6; 2 Bl. Com. 459; *Lucena v. Craufurd*, 2 Bos. & Pul. (N. R.) 300; *Sadlers Co. v. Badcock*, 2 Atk. 554; *Wilson v. Hill*, 3 Met. 66; *Ellis on Insurance*, 1; *Williams on Pers. Prop.* *179; 1 Phillips on Insurance, 1; *Lane v. Maine M. Fire Ins. Co.*, 12 Me. (3 Fairf.) 44, 49.

The original contract in this case was, that, in consideration of a sum of money advanced by Pettigrew, and his agreement to be assessed at a certain rate upon another sum, the defendants would indemnify him and his assigns against loss by fire, to the amount of \$1,425, for the term of five years, — to wit, on his dwelling-house \$500, on furniture and clothing therein \$200, and on other property the remainder of the gross sum of \$1,425. The defendants were paid for insuring the whole property during the entire period of five years; and they agreed, upon this consideration, to keep the whole property insured, whoever might during that time be its legal owner, by force of their expressed obligation to indemnify Pettigrew and his assigns.

¹ CUSHING, C. J., having been of counsel, did not sit. — REP.

An alienation of the property, with the consent of the defendants was therefore contemplated and provided for by the parties to the original contract. Pettigrew sold his house, removed his furniture, and assigned the policy to Cummings (the defendants assenting thereto), who bought the house and placed therein other furniture of equal character and value. If he had sold his own furniture, or left it somewhere else, and bought the furniture of Pettigrew and retained it in the house, the defendants would unquestionably be liable for its loss. It makes no difference, in reason, equity, or common sense, whether the furniture which they were paid for insuring was bought of Stephen Pettigrew or anybody else; and I apprehend it makes no difference in law.

The contract of insurance, we have seen, does not, unless by extraordinary and express stipulation of the parties, run with the subject-matter of insurance. Satisfaction is to be made to the person insured for the loss he may have sustained. In fulfilment of the defendants' agreement with Pettigrew that they would insure his assigns, on the 12th of May, 1870, the defendants, in writing, signified their consent to the assignment by Pettigrew to the plaintiff of "the policy of insurance within written; to hold the same subject to all the liabilities and entitled to all the rights and privileges to which I am liable or entitled by virtue thereof." The liabilities referred to were, the obligation of the plaintiff to pay assessments; the rights referred to were, the rights of suit and recovery against the defendants, in case of a loss of the property covered by the policy during the period of its existence. The assignment was of the whole policy. The obligation of the assignee was, to pay assessments upon the whole valuation of all the property described in the policy.

The intention and contract of the defendants, in consenting to the assignment of the policy, were, to indemnify the owner for the time being, — that is, at the time of its destruction, — not for any specific furniture, but for any furniture which might be in the house during the time specified. As the plaintiff's counsel suggest, — "There can be no question but that Pettigrew might have brought in furniture and clothing not there when the policy was underwritten, and it would be covered by it. He might have replaced what he then had by this very furniture which was burned, and no question would have been made but that it was insured to him. After the premises were sold to the plaintiff and the policy assigned to him, why may he not have done the same thing and been entitled to the same benefit? The insurers are put in no worse condition; their risk was not made greater nor different."

There is, however, another aspect of this case in which the defendants' liability is very clearly apparent. The consent to Pettigrew's assignment may well be regarded as a new and independent contract made directly with the plaintiff, — an agreement to indemnify the plaintiff against loss upon *his* house and *his* furniture and clothing therein.

“ If, on a transfer of the estate, the vendor assigns his policy to the purchaser, and this is made known to the insurer and is assented to by him, it constitutes a *new and original promise* to the assignee to indemnify him in like manner while he retains an interest in the estate; and the exemption of the insurer from further liability to the vendor, and the premium already paid for insurance for a term not yet expired, are a good consideration for such promise, and constitute a new and valued contract between the insurer and the assignee.

“ But such undertaking will be binding, not because the policy is in any way incident to the estate or runs with the land, but in consequence of the new contract.” Shaw, C. J., in *Wilson v. Hill*, 3 Met. 66, at page 69.

So, also, Perley, J., in *Rollins v. Ins. Co.*, 25 N. H. 207: “ The assignment and assent of the corporation make a new contract, upon which . . . the assignee might maintain an action in his own name; and the action in this case would be founded on this new contract made with him.” And, said Eastman, J., in *Folsom v. Ins. Co.*, 30 N. H. 240, assent to the assignment is “ a new contract made with the assignee.”

We have therefore in the case before us a new contract, made between the parties to this suit, whereby the defendants, for a full and sufficient consideration, have undertaken to insure the plaintiff against loss by fire on the house which he bought of Pettigrew, and the furniture and clothing therein which he bought of — no matter whom.

The party insured, whether by an original policy or a supplemental contract, under the form of an assignment, must of course have an insurable interest in the property which is the subject of the contract; but it can be of no importance to the insurer whence or how the other party acquired his title.

If these views are correct, there must be judgment for the plaintiff according to the provisions of the case transferred.

LADD, J. The consent of the directors to the assignment of the policy by Pettigrew to the plaintiff constituted a new and original contract and promise to indemnify him according to the terms of the policy; and this new promise rested upon a sufficient consideration, namely, the exemption of the company from any further liability to Pettigrew, and the premiums already paid and secured for the unexpired term which the policy had to run. *Wilson v. Hill*, 3 Met. 66. It can hardly be claimed that, by any fair construction of the policy, the insurance was only on such furniture and clothing as was in the house, and on such hay and grain as was in the barns, at the time it was executed, so that no change therein could be made by Pettigrew. Common experience teaches that such changes must of necessity be constantly taking place; and the contract was made in view of that fact. The language used shows plainly enough that such changes were in contemplation of the parties. The insurance is not “ on the furniture and clothing *now* therein,” but, in general terms, “ on furniture and clothing therein.”

It is too clear for argument that the policy would cover other furniture and clothing with which Pettigrew might replace worn-out clothing and furniture that was in the house at the time it was made, or any furniture he might have therein to the amount of the insurance during the term.

It follows, conclusively as it seems to me, that, when the defendants entered into the new contract with the plaintiff, identical in its terms because evidenced by the same identical instrument, the rights of the plaintiff under that contract must be the same as were those of Pettigrew. That being so, it was as much an insurance of his furniture and clothing as it was of the furniture and clothing of Pettigrew.

SMITH, J. In general, at common law, where one party assigns his interest in a contract, and the other party agrees to the assignment, this constitutes a new contract between the assignee and such other original party, the terms of the original contract regulating those of the new contract. *Fogg v. Insurance Company*, 10 Cush. 337.

The defendants agreed to insure Pettigrew, his heirs and assigns, "on *his* buildings, and other property situated in Claremont," etc. Pettigrew, during the existence of the policy, sold the buildings to the plaintiff, and assigned to him the contract of insurance, and all the rights and privileges to which he was entitled by virtue thereof, and then surrendered to the plaintiff the possession of the buildings, removing his clothing and furniture. Cummings thereupon commenced to occupy the premises with his own furniture and clothing. The defendants assented to this assignment, and thereby entered into a new contract with the plaintiff, the terms of which were regulated and fixed by those of the original contract, — that is, they agreed to insure him "on *his* buildings and other property situated in Claremont, etc., — that is to say, on dwelling-house, woodshed, and carriage-house, \$500; on furniture and clothing therein, \$200," etc. This undertaking is not binding because the policy is incident to the property insured, but because it is a new contract. *Wilson v. Hill*, 3 Met. 66. The defendants were paid for insuring the full sum of \$1,425, for five years, and their contract was to pay that sum to Pettigrew's assigns as well as to him. When they consented to the assignment, they agreed to insure Cummings the same as they had Pettigrew; they in fact substituted the former for the latter, and agreed that the policy should represent to him just what it had to Pettigrew. No specific furniture and clothing was named in the policy beyond that it was such furniture and clothing of the insured as he might have in the house for the time being. If Pettigrew had not assigned the policy, and had remained in the occupation of the premises, he might have substituted other furniture for that originally insured, and no one would have questioned that it would have been covered by the policy. Any other construction would practically prevent the insurance of provisions, clothing, and family stores, as well as stocks of goods, and such property as is worn out, consumed, or otherwise changed several times during the term of a

policy. If Pettigrew then could have replaced the furniture and clothing originally insured, with other property of similar character and value, without affecting his rights under the policy, there does not seem to be any reason why Cummings might not have done the same thing.

The contract was to insure him (Cummings) on *his* furniture and clothing, and it could make no difference with the defendants whether he procured his furniture of Pettigrew or of some one else. The risk was not increased, nor was it in any respect different; and, besides, there was a good consideration for this new undertaking. Cummings purchased the real estate and became the assignee of the whole policy; and having become assignee of the whole policy, and having become substituted, with the consent of the defendants, for Pettigrew, I think he is entitled to all the benefits that his assignor could claim under the policy, and could do whatever he could do. It must follow, then, that by the new contract between these parties the defendants insured the plaintiff's furniture and clothing, and consequently

*The plaintiff is entitled to judgment according to the finding of the court below.*¹

CONTINENTAL INS. CO. v. MUNNS.

SUPREME COURT OF INDIANA, 1889. 120 Ind. 30.

FROM the Montgomery Circuit Court.

B. Crane and A. B. Anderson, for appellant.

H. H. Dochterman, for appellee.

MITCHELL, J. This is an appeal from a judgment rendered by the Montgomery Circuit Court in favor of William Munns against the Continental Insurance Company. The questions for decision arise upon the following facts: On January 17, 1883, the insurance company above named delivered to John Bittle a policy of insurance, by which it insured his dwelling-house and its contents, consisting of household furniture, etc., his barn, shed, and granary, and their contents, severally, consisting of farming utensils, wagons, carriages, grain, horses, etc., for a period of five years for a gross premium of \$37.

At the time the policy was issued Bittle owned the farm upon which the several buildings insured were situate, and the personal property covered by the policy was in the buildings therein described, the insurance being apportioned in specified sums upon the several buildings and the property therein situate.

The policy contained a stipulation of the following purport: "If the applicant shall mortgage, or otherwise encumber the property hereby

¹ See *Walton v. Louisiana State M. & F. Ins. Co.*, 2 Rob. La. 563 (1842). — ED.

insured, without notice to and consent of the company indorsed hereon, this policy shall become null and void." On the 27th day of June, 1885, Bittle, without notice to the company, and without its knowledge or consent, mortgaged the farm upon which the house, barn, and other buildings insured were situate, to the Provident Life and Trust Company of Philadelphia, to secure a loan of \$5,000. In the month of September following, he sold and conveyed the land, with the buildings thereon, to William Munns, for the consideration of \$12,000, and in a few days thereafter, without any new consideration, transferred the policy of insurance to the purchaser. The latter soon afterwards presented the policy to the company's general superintendent, who indorsed its consent thereon that the policy might be assigned to the purchaser, subject to all the terms and conditions mentioned or referred to therein. The company had no notice or knowledge of the existence of the mortgage at the time it gave its consent to the transfer of the policy. On July 27, 1886, the barn, shed, and granary, and their contents, were consumed by fire, entailing a loss amounting to \$1,700. After the destruction of the property, the company learned of the mortgage executed by Bittle, when it refused payment of the loss, on the ground that placing the encumbrance above mentioned on the property was a violation of the condition of the policy, which rendered it null and void.

Whether the judgment shall be affirmed or reversed depends upon whether or not the company can avail itself of the default of Bittle in an action on the policy by the plaintiff. It must be assumed, as a matter of course, that the latter, when he purchased the farm and took an assignment of the insurance policy, had knowledge of the mortgage on the land, and of the condition relating to encumbrances in the policy.

Imputing to him knowledge of these facts, the question remains, did he take the policy strictly as assignee, subject to all the infirmities, defences, or any forfeiture which the laches or default of the assignor may have imposed upon it? or did the assignment, with the consent of the company, constitute the policy in effect a new and original contract between the latter and the assignee, unaffected by any previous forfeiture that may have occurred? If the transfer of the policy simply substituted the assignee to the rights which the assignor then had in the contract, it may well be said that if the latter had no rights by reason of the forfeiture which occurred prior to the assignment, the mere transfer conferred no new rights on the assignee. If, on the other hand, the assignment of the policy, with the assent of the company, constitutes a new, original, and independent contract between the assignee and the insurer, then it is quite clear that no act of forfeiture committed by the assignor before the sale, assignment, and consent is available against the policy in the hands of the purchaser newly insured.

A contract of insurance is purely a personal engagement, by which

the insurer, for a consideration paid, agrees to indemnify the person insured against loss arising from damage to his property by fire. The contract appertains to the person with whom it is made, and does not run with the property insured. *Nordyke & Marmon Co. v. Gery*, 112 Ind. 535 (5 Am St. Rep. 27); *Cummings v. Cheshire, etc. Ins. Co.*, 55 N. H. 457.

It is abundantly settled that upon a sale and transfer of property covered by a policy of insurance, and an assignment of the policy to the purchaser, duly assented to by the company, a new and original contract of indemnity arises between the insurance company and the assignee, which the latter may enforce without regard to what may have occurred prior to the assignment. The policy, it is said, in such a case, expires with the transfer of the estate, so far as it relates to the original holder, but the assignment and assent of the company thereto constitute an independent contract with the purchaser and assignee, the same in effect as if the policy had been reissued to him upon the terms and conditions therein expressed. *Wilson v. Hill*, 3 Metc. 66; *Fogg v. Middlesex, etc. Ins. Co.*, 10 Cush. 337; *Fanagan v. Camden, etc. Ins. Co.*, 1 Dutch. (N. J.) 506; *Cummings v. Cheshire, etc. Ins. Co.*, 55 N. H. 457; *Steen v. Niagara, etc. Ins. Co.*, 89 N. Y. 315; *Shearman v. Niagara, etc. Ins. Co.*, 46 N. Y. 526; *Hooper v. Hudson River, etc. Ins. Co.*, 17 N. Y. 424; *Ellis v. Council Bluffs Ins. Co.*, 64 Iowa, 507; *Wood Insurance*, §§ 110, 366.

Where an estate is sold and the policy transferred to the purchaser, and upon notice to the insurer he assents to it, a new and original contract of indemnity arises to the assignee, which he may enforce in his own name. The policy in such case expires with the transfer of the title to the estate, but the assent of the insurer to the assignment of the policy constitutes a new contract. *Pratt v. New York, etc. Ins. Co.*, 64 Barb. 589; *Flanders' Fire Ins.*, 412, 484; *Foster v. Equitable, etc. Ins. Co.*, 2 Gray, 216.

Aside from the prohibitory clause, policies of insurance, prior to any loss, are not, in their nature, assignable from one person to another without the express consent of the insurance company issuing them. They are therefore subject to the common-law rule, the effect of which is, that where the assignee of a contract gives notice of the assignment to the other party to the instrument, and the latter assents to it, the transaction constitutes a new engagement between one of the parties to the contract and the assignee of the other, the terms of which are regulated and fixed by the original contract. *Fogg v. Middlesex, etc. Ins. Co.*, *supra*; *Wilson v. Hill*, *supra*; *Hooper v. Hudson River, etc. Ins. Co.*, *supra*; *Flanders' Insurance*, 484.

In order that a policy of insurance may be effectual, the insured must have an interest in the property covered by the contract of insurance, not only when the contract is entered into, but when the loss occurs. If the interest in the property and the interest in the policy become separated, the operation of the policy becomes suspended, and

if a loss occurs while the policy is thus suspended, no recovery can be had. An assignment of an insurance policy without a transfer of the property insured, would be an idle ceremony so far as transferring to the assignee any beneficial interest in the contract. On the other hand, the transfer of the property insured suspends the operation of the policy, which becomes inoperative for want of a subject-matter to act upon, until by the assignment and assent of the company a new contract of insurance, embodying the same terms and conditions as the old, arises between the latter and the purchaser. The contract of insurance thus consummated arises directly between the purchaser and the insurance company, to all intents and purposes the same as if a new policy had been issued embracing the terms of the old. In such a case no defence predicated on supposed violations of the conditions of the policy by the assignor will be available against the assignee. Until the latter himself does some act, or permits a condition of things to exist in violation of the terms of the policy, he is not in default. *Ellis v. State Ins. Co.*, 68 Iowa, 578 (56 Am. R. 865), and *Insurance Co. v. Garland*, 108 Ill. 220, are not opposed to the conclusions above stated.

The case first cited involved a policy which contained a provision that "if the title of the property is . . . encumbered . . . this policy shall be void." At the time the policy was assigned there was a mortgage on the property which remained upon it until after the loss. This condition, as the court well says, pertained to the character of the risk as it then was or should thereafter be, and when the assignee became a party to the condition he virtually agreed that if there was then or should thereafter be an encumbrance on the property, he should not in case of loss be entitled to recover.

The contract provided against subsisting encumbrances as fully as it did against those which might be made thereafter, and the gist of the defence which the court sustained was that the encumbrance was allowed to remain. The court fully recognized the doctrine of its former decisions, which hold that an assignment of a policy with the assent of the insurance company creates a new contract, and that the assignee is not affected by the acts of the assignor.

The other case relied upon was predicated upon a policy which contained a stipulation to the effect that if "the assured shall allow the buildings herein insured to become vacant or unoccupied, and so remain, . . . this policy shall become void." It was properly held that this provision was imported into the new contract, and became a present agreement with the assignee, and that as he permitted the premises to remain unoccupied the company had the right to avoid the policy because he had violated his agreement. The distinction between the cases relied on and the present case is obvious. In those cases the defences were not predicated upon acts or defaults of the vendor, but upon violations of the terms of the policy by the vendee himself. The policy involved in the present case contained no provision against sub-

sisting encumbrances. Future encumbrances alone were referred to, and the established rule is that conditions which create forfeitures will not be extended by construction. *Northwestern, etc. Ins. Co. v. Hazlett*, 105 Ind. 212; *Symonds v. Northwestern, etc. Ins. Co.*, 23 Minn. 491.

There is no pretence that the assignee made any misrepresentation concerning the condition of the risk at the time the company gave its assent to the assignment. The rule applicable is that a failure or neglect on the part of the insured to make known facts which the insurer may regard as material to the risk, is not a breach of a condition in the policy, avoiding it in case of any omission to make known every fact material thereto, because the insured has a right to suppose that the insurer will make proper inquiries concerning all facts except such as are supposed to be known, or are regarded as immaterial. *Short v. Home Ins. Co.*, 90 N. Y. 16; *Burritt v. Saratoga, etc. Ins. Co.*, 5 Hill, 188; *Clark v. Manufacturers' Ins. Co.*, 8 How. 235.

In the case last cited the court said: "As to the ordinary risks connected with the property insured, if no representations whatever are asked or given, the insurer must, as before remarked, be supposed to assume them; and, if he acts without inquiry anywhere concerning them, seems quite as negligent as the insured, who is silent when not requested to speak."

An applicant for insurance is not bound, unless inquired of, to disclose whether or not the property insured is encumbered. As the public records usually give information in reference to such matters, he may assume that the insurer knew of any existing encumbrances, or deemed it immaterial whether or not the property was encumbered.

These conclusions lead to an affirmance of the judgment.

*Judgment affirmed, with costs.*¹

¹ *Acc.*; *Ellis v. Ins. Co. of North America*, 32 Fed. R. 646 (C. C., S. D. Iowa, 1887); *Hall v. Niagara F. Ins. Co.*, 93 Mich. 184 (1892).

Compare *McCluskey v. Providence Washington Ins. Co.*, 126 Mass. 306 (1879); *Fire Assn. v. Flournoy*, 84 Tex. 632 (1892).

On assignees, see also:—

Brichta v. New York Lafayette Ins. Co., 2 Hall, 372 (1829);

Birdsey v. City F. Ins. Co., 26 Conn. 165 (1857);

Mellen v. Hamilton F. Ins. Co., 17 N. Y. 609 (1858);

Ellis v. Kreutzinger, 27 Mo. 311 (1858);

Minturn v. Manufacturers' Ins. Co., 10 Gray, 501, 505 (1859);

Bergson v. Builders' Ins. Co., 38 Cal. 541 (1869);

Bates v. Equitable Ins. Co., 10 Wall. 33 (1869);

Hall v. Dorchester Mut. F. Ins. Co., 111 Mass. 53 (1872);

Griswold v. American Central Ins. Co., 1 Mo. App. 97 (1876), s. c. affirmed, 70 Mo. 654 (1879);

Davis v. German American Ins. Co., 135 Mass. 251 (1883);

Biddeford Saving's Bank v. Dwelling House Ins. Co., 81 Me. 566 (1889);

Bullman v. North British and Mercantile Ins. Co., 159 Mass. 118, 122-123 (1893).—ED.

SECTION II. (*continued*).

(B) BENEFICIARIES.

GROSVENOR v. ATLANTIC FIRE INS. CO.

COURT OF APPEALS OF NEW YORK, 1858. 17 N. Y. 391.

APPEAL from the Superior Court of New York City. The action was upon a policy whereby the defendant did "insure Eugene W. McCarty against loss or damage by fire, to the amount of \$7,000 on his brick dwelling-house, etc., until November 14, 1854. Loss, if any, payable to Seth Grosvenor, mortgagee." The policy contained a condition that in case of any transfer, or termination of the interest of the assured in the property insured or in the policy, either by sale or otherwise, without the consent of the company manifested in writing, the policy should from thenceforth be void. At the trial before Mr. Justice Slosson and a jury, the plaintiff proved the policy, the loss, and the service of preliminary proofs thereof. He then proved a mortgage of the insured property made by Eugene McCarty to Edward Kellogg, and its assignment by the latter to the plaintiff before the date of the policy. The defendant's counsel offered to prove, and the plaintiff's counsel admitted it to be true, that in January, 1854, one month before the fire, McCarty, the person named in the policy as the assured, sold and conveyed the property therein described to one Bostwick. The judge decided that the evidence was inadmissible, and the defendant's counsel excepted. A verdict was rendered for the plaintiff, subject to the opinion of the court at general term, and judgment having been ordered for the plaintiff, the defendant appealed to this court.

William C. Noyes, for the appellant.

Daniel Lord, for the respondent.

HARRIS, J. The contract of insurance is a contract of indemnity. To sustain an action upon such a contract, it must appear that the party insured has sustained a loss. This involves the necessity of an insurable interest at the time of the alleged loss. Without such interest, the party insured cannot be damnified.

In this case, the contract was between the defendants and McCarty. The agreement was to insure Eugene W. McCarty against loss or damage by fire, to the amount of \$7,000, on his three-story brick dwelling-house. But after the contract was made, and before the alleged loss, McCarty had sold and conveyed the property insured. At the time of the fire he had no insurable interest; of course, he has no claim for indemnity. No action, therefore, could be maintained upon the policy by McCarty.

But at the time the insurance was effected, the plaintiff in this action, Grosvenor, was the holder of a mortgage upon the premises insured. As such mortgagee, he, too, had an insurable interest. The extent of that interest was the amount of his debt. To that extent he might have contracted with the defendants to indemnify him against loss by fire. The payment of his debt would as completely terminate the contract to insure as would the alienation of the property, when the contract is made with the owner.

The important inquiry in this case is, to which of these classes does the contract in question belong? The action was brought by the plaintiff as mortgagee. The contract was made with McCarty, the mortgagor. But the policy provides that in case of loss, such loss should be payable to the plaintiff. What is the legal effect of this provision? Without it the plaintiff could have had no claim against the defendants for indemnity. Is this provision to be regarded as an appointment of the plaintiff to receive any money which might become due from the insurers by reason of any loss sustained by the mortgagor, or has it the effect to render the policy, which would otherwise be a contract to indemnify the mortgagor against a loss, a contract to indemnify the mortgagee? A determination of this question will also determine the rights of the parties to this action.

Were it not for one or two decisions in this State bearing upon the question, I should have little difficulty in pronouncing in favor of the former of these propositions. It seems to me to be very clear that it was the intention of all the parties that the interest of the mortgagor, and not that of the mortgagee, should be insured. It is stated in the policy that the property insured is the property of McCarty, and that he is the person insured. McCarty paid the premium. He made the contract. His interest as owner, and not that of the plaintiff as mortgagee, was the subject of the insurance. The plaintiff was merely the appointee of the party insured to receive the money which might become due him from the insurers upon the contract. The provision in the policy in this respect had no more effect upon the contract itself than it would if it had been provided that the loss for which the insurers should become liable should be deposited in a specified bank to the credit of the party insured.

Supposed that the plaintiff, although described in the policy as a mortgagee, had, in fact, held no mortgage, could it be pretended that the defendants might have avoided the policy on the ground that the plaintiff had no insurable interest? Or, suppose again, that after the contract had been made, the mortgage had been paid, could it be claimed that the contract to insure had also ceased? I presume none will deny that, in either case, the contract would have continued in force for the benefit of the owner of the property insured. If so, it must have been because the interest of the mortgagor, and not that of the mortgagee, was the thing insured. I agree with the court below that "there is nothing in the language of the policy on which the court

can adjudge that in legal effect it is a contract insuring the interest of the mortgagee as such, except in the provision which declares that the loss, if any, which occurs under the contract insuring the mortgagor's interest, shall be payable to the mortgagee. That provision merely designates a person to whom such loss is to be paid, and shows that he is a person who may have an interest in its being so paid."

The undertaking to pay the plaintiff was an undertaking collateral to and dependent upon the principal undertaking to insure the mortgagor. The effect of it was, that the defendants agreed that whenever any money should become due to the mortgagor upon the contract of insurance, they would, instead of paying it to the mortgagor himself, pay it to the plaintiff. The mortgagor must sustain a loss for which the insurers were liable, before the party appointed to receive the money would have a right to claim it. It is the damage sustained by the party insured, and not by the party appointed to receive payment, that is recoverable from the insurers. *Macomber v. The Cambridge Mutual Fire Ins. Co.*, 8 Cush. 133. The insurance being upon the interest of the mortgagor, and he having parted with that interest before the fire, no loss was sustained by him, and, of course, none was recoverable by his assignee or appointee. The right of such a party being wholly derivative, cannot exceed the right of the party under whom he claims. *Carpenter v. The Providence Washington Ins. Co.*, 16 Pet. 495; *Foster v. The Equitable Fire Ins. Co.*, 2 Gray, 216.

I agree with the learned judges who delivered opinions upon the decision of this case in the court below, that there is no just ground for discrimination between this case and that of an assignment of the policy to a mortgagee to be held by him as collateral security for his debt, with the consent of the insurer. In either case the insurance is upon the interest of the mortgagor. The terms and conditions upon which indemnity may be claimed are agreed upon, and then the original parties further agree that when, by the terms and conditions of the contract, the insurers shall become liable by reason of a loss sustained by the party insured, the money shall be paid, not to the party who has sustained the loss, but to his appointee or assignee for his benefit. Such an appointment or assignment ought not to be construed so as to vary, in any respect, the liabilities of the insurers upon their original contract. It is certainly true, as was said by Mr. Justice Woodruff, that, "when applied to other agreements for the payment of money, an assignment does no more than direct to whom it shall be paid when it shall become due."

The case of *The Traders' Ins. Co. v. Robert*, 9 Wend. 404, was, in my judgment, erroneously decided.¹ . . .

Upon the merits of the question I have already sufficiently expressed the convictions of my own judgment. The defendants contracted with McCarty, and not the plaintiff. They agreed, upon the performance of certain conditions, to pay for him to the plaintiff certain money. Some

¹ The discussion of the authorities has been omitted. — ED.

of these conditions were positive in their character; others negative. Certain things were to be done by the assured, and other things were not to be done. If all these conditions were performed, then, if a loss occurred, the defendants agreed to indemnify him against that loss, to the extent specified in the policy, and he appointed the plaintiff, his creditor, to receive from the defendants the amount for which they were thus contingently liable. The terms of this contract have never been waived, relaxed, or modified. The defendants have shown an express violation of one or more of the conditions upon which their liability was to depend. And yet it has been adjudged, although it is evident that it has been done with reluctance and against the better judgment of the court making the decision, that the proof of these violations constituted no defence to the action.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

ROOSEVELT, J., dissented; SELDEN and STRONG, JJ., concurred in the reversal, distinguishing this from the case where a policy is assigned with the assent of the insurers to a mortgagee; they were of opinion that in such case a privity of contract exists between the mortgagee and insurers, and the doctrine of *The Traders' Insurance Company v. Robert* should be maintained.

*Judgment reversed, and new trial ordered.*¹

HATHAWAY, RESPONDENT, v. ORIENT INS. CO.,
APPELLANT.

COURT OF APPEALS OF NEW YORK, SECOND DIVISION, 1892.
134 N. Y. 409.

APPEAL from judgment of the general term of the Supreme Court in the fifth judicial department, entered upon an order made October 23, 1890, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought by plaintiff, as assignee of a mortgage,

¹ *Acc.*: *Franklin Savings Institution v. Central Mut. F. Ins. Co.*, 119 Mass. 240 (1876); *Moore v. Hanover F. Ins. Co.*, 141 N. Y. 219 (1894).

See *Illinois Mut. F. Ins. Co. v. Fix*, 53 Ill. 151 (1870); *Gillet v. Liverpool and London and Globe Ins. Co.*, 73 Wis. 203 (1888); *Union Bldg. Assn. v. Rockford Ins. Co.*, 83 Iowa, 647 (1891); *Hocking v. Insurance Co.*, 93 Tenn. 729 (1897).

On the special agreement commonly called the "mortgagee clause," see *Hastings v. Westchester F. Ins. Co.*, 73 N. Y. 141 (1878); *Maxcy v. New Hampshire F. Ins. Co.*, 54 Minn. 272 (1893); *Eddy v. London Assur. Corp.*, 143 N. Y. 311, 321-324 (1894); *Syndicate Ins. Co. v. Bohn*, 27 U. S. App. 564, 575-583 (C. C. A., Eight Circuit, 1894), s. c. 65 Fed. R. 165, 172-178. *Kase v. Hartford F. Ins. Co.*, 58 N. J. L. (29 Vroom) 34 (1895); *Palmer Savings Bk. v. Ins. Co. of North America*, 166 Mass. 189 (1896); *Planters' Mut. Ins. Assn. v. Southern Savings Fund & Loan Co.*, 68 Ark. 8 (1900). — Ed.

which contained a covenant that the buildings upon the mortgaged property should be kept insured against damage by fire for the benefit of the holder of the mortgage, to recover his interest in a policy for \$1,900 issued thereon by defendant, \$1,200 of which was on the buildings destroyed and their contents, and \$700 on machinery in the building, which plaintiff claimed was attached to and formed part of the realty. In said policy the loss, if any, was made payable to plaintiff "as his mortgage interest may appear." The property insured was destroyed by fire, and subsequently the owner and defendant, without plaintiff's knowledge or consent, estimated the loss upon the buildings, including machinery and personal property, at \$1,200, \$700 of which was paid to the owner and \$500 sent to plaintiff, who refused to accept it, and brought this action to recover the amount of his interest in the property destroyed, which he alleged to be \$1,574.70.

Further facts are stated in the opinion.

Richard Crowley, for appellant.

S. E. Filkins, for respondent.

FOLLETT, C. J. The mortgage held by the plaintiff contained a covenant that the buildings should be kept insured against damage by fire for the benefit of its holder. Pursuant to this covenant Breckon, the owner of the fee, procured the policy on which the action was brought, by the terms of which the defendant "does insure T. W. Breckon." . . . "Loss, if any, payable to A. B. Hathaway, as his mortgage interest may appear." The owner of the fee and the mortgagee each had an insurable interest in the property which could have been protected by separate policies, or by a single one as they and the insurer might agree. The policy describes Breckon as the owner and Hathaway as mortgagee, and provides that in case of loss the damages shall be "payable to Hathaway as his mortgage interest may appear."

It is said that Hathaway is the appointee of Breckon. He is, but he is not a mere appointee of Breckon, and without a vested interest in the policy. He acquired his right to recover the damages, not solely by the appointment of Breckon, but by the policy, a contract entered into between the insurer, the owner of the fee, and the mortgagee. Had this policy provided that in case of loss the damage should be paid to a person having no interest in the insured property, such person would have been a naked appointee, the same as though the damages had been directed to be paid to a bank or to any collecting agent, and the owner could have settled the loss and released the insurer on his own terms. It may be that the same rule would have been applicable, as between the insurer and the appointee, had the loss been payable "to A. B. Hathaway," having an insurable interest, which was neither known to nor described by the insurer in its policy. The rights of an appointee, an agent, or the trustee of an express trust, who has no interest in a contract which he may enforce, are quite different from those of a person having a vested legal interest in a contract created by the concurrent action of all the parties to it.

The questions decided in *Traders' Ins. Co. v. Roberts*, 9 Wend. 404; *Tillou v. Kingston Mutual Ins. Co.*, 5 N. Y. 405; *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391; and *Buffalo Steam Engine Works v. Sun Mutual Ins. Co.*, id. 401, are not involved in the case at bar, and it is unnecessary to attempt to harmonize those and kindred decisions. In the cases cited the owners of property insured it in their own names, the loss, if any, payable to mortgagees, or the insurance was assigned, with the assent of the insurer to the mortgagees for their security, and before a loss occurred, and while the contract of insurance was in part executory, the owner increased the risk or did a prohibited act, or omitted to perform some act required by the policy. The question in these cases was whether the violation of the contract by the owner was a defence to an action by or for the benefit of the mortgagee. No such question is involved in the case at bar. The liability of the insurer is admitted, and the question here is whether the owner of the property and the insurer may, without the concurrence of the mortgagee, effect an accord and satisfaction without the assent of the latter. It is a general rule that where a demand is owned by several by such an unity of interest that all must be joined as parties in a strictly personal action for its recovery, that a release of the claim by one of the owners is as effectual as the release of all. *Austin v. Hall*, 13 Johns. 286; *Decker v. Livingston*, 15 Johns. 478; *Osborn v. Martha's Vineyard, etc.*, 140 Mass. 549. But this rule has its exceptions. *Gock v. Keneda*, 29 Barb. 120; *Upjohn v. Ewing*, 2 Ohio State 13; 1 A. & E. Encyc. 106.

Breckon the owner was not a necessary party plaintiff to an action for the recovery of the amount due from the defendant, for the whole amount was recoverable by an action brought by the mortgagee individually. *Dakin v. Liverpool, London, & Globe Ins. Co.*, 77 N. Y. 600, though a joint action by the owner and the mortgagee could have been maintained. *Winne v. Niagara Fire Ins. Co.*, 91 N. Y. 185.

In case a claim arises in favor of A. and B., against C., out of a contract entered into by the three, to which claim by the contract A. has the prior and B. the subsequent right, C. & B. cannot without the consent of A., effect an accord and satisfaction which will cut off the right of A. *Ennis v. Harmony Fire Ins. Co.*, 3 Bosw. 516; *Cromwell v. Brooklyn Fire Ins. Co.*, 44 N. Y. 42; *Reid v. McCrum*, 91 N. Y. 412; *Baltis v. Dobin*, 67 Barb. 507.

In *Cromwell's* case a house and lot had been sold under an executory contract by which the vendee covenanted to insure the house for the vendor's benefit. The vendee went into possession and insured the house under a policy payable to the vendor in case of loss. On the expiration of this policy the vendee took out a new one payable to himself, and during its life the house was burned. The vendor had assigned his interest in the contract, and the assignee, *Cromwell*, the plaintiff in the action, notified the insurer of his rights under the contract, demanded payment of the loss and forbade its payment to the

vendee. The insurer, disregarding the demand and notice, paid the amount due under the policy to the vendee. In an action brought by Cromwell, the assignee of the vendor, it was held that he was entitled to recover, notwithstanding the accord and satisfaction between the insured and the vendee. The principle upon which this decision rests is that the vendee and insurer could not effect an accord and satisfaction which would bar an action by one having a prior equitable right to the money due under the contract. *Reid v. McCrum*, *supra*, is, in its facts, a stronger authority in support of the judgment in the case at bar. In that case the owner of realty mortgaged it covenanting to keep the buildings insured and the policy assigned to the mortgagee. Afterwards Hugh McCrum acquired the title to the property subject to the mortgage, and obtained policies of insurance on the buildings, which were indorsed by the insurers: "Loss, if any, payable to John Reid, mortgagee." Subsequently McCrum procured the insurers to cancel the indorsement and to write on the policies: "The mortgagee's interest having ceased, the loss, if any, is now payable to Hugh McCrum as owner."

The mortgagee's interest had not terminated and he had no knowledge of the change. After this the buildings were destroyed by fire, and the mortgagee began an action to foreclose his security, making McCrum and the insurers parties defendant, asking that McCrum be compelled to assign the insurance and the insurers required to pay the loss to the plaintiff. It was held that the policies could not be legally changed without the assent of the mortgagee, and that he was entitled to recover the loss from the insurers.

Upon principle and authority it seems to be clear that the defendant in this case had no authority to agree with the owner as to the amount of the damages, and determine as between him and the mortgagee what sum was payable to each, and the accord and satisfaction entered into between the insurer and the owner is not a bar to a recovery by the mortgagee of his damages.

The judgment should be affirmed with costs.

All concur.

*Judgment affirmed.*¹

¹ See *Grange Mill Co. v. Western Assur. Co.*, 118 Ill. 396 (1886); *Edwards v. Agricultural Ins. Co.*, 88 Wis. 450 (1894); *Security Co. v. Panhandle Nat. Bk.*, 93 Tex. 575 (1900).

When a policy insures a mortgagor, but is payable, in case of loss, to a mortgagee, the authorities do not agree as to the person who may maintain an action. To the effect that the action may be brought by the mortgagee, see: *Cone v. Niagara F. Ins. Co.*, 60 N. Y. 619 (1875); *Chamberlain v. N. H. F. Ins. Co.*, 55 N. H. 249, 258 (1875); *State Ins. Co. v. Maackens*, 38 N. J. L. (9 Vroom) 564 (1876); *Donaldson v. Ins. Co.*, 95 Tenn. 280 (1895); *Palmer Savings Bank v. Ins. Co. of North America*, 166 Mass. 189 (1896). To the effect that the action may be brought by the mortgagor, see: *Martin v. Franklin F. Ins. Co.*, 38 N. J. L. (9 Vroom) 140 (1875), (where the policy was under seal); *Hartford E. Ins. Co. v. Davenport*, 37 Mich. 609 (1877); *Friemansdorf v. Watertown Ins. Co.*, 9 Biss. 167 (1879); *Fire Ins. Companies v. Felrath*, 77 Ala. 194, 198-199 (1884); *Williamson v. Michigan F. & M. Ins. Co.*, 86 Wis. 393 (1893). To the effect that the action may be brought by mortgagor and mortgagee jointly,

see: *Home Ins. Co. v. Gilman*, 112 Ind. 7 (1887); *Williamson v. Michigan F. & M. Ins. Co.*, *supra* (1893).

On policies worded "loss, if any, payable to" some beneficiary, see also:—

Minturn v. Manufacturers' Ins. Co., 10 Gray, 501, 505 (1859);

Frink v. Hampden Ins. Co., 45 Barb. 384 (1865);

Bates v. Equitable Ins. Co., 10 Wall. 33 (1869);

Griswold v. American Central Ins. Co., 1 Mo. App. 97 (1876), s.c. affirmed, 70 Mo. 654 (1879);

Davis v. German American Ins. Co., 135 Mass. 251 (1883);

Parks v. Connecticut F. Ins. Co., 26 Mo. App. 511 (1887).—ED.

SECTION III.

Life Insurance.

(A) ASSIGNEES.

ASHLEY v. ASHLEY.

CHANCERY, 1829. 3 Sim. 149.

IN 1802 William Heath insured his life, in the Equitable Insurance Office, for £1,000. By a deed poll, dated the 10th of March, 1810, Heath, in consideration of 5s, and for divers other considerations him thereunto moving, assigned the policy to James Hodsoll. In October, 1810, Hodsoll died. In February, 1815, a decree was made in a suit instituted by Heath and others, against Hodsoll's executors, under which the policy was sold to General Ashley, for £320; and in August of the same year, the executors assigned the policy to General Ashley. In August, 1817, General Ashley died. In 1829 the policy was sold to Charles Farebrother, under the decree in a cause instituted by General Ashley's widow, against his executors. An order was afterwards made, on the application of Farebrother, for a reference to the master to inquire and state whether a good title could be made to the policy. The master reported in favor of the title. Farebrother excepted to the report; and General Ashley's executors presented a petition praying that the report might be confirmed; and that Farebrother might be ordered to pay his purchase money into court, in trust in the cause. The exceptions and petition were heard at the same time.

The *Solicitor-General*¹ and Mr. *Duckworth*, for C. Farebrother.

Assurances are annual contracts between the assurers and the assured. Heath had an interest in insuring his own life; but when it became a contract between Hodsoll and the office, Hodsoll had no interest, and therefore it was void; or, at all events, he had no interest beyond the 5s paid by him as the consideration for the assignment. *Godsall v. Boldero*, 9 East, 72. If a person having an interest in a life, insures it, and then sells the policy, and afterwards his interest in the life ceases, the assignee would not be able to recover a single shilling upon the policy. Next, it is not disputed that the assignment by Heath to Hodsoll was voluntary; and, therefore, Heath's creditors would be entitled to set it aside at any time.

Mr. *Pepys* and Mr. *Parker*, for the petitioners.

The VICE-CHANCELLOR.² Unless this transaction is affected by the act of Parliament, no objection can be made to it. By the 14th Geo.

¹ Sir E. B. SUGDEN. — ED.

² Sir LANCELOT SHADWELL. — ED.

III. c. 48, it is enacted, etc. [His Honor here read the three first sections of 14 Geo. III. c. 48.] Now there is not a word said here as to the assignment of policies. This policy was good at the time it was effected. By an instrument of the 10th of March, 1810, an assignment of it was made; and, subsequently, the parties who had become entitled to the policy, sold it for a valuable consideration, under a decree of the court; so that some person became entitled to bring an action on the policy, in the name of the assured; and if such an action had been brought, there is not a word in the act of Parliament to defeat it. The question is whether the dealing with the policy has been such as that a court of equity would compel the assured to permit the assignee to use his name in bringing an action on the policy. It appears to me that a purchaser for valuable consideration is entitled to stand in the place of the original assignor, so as to bring an action in his name for the sum insured.¹

The case cited is not applicable; for there the action was brought by the assured; and, at the time of the action brought, his interest had ceased; and therefore it came within the third section of the act of Parliament.

WARNOCK v. DAVIS.

SUPREME COURT OF THE UNITED STATES, 1881. 104 U. S. 775.²

ERROR to the Circuit Court of the United States for the Southern District of Ohio.

This was an action by Warnock, administrator of the estate of Crosser, deceased, against Davis and others, partners, doing business under the name of the Scioto Trust Association, for part of the proceeds of a policy in the Protection Life Insurance Company, issued to Crosser on his own life, and by Crosser assigned to the defendants.

Crosser applied for this policy on February 27, 1872; and on the same day he entered into a written agreement with the Scioto Trust Association, to the following effect:—

“This agreement, by and between Henry L. Crosser, of the first part, 27 years old, tanner by occupation, residing at town of Springville, county of Greenup, State of Kentucky, and the Scioto Trust Association, of Portsmouth, Ohio, of the second part, witnesses: Said party of the first part having this day made application to the Protection Life Insurance Company, of Chicago, Illinois, for policy on his life, limited to the amount of \$5,000.00, hereby agrees to and with the Scioto Trust Association that nine-tenths of the amount due and payable on said policy at the time of the death of the party of the first

¹ *Brown v. Carter*, 5 Ves. 862; *Prodgers v. Langham*, 1 Sid. 133. — *REP.*

² The statement has been rewritten. — *ED.*

part shall be the absolute property of, and be paid by, said Protection Life Insurance Company to said Scioto Trust Association, and shall by said party of the first part be assigned and transferred to said Scioto Trust Association, and the remaining one-tenth part thereof shall be subject to whatever disposition said party of the first part shall make thereof in his said transfer and assignment of said policy; that the policy to be issued on said application shall be delivered to and forever held by said Scioto Trust Association, said party of the first part hereby waiving and releasing and transferring and assigning to said Scioto Trust Association all his right, title, and interest whatever in and to said policy, and the moneys due and payable thereon at the time of his death, save and except the one-tenth part of such moneys being subject to his disposition as aforesaid; also, to keep the Scioto Trust Association constantly informed concerning his residence, post-office address, and removals; and further, that said party of the first part shall pay to the said Scioto Trust Association a fee of \$6.00 in hand on the execution and delivery of this agreement, and annual dues of \$2.50, to be paid on the first of July of every year hereafter, and that in default of such payments the amounts due by him for fees or dues shall be a lien on and be deducted from his said one-tenth part.

"In consideration whereof the said Scioto Trust Association, of the second part, agrees to and with said party of the first part to keep up and maintain said life insurance at their exclusive expense, to pay all dues, fees, and assessments due and payable on said policy, and to keep said party of the first part harmless from the payment of such fees, dues, and assessments, and to procure the payment of one-tenth part of the moneys due and payable on said policy after the death of said party of the first part, when obtained from and paid by said Protection Life Insurance Company, to the party or parties entitled thereto, according to the disposition made thereof by said party of the first part in his said transfer and assignment of said policy, subject to the aforesaid lien and deduction.

"It is hereby expressly understood and agreed by and between the parties hereto, that said Scioto Trust Association do not in any manner obligate themselves to said party of the first part for the performance by said Protection Life Insurance Company of its promises or obligations contained in the policy issued on the application of said party of the first part and herein referred to.

"Witness our hands, this 27th day of February, A. D. 1872.

"HENRY L. CROSSER.

"THE SCIOTO TRUST ASSOCIATION,

"By A. McFARLAND, *President*,

"GEORGE DAVIS, *Treasurer*."

The policy was issued to Crosser on the same day, and on the next day he executed a written assignment to the Scioto Trust Association, in accordance with the terms of the agreement.

Crosser died on September 11, 1873. The Scioto Trust Association collected the amount of the policy, and paid one-tenth, less certain charges provided for in the agreement, to Crosser's widow, in accordance with the disposition made by Crosser in the instrument of assignment.

This action was brought for the remainder of the amount of the policy. The answer was composed of three defences. The first defence was a general allegation of assignment for valuable consideration; and the other defences contained the agreement and the assignment. The case was tried without the intervention of a jury; and the evidence consisted of the policy, the agreement and assignment, the proofs of death, and the Scioto Trust Association's receipt for the amount of the policy. The court found for the defendants; whereupon the plaintiff excepted, and, after entry of judgment for the defendants, brought the case to this court for review.

Mr. *J. B. Foraker*, for the plaintiff in error.

Mr. *A. C. Thompson*, for the defendants in error.

Mr. Justice FIELD, after stating the facts, delivered the opinion of the court, as follows: —

As seen from the statement of the case, the evidence before the court was not conflicting, and it was only necessary to meet the general allegations of the first defence. All the facts established by it are admitted in the other defences. The court could not have ruled in favor of the defendants without holding that the agreement between the deceased and the Scioto Trust Association was valid, and that the assignment transferred to it the right to nine-tenths of the money collected on the policy. For alleged error in these particulars the plaintiff asks a reversal of the judgment.

The policy executed on the life of the deceased was a valid contract, and as such was assignable by the assured to the association as security for any sums lent to him, or advanced for the premiums and assessments upon it. But it was not assignable to the association for any other purpose. The association had no insurable interest in the life of the deceased, and could not have taken out a policy in its own name. Such a policy would constitute what is termed a wager policy, or a mere speculative contract upon the life of the assured, with a direct interest in its early termination.¹ . . .

The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. Nor is its character changed because it is for a portion merely of the insurance money. To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded, if the policy, or an interest in it, could, in consideration of paying the premiums and assessments upon it, and the promise to pay upon the death of the assured a portion of its proceeds of his represen-

¹ The passage here omitted will be found *ante*, p. 118, n. — Ed.

tatives, be transferred so as to entitle the assignee to retain the whole insurance money.

The question here presented has arisen, under somewhat different circumstances, in several of the State courts; and there is a conflict in their decisions.¹ . . .

Although the agreement between the Trust Association and the assured was invalid as far as it provided for an absolute transfer of nine-tenths of the proceeds of the policy upon the conditions named, it was not of that fraudulent kind with respect to which the courts regard the parties as alike culpable and refuse to interfere with the results of their action. No fraud or deception upon any one was designed by the agreement, nor did its execution involve any moral turpitude. It is one which must be treated as creating no legal right to the proceeds of the policy beyond the sums advanced upon its security; and the courts will, therefore, hold the recipient of the moneys beyond those sums to account to the representatives of the deceased. It was lawful for the association to advance to the assured the sums payable to the insurance company on the policy as they became due. It was, also, lawful for the assured to assign the policy as security for their payment. The assignment was only invalid as a transfer of the proceeds of the policy beyond what was required to refund those sums, with interest. To hold it valid for the whole proceeds would be to sanction speculative risks on human life, and encourage the evils for which wager policies are condemned.

The decisions of the New York Court of Appeals are, we are aware, opposed to this view. They hold that a valid policy of insurance effected by a person upon his own life, is assignable like an ordinary chose in action, and that the assignee is entitled, upon the death of the assured, to the full sum payable without regard to the consideration given by him for the assignment, or to his possession of any insurable interest in the life of the assured. *St. John v. American Mutual Life Insurance Company*, 13 N. Y. 31; *Valton v. National Loan Fund Life Assurance Company*, 20 N. Y. 32. In the opinion in the first case the court cite *Ashley v. Ashley*, 3 Sim. 149, in support of its conclusions; and it must be admitted that they are sustained by many other adjudications. But if there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured, it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has no interest. The same ground which invalidates the one should invalidate the other — so far, at least, as to restrict the right of the assignee to the sums actually advanced by him. In the conflict of decisions on this subject we are free to follow those which seem more fully in accord with the general policy of the law against speculative contracts upon human life.

¹ Here were stated *Franklin L. Ins. Co. v. Hazzard*, 41 Ind. 116 (1872), and *Stevens v. Warren*, 101 Mass. 564 (1869). —ED.

In this conclusion we are supported by the decision in *Cammack v. Lewis*, 15 Wall. 643. There a policy of life insurance for \$3,000, procured by a debtor at the suggestion of a creditor to whom he owed \$70, was assigned to the latter to secure the debt, upon his promise to pay the premiums, and, in case of the death of the assured, one-third of the proceeds to his widow. On the death of the assured, the assignee collected the money from the insurance company and paid to the widow \$950 as her proportion after deducting certain payments made. The widow, as administratrix of the deceased's estate, subsequently sued for the balance of the money collected, and recovered judgment. The case being brought to this court, it was held that the transaction, so far as the creditor was concerned, for the excess beyond the debt owing to him, was a wagering policy, and that the creditor, in equity and good conscience, should hold it only as security for what the debtor owed him when it was assigned, and for such advances as he might have afterwards made on account of it; and that the assignment was valid only to that extent. This decision is in harmony with the views expressed in this opinion.

The judgment of the court below will, therefore, be reversed, and the cause remanded with direction to enter a judgment for the plaintiff for the amount collected from the insurance company, with interest, after deducting the sum already paid to the widow, and the several sums advanced by the defendants; and it is

*So ordered.*¹

MUTUAL LIFE INS. CO. v. ALLEN AND ANOTHER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1884. 138 Mass. 24.

BILL of interpleader, filed October 22, 1881, by a corporation organized under the laws of the State of New York, against George Allen and Catherine Fellows, to determine which of the defendants was entitled to the proceeds of a policy of insurance, issued by the plaintiff on July 25, 1855, upon the life of Israel Fellows, in the sum of \$2,000. The bill alleged the following facts:—

By the terms of the policy it was issued "for the sole use of Catherine Fellows," and the plaintiff promised and agreed "to and with the said assured, her executors, administrators, and assigns, well and truly to pay, or cause to be paid, the said sum insured to the said assured, her executors, administrators, or assigns, for her sole use, within sixty days after due notice and proof of the death of the said Israel Fellows. And, in case of the death of the said Catherine Fellows before the de-

¹ See *Helmetag v. Miller*, 76 Ala. 183 (1884); *Roller v. Moore*, 86 Va. 512 (1889); *Cawthon v. Perry*, 76 Tex. 383 (1890); *Hays v. Lepeyre*, 48 La. Ann. 749 (1896).—
ED.

cease of the said I. Fellows, the amount of the said insurance shall be payable after her death to her children, for their use, or to their guardian, if under age, within sixty days after due notice and proof of the death of the said I. Fellows, as aforesaid." The policy also contained this clause: "N. B. If assigned, notice to be given to this company."¹

On January 1, 1881, Israel Fellows, Catherine Fellows, and their two children, who were then of age, by two instruments in writing under their hands and seals, duly executed and delivered in this Commonwealth, assigned and transferred the policy of insurance to the defendant Allen, together with all their respective claims and demands under the same.²

On March 7, 1881, Israel Fellows died, leaving his widow, Catherine Fellows, surviving him. Proof of his death was duly made. His widow made a demand upon the plaintiff for the payment of the policy, and brought an action upon the policy in the Supreme Court in New York.

In August, 1881, Allen also brought an action on the policy in this Commonwealth, in the name of Catherine Fellows, for his own benefit.

The answer of Allen admitted the allegations of the bill; and averred that Allen bought the policy for a good and valuable consideration.

The answer of Mrs. Fellows admitted the allegations of the bill; and averred that the assignment was invalid under the laws of the State of New York, and that Allen had no insurable interest in the life of Israel Fellows.

The case was heard by HOLMES, J., who reported it for the consideration of the full court, in substance as follows:—

The plaintiff paid the money into court. The policy was delivered by the plaintiff in this Commonwealth. At that time, and when the assignment was made, the law of New York was as set forth in the Laws of 1840, c. 80,³ and in the cases of *Eadie v. Slimmon*, 26 N. Y. 1, and *Barry v. Equitable Assur. Society*, 59 N. Y. 587.

"The amount of premium annually paid upon the policy did not exceed \$300. There was some evidence that the defendant Fellows

¹ The policy was signed by the president and secretary, but the place of signing was not stated in the policy, in the pleadings, or in the report of the case; nor did the policy state where the sum insured was to be paid. — REP.

² The substance of these assignments is stated in the opinion. — REP.

³ "Section 1. It shall be lawful for any married woman, by herself, and in her name, or in the name of any third person, with his assent, as her trustee, to cause to be insured, for her sole use, the life of her husband for any definite period, or for the term of his natural life; and in case of her surviving her husband, the sum or net amount of the insurance becoming due and payable by the terms of the insurance, shall be payable to her, to and for her own use, free from the claims of the representatives of her husband, or of any of his creditors; but such exemption shall not apply where the amount of premium annually paid shall exceed \$300.

"Section 2. In case of the death of the wife, before the decease of her husband, the amount of the assurance may be made payable after her death to her children for their use, and to their guardian, if under age." — REP.

did not expect that her assignment, although absolute in form, was to be used, except as security for a loan of \$1,000 to her husband; but there was no evidence which satisfied me that there was any restriction upon his power to deliver it as an absolute transfer; and I found that the policy was assigned in Massachusetts to the defendant Allen by the defendant Fellows (both being then residents of Massachusetts), in consideration of \$1,000 paid to her husband by said Allen, and the discharge of certain notes held by said Allen amounting to \$470.79. If the transfer was valid in manner and form as agreed, Allen ceased from that moment to have an insurable interest in the life of said Fellows as a creditor, and he had no other."

The judge ruled that, so far as the present question was concerned, the transfer was governed by the law of Massachusetts, and that, by the law of Massachusetts, it was not void for want of an insurable interest in the transferee; and found for Allen.

Such decree was to be entered as justice and equity required.

J. F. Colby, for Allen.

W. S. Slocum, (*W. F. Slocum* with him,) for Mrs. Fellows.

W. ALLEN, J. The contract of insurance was made and was to be performed in this State, and the money due upon it has been paid into court here; and the contract of assignment was made in this State between parties domiciled here. The validity and effect of the assignment, and the capacity of the parties to it, must be governed by the laws of this State. The only question which requires discussion is, whether, by that law, the assignment is void for want of interest of the assignee in the life insured.

The policy, in consideration of an annual premium to be paid by Mrs. Fellows, assured the life of her husband for her sole use, and for her children if she should not survive her husband. The promise was to the assured, her executors, administrators, and assigns. The policy contained no reference to an assignment except the following: "N. B. If assigned, notice to be given to this company." The policy was issued in 1855. In 1881, an assignment in the words following, signed by Mrs. Fellows, her husband and children (who were all of age), was indorsed upon the policy: "I hereby assign, transfer, and set over unto George Allen, of Boston, all my right, title, and interest in and to the within policy of life insurance, and all right that may at any time be coming to me thereon."

A more formal instrument of assignment, with a power of attorney to receive "all sums of money that may at any time hereafter be or become due and payable to us, or either of us, by the terms of said policy," was also executed by the same parties. The policy and assignments were delivered to the defendant Allen, and notice thereof given to the plaintiff. The consideration of the assignment was the payment of a sum of money by the assignee, and the discharge of certain notes held by him against Mr. Fellows. It is to be assumed, on the report, that the transaction was not, in the intention of the parties, a wagering

contract, but an honest and *bona fide* sale of the equitable interest in the policy. The defendant Allen had no insurable interest in the life of Mr. Fellows except as his creditor, and that interest ceased when he ceased to be a creditor by accepting the assignment in satisfaction of his debt, so that he is in the position of a *bona fide* assignee of the policy for valuable consideration without interest in the life insured, and the question between him and the assignor is which has the equitable interest in the policy.

The policy is a common form of what is called life insurance, and is a contract by which the insurer, in consideration of an annual payment to be made by the assured, promises to pay to her a certain sum upon the death of the person whose life is insured. To prevent this from being void, as a mere wager upon the continuance of a life in which the parties have no interest except that created by the wager itself, it is necessary that the assured should have some pecuniary interest in the continuance of the life insured. It is not a contract of indemnity for actual loss, but a promise to pay a certain sum on the happening of a future event from which loss or detriment may ensue, and if made in good faith for the purpose of providing against a possible loss, and not as a cloak for a wager, is sustained by any interest existing at the time the contract is made. See *Loomis v. Eagle Ins. Co.*, 6 Gray, 396, and *Forbes v. American Ins. Co.*, 15 Gray, 249. Mrs. Fellows had an insurable interest in the life of her husband, and the policy to her was a valid contract to pay the sum insured to her upon the event of his death. This contract was a chose in action assignable by her. *Palmer v. Merrill*, 6 Cush. 282.

The policy was not negotiable, and her assignment could not, in this State, pass the legal, but only the equitable, interest in the contract. The assignment was a contract between her and her assignee, to which the insurer was not a party. It purported to give to the assignee only the equitable interest of the assignor in the contract, — the right to recover in the name of the assignor the sum which should become due to her under the contract.

The direction in the policy, that notice of an assignment of it should be given to the insurer, had no effect upon the character of the assignment, however its operation might have been limited had notice not been given. The assent of the insurer to the assignment would not make a new contract of insurance. Its only effect would be to enable the assignee to enforce in his own name, instead of the name of the assignor, the right she held under the contract. *McCluskey v. Providence Washington Ins. Co.*, 126 Mass. 306.

This distinction between the assignment of the interest of the insured in a policy, which is a contract between the assignor and the assignee only, and the transfer or renewal to a third person of a policy, which is a contract to which the insurer is a party, is illustrated in the case of fire insurance. That is strictly a personal contract of indemnity to the assured, and he, or his assigns in his name, can recover only an

indemnity for actual loss to him. If he has no interest in the property insured at the time of the loss, he can recover nothing, and if he parts with his interest before a loss, he becomes incapacitated to recover upon the policy, and it ceases to insure anything and becomes void. *Wilson v. Hill*, 3 Met. 66. It follows that, where a purchaser of insured property would have the benefit of an unexpired term of insurance, it must be by a new contract with the insurer, and not by assignment from the insured. This is usually provided for in the policy, so that by its terms an assignment by the insured with the assent of the insurer will continue the policy to the purchaser; but in such a case there is a new contract of insurance with the purchaser upon his newly acquired interest, and he becomes the assured. But the assured in a fire policy can, while his insurance continues, assign his rights under the policy in the same manner as the insured in a life policy can do. In *Fogg v. Middlesex Ins. Co.*, 10 Cush. 337, Chief Justice Shaw says, after referring to the kind of transfer just mentioned: "But there is another species of assignment, or transfer it may be called, in the nature of an assignment of a chose in action; it is this: 'In case of loss, pay the amount to A. B.' It is a contingent order or assignment of money, should the event happen upon which money will become due on the contract. If the insurer assents to it, and the event happens, such assignee may maintain an action in his own name, because, upon notice of the assignment, the insurer has agreed to pay the assignee instead of the assignor. But the original contract remains; the assignment and assent to it form a new and derivative contract out of the original. But the contract remains as a contract of guaranty to the original assured; he must have an insurable interest in the property, and the property must be his at the time of the loss. The assignee has no insurable interest, *prima facie*, in the property burnt, and does not recover as the party insured, but as the assignee of a party who has an insurable interest and a right to recover, which right he has transferred to the assignee, with the consent of the insurers." See also *Phillips v. Merrimack Ins. Co.*, 10 Cush. 350.

If Mrs. Fellows had surrendered or forfeited her policy, and the contract between her and the insurer had become null, a new contract, by which the defendant Allen should have become the assured instead of Mrs. Fellows, might have required an insurable interest in him, though in the form of an assignment and a renewal or revival of the original policy. But the original policy has not been surrendered or forfeited, nor the contract in any way changed. Mrs. Fellows is still the assured, and the policy is supported by her interest in the life, and is in form payable to her. If the assignment is valid, it is payable to her in trust for the assignee; if void, for her own use. In no respect can the assignment affect the validity of the contract of insurance, or taint that as a wagering policy. The only question that can be raised is as to the assignment itself, — whether, as between the parties to it, it is void as a gaming contract.

That a right to receive money upon the death of another is assignable at law or in equity will not be questioned. The right of Mrs. Fellows, under our law, to assign the equitable interest in the policy in question is not denied; but it is contended that she can assign it only to some one who has an insurable interest in the life of Mr. Fellows. We find no reason for this exceptional limitation of the right of assignment, which would allow Mrs. Fellows to assign her policy to Mr. Fellows, or his creditors or dependant relatives, but would forbid her to pledge it for her own debts, or sell it for her own advantage. If there is any such reason, it must be found in the contract of assignment itself, and irrespective of the rule that the original contract must be supported by an interest in the life insured. That rule was satisfied. Whether a similar rule affects the contract between the assignor and assignee must depend upon considerations applicable to that contract alone.

One objection urged is, that it gives to the assignee an interest in the death of the person whose life is insured, without a counterbalancing interest in his life. It is true that every person who is in expectation of property at the death of another has an interest in his death, but it does not follow, and is not true, that the law does not allow the possession and assignment of such expectations, nor that an insurable interest is required in a life insurance for the purpose of protecting the life insured. The objection applies with equal force to the assignment of a provision made for one upon the death of another by deed or will as to the assignment of a like provision in the form of a life insurance.

The other objection urged is, that such transactions may lead to gaming contracts. This does not meet the question, which is whether such an assignment is in itself illegal as a wagering contract. Most contracts have an element of gambling in them. There is uncertainty in the value of any contract to deliver property at a future day, and great uncertainty in the present value of an annuity for a particular life, or of a sum payable in the event of a particular death, and such contracts and rights are often used for gambling purposes. The question is whether the right to a sum of money, payable on the death of a person under a contract in the form of an insurance policy, has any special character or quality which renders it less assignable than the right to a sum payable at the death of the same person under any other contract or assurance, or than a remainder in real estate expectant on such death. We see nothing in the contract of life insurance which will prevent the assured from selling his right under the contract for his own advantage, and we are of opinion that an assignment of a policy made by the assured in good faith for the purpose of obtaining its present value, and not as a gaming risk between him and the assignee, or a cover for a contract of insurance between the insurer and the assignee, will pass the equitable interest of the assignor; and that the fact that the assignee has no insurable interest in the life insured

is neither conclusive nor *prima facie* evidence that the transaction is illegal.¹ . . .

The general rule laid down in *Stevens v. Warren*, 101 Mass. 564, "that no one can have an insurance upon the life of another, unless he has an interest in the continuance of that life," and from which the inference that an assignee of a party must have an insurable interest seems to have been drawn, we think, is not strictly accurate, or may be misleading. An insurable interest in the assured at the time the policy is taken out is necessary to the validity of the policy, but it is not necessary to the continuance of the insurance that the interest should continue; if the interest should cease, the policy would continue, and the insured would then have an insurance without interest. *Dalby v. India & London Assur. Co.*, 15 C. B. 365, and *Law v. London Policy Co.*, 1 Kay & Johns. 223, cited in *Loomis v. Eagle Ins. Co.*, 6 Gray, 396; *Connecticut Ins. Co. v. Schaefer*, 94 U. S. 457; *Rawls v. American Ins. Co.*, 27 N. Y. 282; *Provident Ins. Co. v. Baum*, 29 Ind. 236. The value and permanency of the interest is material only as bearing on the question whether the policy is taken out in good faith, and not as a gambling transaction. If valid in its inception, it will not be avoided by the cessation of the interest. The mere fact that the assured himself has no interest in the life does not avoid or annul the policy.

We think that the second ruling was correct, and that the fact that the assignee had no insurable interest in the life does not avoid the assignment. It is one circumstance to be regarded in determining the character of the transaction, but is not conclusive of its illegality.

*Decree for the defendant Allen.*²

¹ Passages discussing the authorities have been omitted. — Ed.

² *Acc.*: *St. John v. American Mut. L. Ins. Co.*, 2 Duer, 419 (1853), s. c. affirmed, 13 N. Y. 31 (1855); *Clark v. Allen*, 11 R. I. 439 (1877); *Eckel v. Renner*, 41 Ohio St. 232 (1884), (where the assignment was without consideration); *Bursinger v. Bank of Watertown*, 67 Wis. 75 (1886); *Murphy v. Red*, 64 Miss. 614 (1887); *Fitzpatrick v. Hartford L. & Annuity Ins. Co.*, 56 Conn. 116 (1888); *Souder v. Home Friendly Society*, 72 Md. 511 (1890); *Nye v. Grand Lodge*, 9 Ind. App. 131 (1893); *Steinback v. Diepenbrock*, 158 N. Y. 24 (1899); *Chamberlain v. Butler*, 86 N. W. Rep. 481 (Neb., 1901).

Contra: *Missouri Valley Ins. Co. v. Sturges*, 18 Kans. 93 (1877); *Bayse v. Adams*, 81 Ky. 368 (1883); *Gilbert v. Moose*, 104 Pa. 74 (1883); *Downey v. Hoffer*, 110 Pa. 109 (1885); *Alabama Gold L. Ins. Co. v. Mobile Mut. Ins. Co.*, 81 Ala. 329 (1886); *Missouri Valley L. Ins. Co. v. McCrum*, 36 Kans. 146 (1887); *Price v. Knights of Honor*, 68 Tex. 361 (1887); *Cawthon v. Perry*, 76 Tex. 383 (1890).

But see *Cheeves v. Anders*, 87 Tex. 287 (1894); *McHale v. McDonnell*, 175 Pa. 632, 646 (1896).

On what constitutes an assignment, see *Hamilton v. Baldwin*, 15 Beav. 232 (1852); *Hewins v. Baker*, 161 Mass. 320 (1894). — Ed.

SECTION III. (*continued*).

(B) BENEFICIARIES.

LEMON *v.* PHOENIX MUTUAL LIFE INS. CO. AND ANOTHER.

SUPREME COURT OF CONNECTICUT, 1871. 38 Conn. 294.

BILL in equity to compel the Phoenix Mutual Life Insurance Company to pay to the petitioner the amount of a policy of life insurance ; brought to the Superior Court, and referred to a committee who found the following facts : —

On the 1st of January, 1868, the respondents, the Phoenix Mutual Life Insurance Company, a corporation established by this State, were doing business by their agent in this State and in Canada, and have so continued to do business ever since. On the 9th of January, 1868, George C. Peterson, of Canada, made application to the company, through their agents at Montreal, for a policy of insurance on his life, termed an endowment policy, payable at fifty years of age, or at his death if earlier. On the 13th of January, 1868, in pursuance of this application, the company issued a policy upon Peterson's life for \$3,000, payable to himself, which was sent to the company's agent at Montreal for his counter-signature and delivery to the assured. In November, 1868, Peterson applied to the Montreal agents to have his policy changed and made payable to the petitioner, but made no new application, nor did the company ever make any new examination of Peterson, nor was his health such as to enable him to pass the necessary medical examination for a new policy in November, 1868, or afterwards.

The agents wrote to the company on the 24th of November, and immediately as is supposed after Peterson's request, returning the policy, saying that Peterson "wants a policy payable to Miss Elizabeth Lemon, Stamford, Ontario." The company on the 27th of November wrote a new policy payable to the petitioner, bearing the same date and number and for the same amount as the original policy, which they cancelled. This policy was duly sent to the company's agents at Montreal, where it remained until the 15th of December, 1868. Peterson requested the agents to forward the policy to Charles Lemon, the brother of the petitioner. He also wrote to Lemon that he had done so ; and the agents forwarded the policy to Charles Lemon on the 15th of December, 1868. Peterson also informed Miss Lemon of what he had done. Peterson went south for his health, which was failing, starting November 30, 1868, nor was he able to do business after that time until his death. Lemon received the policy in the ordinary course of the mails, probably on the 16th or 17th of December. On the 16th of December, 1868, Peterson wrote from Aiken, South Carolina, to the agents at Montreal,

asking them to have his policy changed from the favor of Miss Elizabeth Lemon to that of his brother Peter Alexander Peterson, Stamford, Ontario, saying, "After the policy is changed please return the same to Mr. Geo. P. MacPherson, who will hand you this with the policy." George Peterson sent a letter to Lemon from Aiken, dated December 14, 1868, saying, "Please send the policy I advised you would be sent to you to George P. MacPherson, Montreal." Lemon sent the policy to MacPherson forthwith, and MacPherson took it to the agents, who sent it to the home office.

The company in January, 1869, on surrender to them of Lemon's policy, cancelled it, and wrote another policy numbered and dated as the others had been, and similar to the Lemon policy, excepting that Peter A. Peterson's name appeared in the place of Miss Lemon's. Miss Lemon had no knowledge of the transfer to Peter A. Peterson, and gave no consent thereto. Charles Lemon had no knowledge of the transfer until after George Peterson's death. Before the first change in the policy, when Peterson had expressed to Lemon his intention of changing it to her benefit, she suggested to him the propriety of giving it to her brother. George C. Peterson died October 19, 1869, and Peter A. Peterson furnished due proofs of his death to the company. The last policy was found with George C. Peterson's effects. Peter had not seen it until after George's death. Neither Charles nor Elizabeth Lemon made any inquiries about the policy after its change to Peter's favor, during George's life, nor did either of them pay, or take any measures to pay, the premium upon it. Miss Lemon and George C. Peterson promised marriage to each other in 1867, which promise was binding at the time of issuing all the policies. Miss Lemon had no other interest in George's life. Peter A. Peterson advanced money to George to take care of him in his sickness, and went south with him in November, 1868; and George was in Peter's debt in November, 1868, and always afterwards, to a considerable amount, although not to the full amount of the policy. George had the policy changed from Miss Lemon's benefit to Peter's, to secure him for his existing and anticipated debts, intending to make the policy solely beneficial to Peter, who relied upon the policy for his security for his advances. The company were not aware that either of the policies had ever gone out of George's possession when they wrote the one beneficial to Peter. Had they known it, they would have required, in addition to its surrender, a written assignment from Miss Lemon. George paid the two premiums upon the policy, but Peter furnished him the money which he used to pay the second premium. George left a small estate, outside of this policy, not enough to pay his brother's advances.¹ . . .

Peter A. Peterson, who resided in Canada, was made a party to the bill, and pursuant to an order of court service was made on him by mail, but he made no appearance. The Superior Court accepted the

¹ A passage foreign to the rights of the beneficiary has been omitted. — Ed.

report of the committee, and reserved the question what decree should be passed for the advice of this court.

C. E. Perkins, for the petitioner.

Goodman, for the Phoenix Mutual Life Insurance Co.

SEYMOUR, J.¹ . . . The leading question in this case is whether the petitioner became the owner of this second policy.

It is not claimed that the mere fact of making the policy payable to Miss Lemon, without more, vested in her a complete title. It is conceded that so long as Mr. Peterson retained it in his own possession, he might control it as his own. On the other hand, it is not doubted that, if Mr. Peterson delivered it to Miss Lemon as a gift to her, such delivery would vest in her a complete title. The difficulty in the case is in determining whether, on the facts found, the policy may properly be regarded as having been in legal effect delivered to her. This is so much a mere matter of fact that the committee should have distinctly found it the one way or the other, but, instead of a direct finding, we have a special statement of facts bearing on the question, and it is left to the court to decide the ultimate facts, by inference from this special statement. Neither the petitioner nor the respondent saw fit to remonstrate against the acceptance of the report of the committee. On the contrary, the report is accepted without objection from either party; and we must dispose of the question as best we may with the light we have.

First, the fact that Mr. Peterson caused the policy to be made payable to Miss Lemon, indicates a settled purpose in his mind that she should have the benefit of it; and his acts immediately after will naturally be construed as intended to carry out such purpose. Second, when therefore the policy is by Mr. Peterson's order sent to Miss Lemon's brother, we naturally regard it as sent to him for her, as depositary for her, and for her benefit, rather than as depositary for Mr. Peterson himself. Third, it appears from the committee's report that the intended change in the policy for her benefit was communicated to her before it was made, and that it was upon her suggestion that the policy was placed in the hands of her brother. Fourth, after the policy was changed and made payable to Miss Lemon, and sent to her brother, she was informed by Mr. Peterson of what he had done. Upon these considerations, in view of all the facts in the case, we think we must find that there was an executed gift of the policy to Miss Lemon, and that the delivery to her brother was as depositary for her. . . .

It is clear that the consideration for policy number three was the surrender of policy number two. Mr. Peterson's health was such that number three would not have been issued, if the company had not been bound by number two. And inasmuch as policy number two belonged to the petitioner, it was her property that, without her consent, was used

¹ In reprinting the opinion, passages stating the facts have been omitted, as well as passages on insurable interest and procedure. — Ed.

to procure number three. She is therefore equitably entitled to the benefit of this policy.

Mr. Peterson's money, however, to the extent of the premium paid in January, 1869, is represented in policy number three; and to that extent Miss Lemon has no interest; and from the \$3,000 due on the policy the amount of that premium and interest on it should be deducted, and the balance paid to the petitioner. . . .

We advise the Superior Court to pass a decree in favor of the petitioner, to the extent and in the manner above specified. We ought, however, to say that it has not escaped our attention that the bill is not in its allegations precisely adapted to the facts as found by the committee, nor precisely to the grounds upon which relief is granted. But no point was made by the respondent on this account, and if any question had been made, we probably should have advised, as has been done in similar cases, that the bill be amended to correspond with the case as shown by the report of the committee.¹

In this opinion the other judges concurred; except CARPENTER, J., who dissented.

¹ *Acc.*: *Gosling v. Caldwell*, 1 Lea (Tenn.), 454 (1878); *Fowler v. Butterly*, 78 N. Y. 68 (1879); *Robinson v. Duvall*, 79 Ky. 83 (1880); *Allis v. Ware*, 28 Minn. 166 (1881); *Weisert v. Muehl*, 81 Ky. 336 (1883); *Wilmaser v. Continental L. Ins. Co.*, 66 Iowa, 417 (1885); *Connecticut Mut. L. Ins. Co. v. Baldwin*, 15 R. I. 106 (1885); *City Savings Bank v. Whittle*, 63 N. H. 587 (1885).

Contra: *Estate of Breitung*, 78 Wis. 33 (1890).

See *Eadie v. Slimmon*, 26 N. Y. 9 (1862); *Gould v. Emerson*, 99 Mass. 154 (1868); *Knickerbocker L. Ins. Co. v. Weitz*, 99 Mass. 157 (1868); *Chapin v. Fellowes*, 36 Conn. 132 (1869); *Landrum v. Knowles*, 22 N. J. Eq. (7 C. E. Green), 594 (1871); *Potter v. Spilman*, 117 Mass. 322 (1875); *Ricker v. Charter Oak L. Ins. Co.*, 27 Minn. 193 (1880); *Wilburn v. Wilburn*, 83 Ind. 55 (1882); *In re Richardson*, 47 L. T. Rep. N. S. 514 (1882); *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156 (1886); *National L. Ins. Co. v. Haley*, 78 Me. 268 (1886); *Ferdon v. Canfield*, 104 N. Y. 143 (1887); *Pingrey v. National L. Ins. Co.*, 144 Mass. 374 (1887); *Garner v. Germania L. Ins. Co.*, 110 N. Y. 266 (1888); *Central Bank v. Hume*, 128 U. S. 195, 206 (1888); *Millard v. Brayton*, 177 Mass. 533 (1901).

Compare *Miles v. Connecticut Mut. L. Ins. Co.*, 147 U. S. 177 (1893).

As to the certificates of mutual benefit societies, compare the following cases, to the effect that under the language usual in such certificates, and under the usual rules or statutes governing such societies, a beneficiary can be changed: *Masonic Mut. Benefit Society v. Burkhardt*, 110 Ind. 189 (1886); *Martin v. Stubbings*, 126 Ill. 387 (1888); *Supreme Conclave v. Cappella*, 41 Fed. R. 1 (C. C., E. D. Mich., 1890); *Smith v. National Benefit Society*, 123 N. Y. 85 (1890); *Thomas v. Grand Lodge*, 12 Wash. 500 (1895); *Schoenau v. Grand Lodge*, 88 N. W. Rep. 999 (Minn., 1902). — ED.

HARLEY, ADMINISTRATOR, v. HEIST.

SUPREME COURT OF INDIANA, 1882. 86 Ind. 196.

FROM the Kosciusko Circuit Court.

W. Olds, M. Sickafoose, and H. S. Biggs, for appellant.*J. S. Frazer and W. D. Frazer*, for appellee.

ZOLLARS, J. The record in this case presents in different forms the following material facts : —

On the 1st day of February, 1867, in consideration of the payment of a premium of \$70.20 by David Snyder, and the same amount thereafter to be paid annually, the Connecticut Mutual Life Insurance Company executed and delivered to said David Snyder a policy of insurance upon his life, in which it agreed to pay \$2,000 upon due proof of his death.

That portion of the policy which is material to the parties in this controversy is as follows : “ And the said company do hereby promise and agree with the said assured, his heirs, executors, administrators, and assigns, well and truly to pay, or cause to be paid, at the city of Hartford, the said sum insured to the said assured, his executors, administrators, or assigns, within ninety days after due notice and proof of the death of the said David Snyder, for the benefit of and payable to Wilhelmina R. Snyder, wife of the said David Snyder, deducting therefrom all notes taken for premiums unpaid at that date. And it is hereby conditioned and agreed, that if at any time after three premiums have been paid on this policy, it shall be surrendered while yet in force, the company will issue a paid-up, non-forfeiture policy therefor, for such an amount as the then present value of this policy would purchase, as a single premium.”

The wife, Wilhelmina, died intestate in December, 1869, and left surviving her, her husband, David, and their two minor children.

On the 20th day of February, 1871, said David Snyder, being indebted to appellee, assigned the policy to him by indorsing upon it the following : —

“COLUMBIA CITY, February 20, 1871.

“For value received, I herewith assign my interest to the within policy to Henry Heist.

DAVID SNYDER.”

In the month of November, 1874, David Snyder died intestate. Up to the time of the assignment and delivery of the policy to appellee, said David Snyder paid the premiums as stipulated for in the policy. After the assignment, appellee paid the premiums, viz. : On the 24th day of January, 1872, \$48.70; on the 24th day of January, 1873, \$46.20; and on the 24th day of January, 1874, \$46.55.

In 1875, after appellant had been appointed administrator of the estate of said Wilhelmina, the insurance company filed its complaint in

the Whitley Circuit Court against the parties to this cause, asking that they be required to set up their respective claims to the policy and the money due thereon.

After appellee had filed his answer and cross complaint, the insurance company, by agreement of the parties, and an order of the court, paid to the clerk \$1,909.73, being the amount due on the policy, less an unpaid premium note, and interest on the same, amounting in all to \$127.68. We are not informed by whom this note was executed.

After this, the venue was changed to the Kosciusko Circuit Court. In that court appellant filed his answer and cross complaint, to each paragraph of which, except the general denial, a demurrer by appellee was sustained, and appellant excepted. The cause was then submitted to the court, and after the finding of facts, and conclusions of law on the same, a judgment was rendered, giving to appellee the full amount of money so paid over by the insurance company, the same not exceeding the amount of the premiums paid by him with interest, and the amount due him from Snyder for which the policy was assigned. From this judgment appellant appeals.

Was the policy the personal property of the wife Wilhelmina in such a sense that, upon her death, it went to her heirs at law as a part of her estate, or was it upon her death the property of the husband, so that his assignment transferred the legal title to the same to appellee? This is the important question presented by the record, the determination of which, counsel agree, will be decisive of this controversy.

That the policy was personal property, under our statute (2 R. S. 1876, p. 314), we think there can be no question. In consideration of the payment of the annual premiums, it contained a definite and fixed promise to pay a definite and fixed amount of money, upon the happening of an event, which was uncertain in nothing except the time at which it might occur. Such a policy of insurance is a chose in action, governed by the same principles applicable to other agreements involving pecuniary obligations. *Bliss Life Insurance*, 2d ed., p. 540; *Hutson v. Merrifield*, 51 Ind. 24 (19 Am. R. 722).

The policy in this case, by its terms, was executed for the benefit of the wife, and, upon a fair construction, was payable to her, and not to the personal representatives of the husband. Upon its execution, the title vested in the wife, and not in the husband. By the procurement of the husband, the wife became the owner of the policy and entitled to collect the amount that might become due on the same upon the death of the husband. Had the wife procured the policy to be issued, and paid the premiums, no one could doubt as to the ownership of the policy, and the right to collect the money due thereon. We are unable to see, in this case, why there should be any difference in the ownership and title of the policy by reason of the application having been made and premiums paid by the husband. Had the policy been made payable to the husband, he doubtless might have given it to the wife, and, by proper indorsements thereon, conveyed to her the legal title

to the same. In such case it would have become her separate property, by gift from her husband; and so, too, he had the legal right, in the first instance, to make the application, pay the premiums, and have the policy made payable to the wife for her benefit, and thus vest in her the legal title and ownership of the policy, as her separate property. The title and ownership of the policy being vested in the wife by gift from the husband, it was her separate property, to be disposed of under the statute, which provides that the personal property of the wife, acquired during coverture, by descent, devise, or *gift*, shall remain her own separate property, to the same extent and under the same rules as her real estate so remains, and, on her death before the husband, shall be distributed in the same manner as her real estate descends, and is apportioned under the same circumstances. 1 R. S. 1876, p. 412; R. S. 1881, § 2488.

Personal property thus acquired by the wife, upon her death, descends to her heirs at law, as does her real estate, except for the purpose of paying debts and costs of administration, the title vests in the administrator, if one be appointed. In this case the policy of insurance, upon the death of the wife Wilhelmina, descended to her heirs at law; the undivided one-third to the husband, David Snyder, and the other two-thirds to the minor children, subject to the rights of the appellant, as the administrator of her estate, who, for the purpose of paying debts and costs of administration, has the right to collect the money due upon the policy, to the exclusion of all others. If there had been no need of administration, and no administrator had been appointed, the heirs at law of the wife might have collected the money. Subject to this right of the administrator, the husband had the legal right to assign his interest in the policy, as he did, to the appellee. Upon such assignment appellee became the owner of, and entitled on distribution to, one-third of the amount due upon the policy, after the payment of debts and costs of administration.¹ . . .

It is maintained by the learned counsel for appellee, that Snyder, having paid the premium, had the right, after the death of the wife, to omit the payment, and thus let the policy forfeit; and that, to avoid this loss, he had the right to change the beneficiary, or constitute himself such, by the assignment. If the policy was personal property, and the title thereto was vested in the wife, we are unable to understand how the husband, by any act of his, without the consent of the beneficiary, could change the ownership.

The property, under the statute, passed at once upon the death of the wife to her heirs at law, and the husband had no more control over it than before her death. True, he could not have been compelled to pay the premiums, or provide for the payment, but having paid them by himself and his assignee, the policy did not lapse, and the title to and ownership of the same did not change. . . .

¹ Here and elsewhere in the opinion, passages discussing the authorities have not been reprinted. — ED.

It is said further, that to deny to the husband who has paid the premiums the right to dispose of the policy to his own use, after the death of the wife, imposes upon him a hardship and wrong. A sufficient answer to this is, that if he wishes to retain to himself the control and ownership of the policy in such case, he may so provide in the policy. It was to avoid this so-called wrong, that the Wisconsin court has held that the person procuring the policy may dispose of it without the consent of his nominee. Such a view, we think, is not consistent with legal principles, is in conflict with former rulings of this court, and against the weight of the authorities in the other States.

The appellee, having in good faith paid the premiums since the assignment of the policy, is entitled to have the amount so paid, with interest at six per cent, refunded to him out of the money paid over by the insurance company.

It follows from the conclusion we have reached, that the court below was in error in rendering judgment for appellee, and in its rulings upon demurrers to pleadings. The judgment is therefore reversed, at the costs of appellee, with instructions to the court below to overrule appellee's demurrers to the first, second, fourth, fifth, and sixth paragraphs of appellant's answer and cross complaint, to sustain the demurrer to appellee's answer and cross complaint, and to proceed in accordance with this opinion.¹

AMICK v. BUTLER, ADMINISTRATOR.

SUPREME COURT OF INDIANA, 1887. 111 Ind. 578.

FROM the Jennings Circuit Court.

J. Overmyer, for appellant.

T. C. Batchelor, for appellee.

MITCHELL, J. Suit by Butler, administrator of the estate of Frazee, deceased, against Amick, to recover part of the amount which the latter received on a policy of life insurance which had been effected on the life of the plaintiff's decedent.

The facts most favorable to the plaintiff's theory are comprised in the following statement: On the 23d day of March, 1877, Decatur M.

¹ *Acc.*: *Brown v. Murray*, 54 N. J. Eq. (9 Dick.) 594 (1896).

Contra: *Ryan v. Rothweiler*, 50 Ohio St. 595 (1893).

See *Swan v. Snow*, 11 Allen, 224 (1865); *Hutson v. Merrifield*, 51 Ind. 24 (1875); *Anderson's Estate*, 85 Pa. 202 (1877); *Millard v. Brayton*, 177 Mass. 533, 542 (1901); *In re Scottish Equitable L. Assur. Society*, [1902] 1 Ch. 282 (1901).

Compare the following cases on endowment policies: *Tennes v. Northwestern Mut. L. Ins. Co.*, 26 Minn. 271 (1879); *Tompkins v. Levy*, 87 Ala. 263 (1888); *Lamberton v. Bogart*, 46 Minn. 409 (1891); *Bancroft v. Russell*, 157 Mass. 47 (1892).

On benefit certificate see *Haskins v. Kendall*, 158 Mass. 224 (1893); *Thomas v. Cochran*, 89 Md. 390 (1899).—Ed.

Frazee was indebted to Amick in the sum of about six hundred dollars. By agreement with Amick, Frazee made an application to the U. B. Mutual Aid Society of Pennsylvania, a mutual life insurance company, for membership in that society. Upon due examination he was admitted as a member, receiving a certificate in which Amick, his heirs and assigns, were designated as the beneficiaries, and were to become entitled upon the death of Frazee to two thousand dollars, upon condition that the terms and conditions of the certificate of membership should be complied with. Amick was designated in the application and in the certificate of membership as a creditor. The amount of the indebtedness was erroneously stated in the application at two hundred and fifty dollars. The proof showed that it was about six hundred dollars. All the expenses incident to the issuance of the certificate, and all the annual payments and assessments stipulated in the certificate of membership to be paid by Frazee, were to be and were paid by Amick. At the time the policy was issued it was orally agreed that if Frazee should at any time thereafter pay his indebtedness, and reimburse Amick for the cost of obtaining the policy and carrying the insurance, the latter would turn over the policy to the former.

On the 16th day of April, 1879, Frazee died without having paid any part of his debt, and without having paid any part of the cost of procuring and continuing in force the certificate of membership.

The society, upon due proof of the death of Frazee, paid to Amick about nineteen hundred and sixty-three dollars, in discharge of its liability upon the certificate. After deducting the amount of the indebtedness and the sums advanced for the insurance, it was found that there remained of the sum received from the society twelve hundred and fifty-nine dollars and fifty-eight cents, which the administrator of Frazee had demanded from Amick. The latter having refused payment, the court gave judgment in favor of the administrator for the amount.

The propriety of the conclusion of the learned court on the foregoing facts involves all the questions in the record.

In support of the judgment so given, it is contended that the right of a creditor in the proceeds of a policy of insurance upon the life of his debtor, is limited to the amount of the debt and necessary expenses on account of which the insurance was taken out and maintained. When the debt and expenses are extinguished, the argument is, the excess belongs to the legal representative of the deceased debtor, and may be recovered from the creditor, to whom payment has been made, as money had and received to the use of the debtor's representative.

This conclusion is predicated upon the rule, the effect of which is that one having no insurable interest in the life of another may not, by means of insurance, speculate upon the life of the person insured. The insurable interest can not, it is contended, exceed the amount of the debt; hence, the person obtaining the insurance must account for the excess.

Upon considerations of public policy, the general rule has long prevailed that insurance taken out and obtained by one upon the life of another, in whose life the person procuring the insurance had at the time no insurable interest, is invalid. *Elkhart, etc. Ass'n v. Houghton*, 103 Ind. 286, 53 Am. R. 514; *Continental Life Ins. Co. v. Volger*, 89 Ind. 572, 46 Am. R. 185.

A policy taken upon the life of another, for speculative purposes merely, is regarded as nothing more than a wager on the life of the person insured. Such a transaction is assigned a place in the catalogue of gambling, and is justly condemned by the law. *Ruse v. Mutual Benefit, etc. Co.*, 23 N. Y. 516; *Brockway v. Mutual Benefit, etc. Co.*, 9 Fed. Rep. 249; *Bliss Life Ins.*, § 9.

No one can have the benefit of an insurance effected by himself upon the life of another, unless he has an insurable interest in the life insured.

Where money has been collected upon a policy which had its inception in a scheme of mere speculation upon the life of the person who is the subject of insurance, or where insurance is taken out by a debtor as a security for the benefit of his creditor, the expense of procuring and continuing the policy being borne by the former, the authorities justify the conclusion in either case that the amount collected, less the debt secured or the sums advanced in obtaining and keeping the policy in force, may be recovered by the personal representatives of the person insured. *Gilbert v. Moose*, 104 Pa. St. 74, 49 Am. R. 570; *Cammack v. Lewis*, 15 Wall. 643; *Page v. Burnstine*, 102 U. S. 664; *Warnock v. Davis*, 104 U. S. 775; *Dutton v. Willner*, 52 N. Y. 312; *Drysdale v. Piggott*, 8 DeGex, M. & G. 546; *Lea v. Hinton*, 5 DeGex, M. & G. 823.

In case the policy originates in a transaction which the law condemns, or where the debtor, having taken insurance on his own life, at his own expense, merely pledges the policy as a security for an existing debt, the holder, whether by assignment or otherwise, who receives the entire proceeds, will be regarded as a trustee of the representatives of the insured for the amount received, less the amount of his debt, or the sum advanced on the policy. *American Life, etc. Co. v. Robertshaw*, 26 Pa. St. 189; *Matthews v. Sheehan*, 69 N. Y. 585.

Thus, in *Bruce v. Garden*, 5 Ch. App. C. 32, the language of Lord Hatherley is: "The court requires distinct evidence of a contract—that the creditor has agreed to effect a policy, and that the debtor has agreed to pay the premiums, and in that case the policy will be held in trust for the debtor."

The case under consideration is not within the facts, and hence is not governed by the principles which ruled the cases above mentioned.

This is a case in which a debtor, presumably at the solicitation of his creditor, effected an insurance on his own life for the benefit of his creditor, the latter being designated in the policy as the beneficiary, and agreeing to pay the expense of effecting the insurance and of keeping the policy in force. It was also agreed that the debtor might at any

time pay the debt, and reimburse the creditor for outlays in effecting and maintaining the insurance, and thereby entitle himself to an assignment of the policy. It has never been seriously questioned but that a person may insure his own life, and by the terms of the policy appoint another to receive the money, upon the event of the death of the person whose life is insured; or, having taken a policy, valid in its inception, that he may in good faith assign his interest in such policy, as in any other chose in action. *Hutson v. Merrifield*, 51 Ind. 24 (19 Am. R. 722); *Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380; *Ashley v. Ashley*, 3 Sim. 149; *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24; *Clark v. Allen*, 11 R. I. 439, 23 Am. R. 496. See also note to *Clark v. Allen*, *supra*, 17 Am. Law Reg. 86; *New York Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 591; *Archibald v. Mutual Life Ins. Co.*, 38 Wis. 542; *Eckel v. Renner*, 41 Ohio St. 232.

In either case the essential point is that the transaction be *bona fide*, and not merely a cover for obtaining wagering or merely speculative insurance, and a device to evade the law. *Provident, etc. Co. v. Baum*, 29 Ind. 236; *Olmsted v. Keyes*, 85 N. Y. 593; *Campbell v. New England M. L. Ins. Co.*, 98 Mass. 381; *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457; *Guardian M. L. Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. R. 180; *Murphy v. Red*, 35 Alb. Law Jour. 490; *Cunningham v. Smith*, 70 Pa. St. 450.

The cases which hold invalid the taking or assignment of insurance policies turn upon the fact that in each case the transaction was found to be merely colorable, and a scheme to obtain speculative insurance. *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116, 13 Am. R. 313; *Cammack v. Lewis*, *supra*; *Warnock v. Davis*, *supra*.

Where the person whose life is insured is the real contracting party, and continues to pay the premiums, it is of no consequence that the beneficiary, or appointee in the policy, has no insurable interest in the life of the insured. In such a case the policy is valid in any event, and if the beneficiary or assignee be a creditor, and holds the policy as a security merely, he will be a trustee for the excess, as is any other creditor who holds securities for a debt. In case, however, the party insured is only nominally the contracting party, while the beneficiary named in the policy, or the assignee, has in reality procured the insurance, and paid the premiums, then, in order that the transaction may be taken out of the category of wagering contracts, the beneficiary must have had an insurable interest of a pecuniary character, or of that nature, either present or prospective, at the time the policy had its inception. A policy so taken is the property of the beneficiary, who occupies in that event no trust relation to the debtor. *Hine & Nichols Life Ins.* 75.

That a creditor has an insurable interest in the life of his debtor has never been controverted. It is universally allowable that a creditor may in good faith take insurance upon the life of his debtor, either by procuring a policy in which he is designated as the beneficiary, or by

assignment. We know of no authority to the contrary of this. While this is true, the amount of the insurance obtained must bear some just proportion to the debt, or the extent of the obligation assumed by the beneficiary, and the probable contingencies attending the future maintenance of the policy. The circumstances must be such as not to raise the presumption that the transaction on its face was a mere speculation.

As was said by the learned judge in *Fox v. Penn M. L. Ins. Co.*, 4 Big. L. & A. Ins. Rep. 458: "If a man should owe me \$10, I can not go and insure his life to the extent of \$10,000." *Mowry v. Home Life Ins. Co.*, 9 R. I. 346.

The policy can not, however, be limited to the amount of the debt. If it were otherwise the creditor would inevitably be compelled to lose whatever sums he might be required to pay in effecting the insurance and paying premiums.

The beneficiary takes the chances of all future contingencies, including the continued solvency of the company; or if it be a company in which the fund is to be accumulated by assessments upon the members, that a sufficient number will continue therein to pay the debt and reimburse him for his advances.

No general rule applicable to all cases can be laid down, except that the interest must be of a substantial character, and such as, under all the circumstances, to take from the transaction the suspicion of mere wagering. *Connecticut Mutual Life Ins. Co. v. Luchs*, 108 U. S. 498.

In the case before us the application for membership shows that the person whose life was insured was within a few months of forty-nine years old, and in good health. The certificate of membership required the payment of sixteen dollars into the treasury of the society the first year, ten dollars annually for the ensuing four years, and four dollars annually thereafter during the lifetime of the member, besides paying into the treasury, upon the death of each member, his *pro rata* mortality assessment. In consideration of the agreement to comply with these, among other conditions, the society agreed to pay the beneficiary named, absolutely, upon the death of the member, the sum of two thousand dollars. In the language of the court in *Bevin v. Connecticut Mutual Life Ins. Co.*, 23 Conn. 244: "All the books hold this to be a sufficient interest to sustain a policy of insurance. . . . The policy must, we think, be held to be a valued policy." See note to *Currier v. Continental Life Ins. Co.*, 52 Am. Rep. 134. The transaction being thus relieved from any features of a merely speculative character, the policy vested an absolute right in the beneficiary named therein to collect from the society upon the death of the member the full amount stipulated to be paid, and the amount thus collected became the property of the beneficiary, unless the parol agreement to turn the policy over to the debtor upon the conditions already stated affected the creditor with an enforceable trust in favor of the personal representative. We can discover no principle upon which a trust can be maintained in the

absence of any offer by the debtor in his lifetime to pay the debt and reimburse the creditor for his advances. The right to the insurance vested absolutely in the beneficiary as soon as the contract of insurance was consummated. "The moment this policy was executed and delivered, it became property, and the title to it vested in some one. It will not be claimed that it vested in the person whose life was insured. It must have vested then in all or in a part of the payees." *Continental Life Ins. Co. v. Palmer*, 42 Conn. 60.

The transaction had none of the characteristics of a mortgage. It was entirely at the option of the debtor whether or not he would reimburse the creditor for the sums expended in procuring the insurance. Whatever the creditor might have done in respect to the collection of his debt, it was beyond his power to compel the insured to reimburse him for his advances in procuring and maintaining the policy. The debtor had not agreed to repay advances voluntarily made. The advances having been made for the creditor's own benefit, he had no remedy against the debtor or his legal representative to recover them. The rule in cases involving analogous principles is that where the owner of property vests the title absolutely in another in pursuance of an agreement which gives the grantor the option to repurchase or not, at his election, the transaction does not create a mortgage. *Voss v. Eller*, 109 Ind. 260; *Hays v. Carr*, 83 Ind. 275.

The right to the policy and to the benefits to be derived therefrom, was absolute in the beneficiary until both the debt and the advances were paid, even conceding that the oral agreement referred to would have been enforceable in the lifetime of the insured.

The beneficiary in a life policy, who has an insurable interest in the life of the insured, at the inception of the policy, may enforce payment for the full amount, notwithstanding the debtor, on whose life it runs, may have paid the debt. "Any interest sufficient to justify the insurance, and relieve it of the gambling aspect, will render it valid, and such policy will continue valid in the hands of a beneficiary or assignee, regardless of the cessation of interest, provided the facts show entire good faith and a sufficient justification." *Hine & Nichols Life Insurance*, 82; *Olmsted v. Keyes*, *supra*; *Connecticut Mut. Life Ins. Co. v. Schaefer*, *supra*.

Perhaps, owing to the peculiar nature of contracts such as we are considering, if the debtor, in his lifetime, had tendered the amount of the debt and the advances, the claim of the legal representative might be supported. But, in the absence of an offer to comply with his agreement, we can discover no rational ground upon which the court can now compel the appellant to surrender money to which, according to every principle of law, he has a perfect title, and in which neither the debtor nor his representatives ever had any interest, legal or equitable.

A distinguishing element in the determination of cases of this character is, whether the one whose life is insured so contracts himself to pay the premiums that an action could be maintained against him by

the creditor for that amount. If such a contract is shown, then the policy is to be regarded as a collateral security, and the debtor is entitled to it upon the extinguishment of the principal debt; while, on the other hand, if the creditor pays the premiums, and the debtor is under no obligation to repay them, the right of the creditor is absolute. *Freme v. Brade*, 2 De Gex & J. 582; *Knox v. Turner*, Law Rep., 5 Ch. App. 515; *Gottlieb v. Cranch*, 4 De G., M. & G. 440; *Godsal v. Webb*, 2 Keen, 100.

As has already been seen, the debtor neither paid nor was he under any obligation to pay the premiums.

Within all the rules, therefore, the appellant became the absolute owner of the policy, without any outstanding equity in the debtor or his representative, until such payment was made or tendered according to the contract.

*Judgment reversed with costs.*¹

SCHNEIDER, RESPONDENTS, v. UNITED STATES LIFE
INSURANCE CO., APPELLANT.

COURT OF APPEALS OF NEW YORK, 1890. 123 N. Y. 109.

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department,² entered upon an order made March 29, 1889, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at special term.

The action was upon a policy of life insurance.

The facts, so far as material, are stated in the opinion.

O. P. Buel, for appellant.

Lucius McAdam, for respondents.

O'BRIEN, J. In the year 1861, upon the application of the plaintiff's husband, Henry Schneider, the defendant issued its policy insuring his life for the benefit of the plaintiff. The policy contained the usual stipulation that in case the assured should fail to pay any quarterly premium when the same became due the policy should lapse and become null and void. The husband retained the policy in his possession and paid the premiums as they became due up to and including the premium payable January 17, 1886. On the 15th day of March, 1886, the defendant duly served the notice required by the statute that another premium would fall due the 17th of April following. This notice was served upon the husband who had the policy in his posses-

¹ *Acc.* : *Rittler v. Smith*, 70 Md. 261 (1889).

Contra : *Cheeves v. Anders*, 87 Tex. 287 (1894).

See *Grant v. Cline*, 115 Pa. 618, 625 (1887); *Ulrich v. Reinoehl*, 143 Pa. 238 (1891); *McHale v. McDonnell*, 175 Pa. 632, 646 (1896); *Exchange Bank v. Loh*, 104 Ga. 446, 454-458 (1898). — Ed.

² Reported in 52 Hun, 130. — Ed.

sion, and who was the agent of his wife for the purpose of receiving the notice. Laws of 1877, chap. 321.¹ This premium was not paid, and no notice was thereafter served by the defendant. On the 29th of March, 1886, while the policy was in force, the husband produced and surrendered the policy to the defendant and received \$525, the surrender value, from the defendant, which was paid by its check to the joint order of the husband and the wife. The check was presented, indorsed in proper form, paid by the bank and charged to defendant. At the same time the husband presented and delivered to the defendant a paper under seal, purporting to be signed by the wife and duly acknowledged before a commissioner of deeds, containing a request to accept the surrender of the policy and a release discharging the defendant from all further liability thereon. The company, relying upon this paper, paid the surrender value as above stated. The husband died in September, 1886, and until after that the wife had no knowledge of the existence of the policy and her signature to the paper containing the surrender and release, and the indorsement of her name upon the check was forged. She received no part of the \$525 paid on the surrender of the policy. She demanded payment of the policy, and, upon refusal, presented proofs of the death, and then brought this action. It was found at the trial, as matter of law, that the surrender was void, and the contract to pay in case of death was unaffected thereby. The plaintiff recovered, and the judgment was sustained by the General Term.

The conclusion of the trial court that the surrender was, as against the plaintiff, null and void, and which is clearly correct, renders it necessary for the plaintiff, in order to sustain the recovery, to meet and answer another objection that confronts her. The premium due on the 17th of April, 1886, was not paid. The notice required by the statute was served on the 15th of March preceding, and the existence of the policy as a valid contract of insurance, and the liability of the defendant thereon, depended upon the performance of this condition. The fraudulent surrender of the policy by the husband before the April premium became due, in no way excuses the failure to pay the premium, unless the defendant was in some way connected with that fraud, or guilty of some negligent act in regard thereto. There is no proof and no finding that it was. On the contrary the defendant seems to have been the innocent victim of a fraud perpetrated upon it by the husband, who was the plaintiff's agent in procuring the policy, paying the premiums and receiving the statutory notice as to when they were

¹ "No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. . . . A written or printed notice . . . shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known post-office address, postage paid by the company. . . ." N. Y. Laws of 1877, chap. 321, § 1.—Ed.

due. The paper purporting to be signed by the plaintiff requesting the defendant to accept the surrender and releasing it from further liability, was in proper form. There was attached to it the certificate of an officer authorized to take and certify acknowledgments that the plaintiff appeared before him and duly acknowledged the instrument, and there was no circumstance that could warrant the defendant in doubting its genuineness. It has been found that the defendant relied upon it, and neither in the findings nor the evidence is there anything to be found to justify a suspicion of bad faith. It cannot be held that the transaction between the defendant and the husband, which resulted in the payment to him of the surrender value of the policy and upon which the defendant relied, was void, and at the same time relieve the plaintiff from the effect of a failure to perform the conditions upon which the existence of the contract depended. The plaintiff cannot claim the benefit of a contract made in her behalf but, as it appears, without her knowledge, without at the same time assuming all the responsibility of a failure to perform its essential conditions. In those cases where a recovery has been permitted by the beneficiary, notwithstanding a surrender and release such as appears in this case, the party seeking to recover, was able in some way to connect the company with the fraud, or to show some fault or negligent act on its part that excused the payment of the premium. *Whitehead v. N. Y. L. Ins. Co.*, 102 N. Y. 143; *Frank v. M. L. Ins. Co.*, id. 266; *Knapp v. H. M. L. Ins. Co.*, 117 U. S. 411.

The husband had the possession of the policy, and in dealing with the defendant in regard to it was treated as plaintiff's agent, and the rule that when one of two innocent parties must sustain a loss from the fraud of a third, such loss shall fall upon the one whose act enabled the fraud to be committed, applies to this case.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur.

*Judgment reversed.*¹

¹ See *Mutual L. Ins. Co. v. Hill*, 178 U. S. 347 (1900).

Compare *Manhattan L. Ins. Co. v. Smith*, 44 Ohio St. 156 (1886).

On the rights of beneficiaries, see also:—

Drake v. Stone, 58 Ala. 133 (1877);

Robinson v. Duvall, 79 Ky. 83 (1880);

Pullis v. Robison, 73 Mo. 201 (1880);

Macaulay v. Central Nat. Bank, 27 S. Car. 215 (1887);

Hooker v. Sugg, 102 N. Car. 115 (1889);

Glenn v. Burns, 100 Tenn. 295 (1898);

Union Central L. Ins. Co. v. Buxer, 62 Ohio St. 385 (1900).—ED.

APPENDIX.

SOME FORMS USED IN THE UNITED STATES.

SECTION I.

*Marine Insurance.*¹

(A) A POLICY ON CARGO.

| | | | |
|--------------|--|--|----|
| | BY THE | INSURANCE COMPANY. | 1 |
| | [No. |] | 2 |
| | on account of | | 3 |
| SUM INSURED, | In case of loss to be paid in funds | | 4 |
| \$ | current in the United States, or | | 5 |
| | in the city of New York, to | | 6 |
| | Do | make Insurance, and cause | 7 |
| | | to be insured, lost or not lost, at and from | 8 |
| | | | 9 |
| | | | 10 |
| | upon all kinds of lawful goods and merchandises, | | 11 |
| | laden or to be laden on board the good | | 12 |
| | called the | whereof is master for | 13 |
| | this present voyage, | or whoever else | 14 |
| | shall go for master in the said vessel, or by what- | | 15 |
| | ever other name or names the said vessel, or the | | 16 |
| | master thereof, is or shall be named or called. | | 17 |
| PREMIUM, | BEGINNING the adventure upon the said goods | | 18 |
| ¢ | and merchandises, from and immediately following | | 19 |
| | the loading thereof on board of the said vessel, at | | 20 |
| | as aforesaid, and so shall continue and endure until | | 21 |
| | the said goods and merchandises shall be safely | | 22 |
| | landed at | as aforesaid. AND it shall | 23 |

¹ In the United States the marine insurance forms are not statutory. Each company has forms of its own. Most of the differences are verbal rather than substantial. — Ed.

and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather, or other unavoidable accident, without prejudice to this insurance. The said goods and merchandises, hereby insured, are valued (premium included) at

TOUCHING the adventures and perils which the said INSURANCE COMPANY is contented to bear, and takes upon itself in this voyage, they are of the *seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints and detainerments of all kings, princes or people of what nation, condition or quality soever, barratry of the master and mariners*, and all other perils, losses and misfortunes, that have or shall come to the hurt, detriment or damage of the said goods and merchandises, or any part thereof. AND in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, factors, servants and assigns, to sue, labor and travel for, in and about the defence, safeguard and recovery of the said goods and merchandises or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers, in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof, the said Insurance Company will contribute according to the rate and quantity of the sum herein insured, having been paid the consideration for this insurance, by the assured or assigns, at and after the rate of

AND in case of loss, such loss to be paid in thirty days after proof of loss, and proof of interest in the said (the amount of 29 the Note given for the premium, if unpaid, being first deducted), but no partial loss or particular average shall in any case be paid, unless amounting to *five per cent.* PROVIDED ALWAYS, and it is hereby further agreed, That if the said assured shall have made any other assurance upon the premises aforesaid, prior in day of date to this policy, then the said INSURANCE COMPANY shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured; and the said INSURANCE COMPANY shall return the premium upon so much of the sum by them assured, as they shall be by such prior assurance exonerated from. AND in case of any insurance upon the said premises, subsequent in day of date to this policy, the said INSURANCE COMPANY, shall nevertheless be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made. Other insurance upon the premises aforesaid,

1 of date the same day as this policy, shall be deemed simulta-
2 neous herewith, and the said INSURANCE COMPANY shall not
3 be liable for more than a ratable contribution in the proportion
4 of the sum by them insured to the aggregate of such simul-
5 taneous insurance. IT IS ALSO AGREED, that the property be war-
6 ranted by the assured free from any charge, damage or loss, which
7 may arise in consequence of a seizure or detention, for or on ac-
8 count of any illicit or prohibited trade, or any trade in articles
9 contraband of war.

10 Warranted not to abandon in case of capture, seizure, or detention,
11 until after condemnation of the property insured; nor until ninety
12 days after notice of said condemnation is given to this Company.
13 Also warranted not to abandon in case of blockade, and free from
14 any expense in consequence of capture, seizure, detention or block-
15 ade; but in the event of blockade, to be at liberty to proceed to an
16 open port and there end the voyage.

17 IN WITNESS WHEREOF, the President or Vice-President of the said
18 INSURANCE COMPANY hath hereunto subscribed his name, and
19 the sum insured, and caused the same to be attested by their
20 Secretary, in NEW YORK, the day of one
21 thousand nine hundred and

22 MEMORANDUM. It is also agreed, that bar, bundle, rod, hoop and
23 sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wicker-
24 ware and willow (manufactured or otherwise), salt, grain of all kinds,
25 tobacco, indian meal, fruits (whether preserved or otherwise), cheese,
26 dry fish, hay, vegetables and roots, rags, hempen yarn, bags, cotton
27 bagging, and other articles used for bags or bagging, pleasure car-
28 riages, household furniture, skins and hides, musical instruments,
29 looking glasses, and all other articles that are perishable in their own
30 nature, are warranted by the assured free from average, unless gen-
31 eral; hemp, tobacco stems, matting and cassia, except in boxes, free
32 from average under *twenty per cent* unless general; and sugar, flax,
33 flax-seed and bread, are warranted by the assured free from average
34 under *seven per cent* unless general; and coffee in bags or bulk,
35 pepper in bags or bulk, and rice, free from average, under *ten per*
36 *cent*, unless general.

37 Warranted by the insured free from damage or injury, from damp-
38 ness, change of flavor, or being spotted, discolored, musty or mouldy,
39 except caused by actual contact of sea water with the articles dam-
40 aged, occasioned by sea perils. In case of partial loss by sea
41 damage to dry goods, cutlery or other hardware, the loss shall be
42 ascertained by a separation and sale of the portion only of the con-
43 tents of the packages so damaged, and not otherwise; and the same
44 practice shall obtain as to all other merchandise as far as practicable.
45 Not liable for leakage on molasses or other liquids, unless occasioned
46 by stranding or collision with another vessel.

47 If the voyage aforesaid shall have been begun and shall have ter-

minated before the date of this policy, then there shall be no return . 1
of premium on account of such termination of the voyage. 2

In all cases of return of premium, in whole or in part, *one-half per* 3
cent, upon the sum insured, is to be retained by the assurers. 4

\$ 5

Secretary. 6

President. 7

(B) SOME CLAUSES IN THE MARGIN OF POLICIES ON VESSELS. 8

Machinery. 9

It is understood that this Company is not liable for any injuries 10
to, or derangement of, or breakage of the machinery, or bursting of 11
the boilers, unless occasioned by stranding; but if she takes fire, 12
and any part of the machinery or boilers be damaged thereby, this 13
Company is to be liable therefor. It is also understood that the 14
Company is not liable for fuel, wages and provisions, nor for any 15
expense of any delay consequent upon repairs of any kind. 16

Collision. 17

And it is further agreed, that if the vessel hereby insured shall in 18
consequence of collision with another vessel, become liable to pay, 19
and shall pay, any sum or sums for damages resulting therefrom to 20
said other vessel, her freight or her cargo, in such case this Com- 21
pany will contribute towards the payment of three-fourths of the 22
total amount of said damages, in the proportion that the sum in- 23
sured under this policy bears to the total valuation of the vessel as 24
stated herein, provided that this Company shall not in any event be 25
held liable under this agreement for a greater sum than three-fourths 26
of the amount insured under this Policy. 27

And it is also agreed that this Company will bear a like propor- 28
tionate share of the costs and expenses that may be incurred in con- 29
testing the liability resulting from said collision, provided the 30
written consent of the Company to such contest be first obtained. 31

But under no circumstances shall this Company be held liable for 32
any contribution in respect of any sum that the assured may be held 33
liable to pay, by reason of loss of life or personal injury to individ- 34
uals in any cause whatsoever. 35

Repairs. 36

In case of claim for loss or damage, a deduction of one-third from 37
the cost of repairing or replacing the same shall be made, after de- 38
ducting the value of the old materials, except in the case of anchors, 39
and of sheathing of copper or other metal; a deduction of one-fortieth 40
from the expense of repairing or replacing the metal sheathing, or 41

1 any part thereof, (after first deducting the value of the old metal and
2 nails), shall be made for every month since the vessel was last
3 sheathed until the expiration of forty months, after which time the
4 cost of re-metalling or repairing the same shall be wholly borne by
5 the assured. If a technical total loss be claimed, similar deductions
6 shall be made from the estimated repairs, and unless the net cost
7 thereof would exceed a moiety of the insured value of the vessel, as
8 expressed in this policy, after making such deductions, the loss shall
9 be deemed partial only.

SECTION II.

Fire Insurance.(A) THE MASSACHUSETTS STANDARD POLICY.¹

| | | |
|--|------|---|
| No. — | \$ — | 1 |
| [Corporate name of the company or association; its principal place or places of business.] | | 2 |
| This company shall not be liable beyond the actual value of the insured property at the time any loss or damage happens. | | 3 |
| In consideration of dollars to it paid by the insured, herein- after named, the receipt whereof is hereby acknowledged, does in- sure and legal representatives against loss or damage by fire, to the amount of dollars. | | 4 |
| (Description of property insured.) | | 5 |
| Bills of exchange, notes, accounts, evidences and securities of property of every kind, books, wearing apparel, plate, money, jewels, medals, patterns, models, scientific cabinets and collections, paintings, sculpture and curiosities are not included in said insured property, unless especially mentioned. | | 6 |
| Said property is insured for the term of , beginning on the day of , in the year nineteen hundred and , at 18 noon, and continuing until the day of , in the year nine- teen hundred and , at noon, against all loss or damage by FIRE originating from any cause except invasion, foreign enemies, civil commotions, riots, or any military or usurped power whatever; the amount of said loss or damage to be estimated according to the actual value of the insured property at the time when such loss or damage happens, but not to include loss or damage caused by ex- plosions of any kind unless fire ensues, and then to include that caused by fire only. | | 7 |
| This policy shall be void if any material fact or circumstance stated in writing has not been fairly represented by the insured, — or if the insured now has or shall hereafter make any other insur- ance on the said property without the assent in writing or in print of the company, — or if, without such assent, the said property shall be removed, except that, if such removal shall be necessary for the preservation of the property from fire, this policy shall be valid without such assent for five days thereafter, — or if, without such assent, the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency or consent of the insured, be so altered as to cause an increase of such risks, or if, without such as- | | 8 |

¹ As provided in Revised Laws of Massachusetts, 1902, chap. 118, sect. 60. — Ed.

1 sent, the said property shall be sold, or this policy assigned, or if
2 the premises hereby insured shall become vacant by the removal of
3 the owner or occupant, and so remain vacant for more than thirty
4 days without such assent, or if it be a manufacturing establishment,
5 running, in whole or in part, extra time, except that such establish-
6 ments may run, in whole or in part, extra hours not later than nine
7 o'clock P.M., or if such establishments shall cease operation for more
8 than thirty days without permission in writing indorsed hereon, or
9 if the insured shall make any attempt to defraud the company
10 either before or after the loss, — or if gunpowder or other articles
11 subject to legal restriction shall be kept in quantities or manner dif-
12 ferent from those allowed or prescribed by law, — or if camphene,
13 benzine, naphtha, or other chemical oils or burning fluids shall be
14 kept or used by the insured on the premises insured, except that
15 what is known as refined petroleum, kerosene or coal oil, may be
16 used for lighting, and in dwelling houses kerosene oil stoves may be
17 used for domestic purposes, — to be filled when cold, by daylight,
18 and with oil of lawful fire test only.

19 If the insured property shall be exposed to loss or damage by fire,
20 the insured shall make all reasonable exertions to save and protect
21 the same.

22 In case of any loss or damage under this policy, a STATEMENT in
23 writing, signed and sworn to by the insured, shall be forthwith
24 rendered to the company, setting forth the value of the property
25 insured, the interest of the insured therein, all other insurances
26 thereon, in detail, the purposes for which and the persons by whom
27 the building insured, or containing the property insured, was used,
28 and the time at which and manner in which the fire originated, so far
29 as known to the insured. The company may also examine the books
30 of account and vouchers of the insured, and make extracts from the
31 same.

32 In case of any loss or damage, the company, within sixty days
33 after the insured shall have submitted a statement, as provided in
34 the preceding clause, shall either pay the amount for which it shall
35 be liable, *which amount if not agreed upon shall be ascertained by*
36 *award of referees as hereinafter provided*, or replace the property
37 with other of the same kind and goodness, — or it may, within
38 fifteen days after such statement is submitted, notify the insured of
39 its intention to rebuild or repair the premises, or any portion thereof
40 separately insured by this policy, and shall thereupon enter upon
41 said premises and proceed to rebuild or repair the same with reason-
42 able expedition. It is moreover understood that there can be no
43 abandonment of the property insured to the company, and that the
44 company shall not in any case be liable for more than the sum
45 insured, with interest thereon from the time when the loss shall
46 become payable, as above provided.

47 If there shall be any OTHER INSURANCE on the property insured,

whether prior or subsequent, the insured shall recover on this policy 1
no greater proportion of the loss sustained than the sum hereby 2
insured bears to the whole amount insured thereon. And whenever 3
the company shall pay any loss, the insured shall assign to it, to the 4
extent of the amount so paid, all rights to recover satisfaction for 5
the loss or damage from any person, town or other corporation, 6
excepting other insurers ; or the insured, if requested, shall prose- 7
cute therefor at the charge and for the account of the company. 8

If this policy shall be made payable to a mortgagee of the insured 9
real estate, no act or default of any person other than such mortgagee 10
or his agents, or those claiming under him, shall affect such mort- 11
gagee's right to recover in case of loss on such real estate : *provided*, 12
that the mortgagee shall, on demand, pay according to the estab- 13
lished scale of rates for any increase of risks not paid for by the in- 14
sured ; and whenever this company shall be liable to a mortgagee for 15
any sum for loss under this policy, for which no liability exists as to 16
the mortgagor, or owner, and this company shall elect by itself, or 17
with others, to pay the mortgagee the full amount secured by such 18
mortgage, then the mortgagee shall assign and transfer to the com- 19
panies interested, upon such payment, the said mortgage, together 20
with the note and debt thereby secured. 21

This policy may be CANCELLED at any time at the request of the 22
insured, who shall thereupon be entitled to a return of the portion 23
of the above premium remaining, after deducting the customary 24
monthly short rates for the time this policy shall have been in force. 25
The company also reserves the right, after giving written notice to 26
the insured, and to any mortgagee to whom this policy is made pay- 27
able, and tendering to the insured a ratable proportion of the pre- 28
mium, to cancel this policy as to all risks subsequent to the expiration 29
of ten days from such notice, and no mortgagee shall then have the 30
right to recover as to such risks. 31

In case of loss under this policy and a failure of the parties to 32
agree as to the amount of loss, it is mutually agreed that the amount 33
of such loss shall be referred to three disinterested men, the com- 34
pany and the insured each choosing one out of three persons to be 35
named by the other, and the third being selected by the two so 36
chosen ; the award in writing by a majority of the referees shall be 37
conclusive and final upon the parties as to the amount of loss or 38
damage, and such reference unless waived by the parties *shall be a* 39
condition precedent to any right of action in law or equity to re- 40
cover for such loss ; but no person shall be chosen or act as a referee, 41
against the objection of either party, who has acted in a like capacity 42
within four months. 43

No suit or action against this company for the recovery of any 44
claim by virtue of this policy shall be sustained in any court of law 45
or equity in this Commonwealth unless commenced within two years 46
from the time the loss occurred. 47

1 In witness whereof the said company has caused this policy
2 to be signed by its president and attested by its secretary [or by such
3 proper officers as may be designated], at their office in

4

5 [date].

6 (B) THE STANDARD FIRE INSURANCE POLICY OF THE STATE OF NEW YORK.¹

7

(a) *Policy.*

8 No.

\$

9 In consideration of the stipulations herein named and of
10 dollars premium does insure for the term of from
11 the day of 18 , at noon, to the day of
12 18 , at noon, against all direct loss or damage by fire,
13 except as hereinafter provided, to an amount not exceeding
14 dollars, to the following described property while located
15 and contained as described herein, and not elsewhere, to wit:

16 This company shall not be liable beyond the actual cash value of
17 the property at the time any loss or damage occurs, and the loss or
18 damage shall be ascertained or estimated according to such actual
19 cash value, with proper deduction for depreciation however caused,
20 and shall in no event exceed what it would then cost the insured
21 to repair or replace the same with material of like kind and quality;
22 said ascertainment or estimate shall be made by the insured and
23 this company, or, if they differ, then by appraisers, as hereinafter
24 provided; and, the amount of loss or damage having been thus
25 determined, the sum for which this company is liable pursuant to
26 this policy shall be payable sixty days after due notice, ascertain-
27 ment, estimate, and satisfactory proof of the loss have been received
28 by this company in accordance with the terms of this policy. It
29 shall be optional, however, with this company to take all, or any
30 part, of the articles at such ascertained or appraised value, and also
31 to repair, rebuild, or replace the property lost or damaged with
32 other of like kind and quality within a reasonable time on giving
33 notice, within thirty days after the receipt of the proof herein re-
34 quired, of its intention so to do; but there can be no abandonment
35 to this company of the property described.

36 This entire policy shall be void if the insured has concealed or
37 misrepresented, in writing or otherwise, any material fact or cir-
38 cumstance concerning this insurance or the subject thereof; or if
39 the interest of the insured in the property be not truly stated herein;
40 or in case of any fraud or false swearing by the insured touching

¹ See Laws of New York, 124th Session, 1901, chap. 513. — Ed.

any matter relating to this insurance or the subject thereof, whether 1
before or after a loss. 2

This entire policy, unless otherwise provided by agreement in- 3
dorsed hereon or added hereto, shall be void if the insured now has 4
or shall hereafter make or procure any other contract of insurance, 5
whether valid or not, on property covered in whole or in part by this 6
policy; or if the subject of insurance be a manufacturing establish- 7
ment and it be operated in whole or in part at night later than ten 8
o'clock, or if it cease to be operated for more than ten consecutive 9
days; or if the hazard be increased by any means within the control 10
or knowledge of the insured; or if mechanics be employed in build- 11
ing, altering, or repairing the within described premises for more 12
than fifteen days at any one time; or if the interest of the insured 13
be other than unconditional and sole ownership; or if the subject of 14
insurance be a building on ground not owned by the insured in fee- 15
simple; or if the subject of insurance be personal property and be 16
or become incumbered by a chattel mortgage; or if, with the knowl- 17
edge of the insured, foreclosure proceedings be commenced or notice 18
given of sale of any property covered by this policy by virtue of any 19
mortgage or trust deed; or if any change, other than by the death 20
of an insured, take place in the interest, title, or possession of the 21
subject of insurance (except change of occupants without increase of 22
hazard) whether by legal process or judgment or by voluntary act of 23
the insured, or otherwise; or if this policy be assigned before a loss; 24
or if illuminating gas or vapor be generated in the described build- 25
ing (or adjacent thereto) for use therein; or if (any usage or custom 26
of trade or manufacture to the contrary notwithstanding) there be 27
kept, used, or allowed on the above described premises, benzine, 28
benzole, dynamite, ether, fireworks, gasolene, greek fire, gunpowder 29
exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine 30
or other explosives, phosphorus, or petroleum or any of its products 31
of greater inflammability than kerosene oil of the United States 32
standard, (which last may be used for lights and kept for sale accord- 33
ing to law but in quantities not exceeding five barrels, provided it be 34
drawn and lamps filled by daylight or at a distance not less than ten 35
feet from artificial light); or if a building herein described, whether 36
intended for occupancy by owner or tenant, be or become vacant or 37
unoccupied and so remain for ten days. 38

This company shall not be liable for loss caused directly or in- 39
directly by invasion, insurrection, riot, civil war or commotion, or 40
military or usurped power, or by order of any civil authority; or by 41
theft; or by neglect of the insured to use all reasonable means to 42
save and preserve the property at and after a fire or when the prop- 43
erty is endangered by fire in neighboring premises; or (unless fire 44
ensues, and, in that event, for the damage by fire only) by ex- 45
plosion of any kind, or lightning; but liability for direct damage by 46
lightning may be assumed by specific agreement hereon. 47

1 If a building or any part thereof fall, except as the result of fire,
2 all insurance by this policy on such building or its contents shall
3 immediately cease.

4 This company shall not be liable for loss to accounts, bills,
5 currency, deeds, evidences of debt, money, notes, or securities;
6 nor, unless liability is specifically assumed hereon, for loss to awn-
7 ings, bullion, casts, curiosities, drawings, dies, implements, jewels,
8 manuscripts, medals, models, patterns, pictures, scientific appara-
9 tus, signs, store or office furniture or fixture, sculpture, tools, or
10 property held on storage or for repairs; nor, beyond the actual
11 value destroyed by fire, for loss occasioned by ordinance or law reg-
12 ulating construction or repair of buildings, or by interruption of busi-
13 ness, manufacturing processes, or otherwise; nor for any greater
14 proportion of the value of plate glass, frescoes, and decorations
15 than that which this policy shall bear to the whole insurance on
16 the building described.

17 If an application, survey, plan, or description of property be re-
18 ferred to in this policy it shall be a part of this contract and a
19 warranty by the insured.

20 In any matter relating to this insurance no person, unless duly
21 authorized in writing, shall be deemed the agent of this company.

22 This policy may by a renewal be continued under the original
23 stipulations, in consideration of premium for the renewed term, pro-
24 vided that any increase of hazard must be made known to this com-
25 pany at the time of renewal or this policy shall be void.

26 This policy shall be cancelled at any time at the request of the in-
27 sured; or by the company by giving five days' notice of such cancella-
28 tion. If this policy shall be cancelled as hereinbefore provided, or
29 become void or cease, the premium having been actually paid, the
30 unearned portion shall be returned on surrender of this policy or last
31 renewal, this company retaining the customary short rate; except
32 that when this policy is cancelled by this company by giving notice
33 it shall retain only the *pro rata* premium.

34 If, with the consent of this company, an interest under this policy
35 shall exist in favor of a mortgagee or of any person or corporation
36 having an interest in the subject of insurance other than the in-
37 terest of the insured as described herein, the conditions hereinbefore
38 contained shall apply in the manner expressed in such provisions
39 and conditions of insurance relating to such interest as shall be
40 written upon, attached, or appended hereto.

41 If property covered by this policy is so endangered by fire as to
42 require removal to a place of safety, and is so removed, that part of
43 this policy in excess of its proportion of any loss and of the value of
44 property remaining in the original location, shall, for the ensuing
45 five days only, cover the property so removed in the new location;
46 if removed to more than one location, such excess of this policy
47 shall cover therein for such five days in the proportion that the value

in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the

1 award in writing of any two shall determine the amount of such loss ;
2 the parties thereto shall pay the appraiser respectively selected by
3 them and shall bear equally the expenses of the appraisal and
4 umpire.

5 This company shall not be held to have waived any provision or
6 condition of this policy or any forfeiture thereof by any require-
7 ment, act, or proceeding on its part relating to the appraisal or to
8 any examination herein provided for ; and the loss shall not become
9 payable until sixty days after the notice, ascertainment, estimate,
10 and satisfactory proof of the loss herein required have been received
11 by this company, including an award by appraisers when appraisal
12 has been required.

13 This company shall not be liable under this policy for a greater
14 proportion of any loss on the described property, or for loss by and
15 expense of removal from premises endangered by fire, than the
16 amount hereby insured shall bear to the whole insurance, whether
17 valid or not, or by solvent or insolvent insurers, covering such prop-
18 erty, and the extent of the application of the insurance under this
19 policy or of the contribution to be made by this company in case of
20 loss, may be provided for by agreement or condition written hereon
21 or attached or appended hereto. Liability for re-insurance shall be
22 as specifically agreed hereon.

23 If this company shall claim that the fire was caused by the act or
24 neglect of any person or corporation, private or municipal, this
25 company shall, on payment of the loss, be subrogated to the extent
26 of such payment to all right of recovery by the insured for the loss
27 resulting therefrom, and such right shall be assigned to this company
28 by the insured on receiving such payment.

29 No suit or action on this policy, for the recovery of any claim,
30 shall be sustainable in any court of law or equity until after full com-
31 pliance by the insured with all the foregoing requirements, nor unless
32 commenced within twelve months next after the fire.

33 Wherever in this policy the word "insured" occurs, it shall be
34 held to include the legal representative of the insured, and wherever
35 the word "loss" occurs, it shall be deemed the equivalent of "loss
36 or damage."

37 If this policy be made by a mutual or other company having spe-
38 cial regulations lawfully applicable to its organization, membership,
39 policies or contracts of insurance, such regulations shall apply to and
40 form a part of this policy as the same may be written or printed
41 upon, attached, or appended hereto.

42 This policy is made and accepted subject to the foregoing stipula-
43 tions and conditions, together with such other provisions, agreements,
44 or conditions as may be indorsed hereon or added hereto, and no
45 officer, agent, or other representative of this company shall have
46 power to waive any provision or condition of this policy except
47 such as by the terms of this policy may be the subject of agree-

ment indorsed hereon or added hereto, and as to such provisions 1
and conditions no officer, agent, or representative shall have such 2
power or be deemed or held to have waived such provisions or 3
conditions unless such waiver, if any, shall be written upon or at- 4
tached hereto, nor shall any privilege or permission affecting the in- 5
surance under this policy exist or be claimed by the insured unless 6
so written or attached. 7

IN WITNESS WHEREOF, this company has executed and attested 8
these presents this day of , 18 9

(b) *Forms on the Back of the Policy.* 10

ASSIGNMENT OF INTEREST BY INSURED. 11

The interest of as owner of property covered by this 12
Policy is hereby assigned to subject to the consent 13
of 14

[Signature of the Insured] 15

Dated 16

[NOTE. — To secure Mortgagees, if desired, the Policy should 17
be made payable on its face to such Mortgagee as follows: Loss, 18
if any, payable to *John Doe*, Mortgagee.] 19

CONSENT BY COMPANY TO ASSIGNMENT OF INTEREST. 20

hereby consents that the interest of as 21
owner of the property covered by this Policy be assigned to 22

[Signature for Company.] 23

Dated 24

(c) *Some Permissible Clauses or Riders.*¹ 25

AVERAGE CLAUSE. 26

This Company shall not be liable for a greater proportion of any 27
loss or damage to the property described herein than the sum hereby 28
insured bears to per centum (%) of the actual 29
cash value of said property at the time such loss shall happen. 30

If the insurance under this policy be divided into two or more 31
items this Average Clause shall apply to each item separately. 32

¹ From New York Insurance Report, 1902, Part I., pp. xxiv.-xxx. — Ed.

1 APPLICATION AND SURVEY CLAUSE.

2 This policy is based upon an application and survey of the prop-
3 erty on file which is hereby referred to as forming part of this policy.

4 Date of Application

5 Where filed

6 Attached to and forming part of Policy No.

7 [Signature for Company.]

8 PERCENTAGE VALUE CLAUSE.

9 If at the time of fire the whole amount of insurance on the property
10 covered by this policy shall exceed per cent of the actual cash
11 value thereof, this Company in case of loss or damage shall not be
12 liable to pay more than its *pro rata* share of said per cent
13 of the actual cash value of such property; and should the whole in-
14 surance at the time of the fire exceed the said per cent, a *pro rata*
15 return of premium on such excess of insurance from the time of the
16 fire to the expiration of this policy shall be made on surrender of the
17 policy.

18 Attached to and forming part of Policy No.

19 [Signature for Company.]

20 CO-INSURANCE CLAUSE.

21 If at the time of fire the whole amount of insurance on the
22 property covered by this policy shall be less than the actual cash
23 value thereof, this Company shall, in case of loss or damage, be
24 liable for such portion only of the loss or damage as the amount in-
25 sured by this policy shall bear to the actual cash value of such prop-
26 erty.

27 Attached to and forming part of Policy No.

28 [Signature for Company.]

29 PERCENTAGE CO-INSURANCE CLAUSE.

30 If at the time of fire the whole amount of insurance on the prop-
31 erty covered by this policy shall be less than per cent of
32 the actual cash value thereof, this Company shall, in case of loss or
33 damage, be liable for only such portion of such loss or damage as
34 the amount insured by this policy shall bear to the said
35 per cent of the actual cash value of such property.
36 Attached to and forming part of Policy No.

37 [Signature for Company.]

MORTGAGEE CLAUSE.

1

Loss or damage, if any, under this policy, shall be payable to 2
as mortgagee [or trustee], as interest may 3
appear, and this insurance, as to the interest of the mortgagee [or 4
trustee] only therein, shall not be invalidated by any act or neglect 5
of the mortgagor or owner of the within described property, nor by 6
foreclosure or other proceedings or notice of sale relating to the 7
property, nor by any change in the title or ownership of the prop- 8
erty, nor by the occupation of the premises for purposes more 9
hazardous than are permitted by this policy; *provided*, that in case 10
the mortgagor or owner shall neglect to pay any premium due under 11
this policy, the mortgagee [or trustee] shall, on demand, pay the 12
same. 13

Provided, also, that the mortgagee [or trustee] shall notify this 14
Company of any change of ownership or occupancy or increase of 15
hazard which shall come to the knowledge of said mortgagee [or 16
trustee], and, unless permitted by this policy, it shall be noted 17
thereon and the mortgagee [or trustee] shall, on demand, pay the 18
premium for such increased hazard for the term of the use thereof; 19
otherwise this policy shall be null and void. 20

This Company reserves the right to cancel this policy at any time 21
as provided by its terms, but in such case this policy shall continue 22
in force for the benefit only of the mortgagee [or trustee] for ten 23
days after notice to the mortgagee [or trustee] of such cancellation 24
and shall then cease, and this Company shall have the right, on like 25
notice, to cancel this agreement. 26

Whenever this Company shall pay the mortgagee [or trustee] any 27
sum for loss or damage under this policy and shall claim that, as to 28
the mortgagor or owner, no liability therefor existed, this Company 29
shall, to the extent of such payment, be thereupon legally subrogated 30
to all the rights of the party to whom such payment shall be made, 31
under all securities held as collateral to the mortgage debt, or may 32
at its option, pay to the mortgagee [or trustee] the whole principal 33
due or to grow due on the mortgage with interest, and shall there- 34
upon receive a full assignment and transfer of the mortgage and of 35
all such other securities; but no subrogation shall impair the right of 36
the mortgagee [or trustee] to recover the full amount of 37
claim. 38

Dated, 39
Attached to and forming part of Policy No. 40

[Signature for Company.] 41

SECTION III.

*Life Insurance.*¹

1 A POLICY, WITH THE ACCOMPANYING PROVISIONS, APPLICATION, AND
2 MEDICAL EXAMINER'S REPORT.

3 *The Life Insurance Company of New York*

NUMBER 4 IN CONSIDERATION of the application for this Policy, which is
5 hereby made a part of this contract, promises to pay at its Head
AMOUNT 6 Office in the City of New York, unto

7
8 of in the County of State of

9
10 executors, administrators or assigns,
AGE 11 Dollars,

12 upon acceptance of satisfactory proofs at its Head Office of the
YEARS 13 death of
14

ANNUAL 15 during the continuance of this Policy, upon the following condition ;
PREMIUM 16 and subject to the provisions, requirements and benefits stated on
FOR LIFE, 17 the back of this Policy, which are hereby referred to and made part
18 hereof :

19 The annual premium of Dollars
\$ 20 and Cents shall be paid in advance on the
21 delivery of this Policy, and thereafter to the Company at its Head
22 Office in the City of New York, on the
23 day of in every year during the con-
24 tinuance of this contract.

25 The receipt of the first payment of premium hereon is acknowl-
26 edged.

27 IN WITNESS WHEREOF, the said The Life Insurance Company
28 of New York has caused this Policy to be signed by its President
29 and Secretary at its office in the City of New York, the
30 day of A. D.
31 one thousand eight hundred and ninety-nine.

32 *Secretary.* *President.*

¹ There are no statutory forms for life insurance policies. The differences between the policies of various companies are both verbal and substantial. — ED.

Provisions, Requirements, and Benefits.

1

Premiums. — Each premium is due and payable at the Head Office 2
of the Company in the City of New York, but will be accepted else- 3
where when duly paid in exchange for the Company's receipt signed 4
by the President or Secretary. That part of the year's premium, if 5
any, not due and unpaid at maturity of this policy shall be deducted 6
from the amount of the claim. 7

Grace in Payment of Premiums. — After this policy has been in 8
force one year, thirty days of grace will be allowed in payment of pre- 9
miums, with interest for the time taken at the rate of 5% per annum, 10
during which time this policy shall remain in force for the full amount. 11

Automatic Paid-up Insurance. — After three full years' premiums 12
have been paid, this policy, upon the non-payment of any subsequent 13
premium, will become a non-participating policy for paid-up insur- 14
ance, for the amount stated in the table below, for the end of the last 15
year for which complete annual premiums have been paid; provided 16
there be no unpaid loan hereon. 17

Extended Insurance. — After three full years' premiums have 18
been paid, upon the non-payment of any subsequent premium, within 19
the thirty days of grace, or on satisfactory medical examination within 20
twelve months from the due date of premium, if this policy be sur- 21
rendered, the Company will issue in lieu thereof a non-participating 22
policy for paid-up insurance for the full amount, to cease after the 23
number of years and months stated in the table below for the end of 24
the last year for which complete annual premiums have been paid; 25
provided there be no unpaid loan hereon. 26

Cash Surrender Value. — After three full years' premiums have 27
been paid, upon the non-payment of any subsequent premium on the 28
date called for in the policy and within sixty days thereafter, this 29
policy may be surrendered and the Company will pay therefor, within 30
sixty days from the date of such surrender, the amount stated in the 31
table below for the end of the last year for which complete annual 32
premiums have been paid, deducting any unpaid loan hereon. 33

Loans. — After this policy shall have been in force three full years, 34
the Company, within sixty days after written application, and upon 35
the assignment of this policy as security, will, in conformity with its 36
rules then in force, loan amounts within the limits of the cash sur- 37
render value, with interest in advance, at the rate of five per cent 38
per annum, provided: (1) that premiums be fully paid to the end of 39
the policy year in which the loan falls due; (2) that in any settle- 40
ment of this policy all outstanding indebtedness must be paid. 41

Surplus. — At the expiration of each period of five years from 42
date, a distributive share of surplus shall be apportioned to this 43
policy, if in force, in additional paid-up insurance for the amount 44
purchasable by such share, or the surplus may be drawn in cash at 45
the end of each period, or may at any time be used in payment of 46
premiums on this policy. 47

- 1 *Residence, Travel and Occupation.* — This policy is free from re-
2 strictions as to residence, travel and occupation, after two years from
3 date, except military or naval service in time of war, for which per-
4 mission must be obtained, at the Company's regular rates.
5 *Admission of Age.* — The Company will admit the age of the in-
6 sured upon satisfactory proof; failing such proof, if the age shall
7 have been understated, the amount of insurance or other benefit will
8 be equitably adjusted.]
9 *Incontestability.* — After two years from the date of issue, this
10 policy shall be incontestable if the premiums have been duly paid.

- 11 *Notice.* — No person, except an Executive Officer of the Company
12 or its Secretary at its Head Office in New York, has power on be-
13 half of the Company to make, modify or alter this contract, to extend
14 the time for paying a premium, to bind the Company by making any
15 promise or by accepting any representation or information not con-
16 tained in the application for this contract. Any interlineations, ad-
17 ditions or erasures must be attested by the signature of one of the
18 above named officers. Proofs of death will be required on the forms
19 prescribed by the Company which will be furnished on request.
20 *Assignments.* — The Company declines to notice any assignment
21 of this policy until the original assignment, or a duplicate or certified
22 copy thereof, shall be filed in the Company's Head Office. The Com-
23 pany will not assume any responsibility for the validity of an assign-
24 ment.

25

Table.

| FOR END OF YEAR | AUTOMATIC PAID-UP INSURANCE | EXTENDED INSURANCE FORM DATE OF NON-PAYMENT OF PREMIUM | | CASH SURRENDER VALUE |
|-----------------------|-----------------------------------|--|--------|----------------------------|
| | | Years | Months | |
| 3d | | | | |
| 4th | | | | |
| 5th | | | | |
| 6th | | | | |
| 7th | | | | |
| 8th | | | | |
| 9th | | | | |
| 10th | | | | |
| 11th | | | | |
| 12th | | | | |
| 13th | | | | |
| 14th | | | | |
| 15th | | | | |
| 16th | | | | |
| 17th | | | | |
| 18th | | | | |
| 19th | | | | |
| 20th | | | | |
| 21st | | | | |
| 22d | | | | |
| 23d | | | | |
| 24th | | | | |
| 25th | | | | |
| 26th | | | | |
| 27th | | | | |
| 28th | | | | |
| 29th | | | | |
| 30th | | | | |

(Copy of the Application for this Policy.)

THIS APPLICATION

Made to THE LIFE INSURANCE COMPANY OF NEW YORK
 is the basis and a part of a proposed Contract for Insurance, subject
 to the Charter of the Company and the laws of the State of New
 York. I hereby agree that all the following statements and answers,
 and all those that I make to the Company's Medical Examiner, in
 continuation of this application, are by me warranted to be true, and
 are offered to the Company as a consideration of the contract, which
 I hereby agree to accept, and which shall not take effect until the
 first premium shall have been paid, during my continuance in good
 health, and the policy shall have been signed by the Secretary of the
 Company and issued. I further agree that in any distribution of
 surplus, the principles and methods which may then be in use by the
 Company for such distribution, and its determination of the amount
 apportioned to such policy shall be and are hereby ratified and ac-
 cepted by and for every person who shall have or claim any interest
 in the contract.

1. My full name is
2. I reside at
 In the City of
 County of State of
3. My former residences were
4. My place of business is
5. My P. O. address is
6. My present occupation is in the
 following branch of business or trade
7. My other occupations are
8. My former occupations have been
9. The full name of the person to whom the insurance is pay-
 able is
10. Residing in
11. The relationship of said Beneficiary to me is
 (The Children or Executors, if any are named, are the Children
 or Executors of)
12. The insurable interest of the said Beneficiary in the life pro-
 posed for insurance, other than that of family relation-
 ship, is
13. I hereby apply for insurance on my life on the
 plan Years' Payments Year Distribution.
14. Amount, \$
 Contingent Additions }
 or } \$ Deferred Annuity, \$
 Mortuary Allotment. }
15. The Premiums are to be paid annually for

1 16. I was born on the _____ day of _____ 18____

2 in

3 17. I am a citizen or subject of

4 18. I have been accepted for insurance under the following policies
5 in this Company:

6 19. I am insured in other Companies and Associations, as fol-
7 lows:

8 and in no others.

9 20. No application has ever been made to any Company or Asso-
10 ciation for insurance upon my life on which a policy has
11 not been issued on the plan and premium rate originally
12 applied for, EXCEPT to the following Companies or Asso-
13 ciations :

14 and no such application is now pending or awaiting decis-
15 ion in any corporation.

16 I HEREBY WARRANT AND AGREE that during the next two years fol-
17 lowing the date of issue of the Contract of Insurance for which appli-
18 cation is hereby made, I will not travel or reside in any part of the
19 Torrid Zone, or North of the parallel of 60° North Latitude, and will
20 not engage in any of the following extra hazardous occupations or
21 employments; retailing intoxicating liquors, handling electric wires
22 and dynamos, blasting, mining, sub-marine labor, aeronautic ascen-
23 sions, the manufacture of highly explosive substances, service upon
24 any railroad train or track or in switching or in coupling cars, or on
25 any steam or other vessel, unless written permission is expressly
26 granted by the Company.

27 I FURTHER WARRANT AND AGREE that I will not engage in any mili-
28 tary or naval service in time of war, during the continuance of the
29 said contract, without first obtaining written permission from the
30 Company.

31 I ALSO WARRANT AND AGREE that I will not die by my own act,
32 whether sane or insane, during the period of one year next following
33 said date of issue.

34 I have paid \$ _____ to the subscribing Soliciting
35 Agent, who has furnished me with a binding receipt therefor, signed
36 by the Secretary of the Company, making the insurance in force from
37 this date, provided this application shall be approved, and the policy
38 duly signed by the Secretary at the Head Office of the Company and
39 issued.

Dated at _____ 1899.

41 Signature of person whose Life is proposed for insurance,

43 (Signed)

44 I have known the applicant for _____ and saw
45 him sign this application _____

46 (Signed) *Soliciting Agent.*

Medical Examiner's Report.

1

1. What is your full name? Age years. 2
2. Are you married or single? 3
3. Have you ever had any of the following diseases? (Yes or No.) 4
(Of each illness state date, number of attacks, duration, severity, 5
complications and result.) 6
- A. Dizziness, unconsciousness, epilepsy or convulsions of any 7
sort? Paralysis? Apoplexy? or any diseases of the nervous 8
system? 9
- B. Headaches, — severe, protracted, or frequent? 10
- C. Sunstroke? 11
- D. Discharges from ear or any other chronic discharges? 12
- E. Chronic or persistent cough or hoarseness, or spitting or cough- 13
ing of blood, asthma or shortness of breath, or any chest or 14
lung disease? 15
- F. Disease or any functional disturbance of the heart? 16
- G. Dyspepsia or Indigestion? 17
- H. Chronic or habitual Diarrhœa? 18
- I. Severe, protracted or repeated intestinal colic? 19
- L. Colic, due to renal or hepatic stone, or other derangement of the 20
liver? 21
- M. Hemorrhoids, fistula or other diseases of the rectum? 22
- N. Gravel, bladder or kidney disease? 23
- O. Syphilis or other venereal disease? 24
- P. Stricture? 25
- Q. Malarial or other fever? 26
- R. Rheumatism or gout? 27
- S. Any chronic disease of the skin? 28
- T. Cancer or tumors or ulcers of any kind? 29
4. What are the full particulars of any other illness, constitutional 30
diseases or injury you have had, giving date, duration and re- 31
maining effects, if any? 32
5. Has your weight recently increased or diminished, and from 33
what cause? 34
6. Are you on the U. S. invalid pension roll — if so, for what dis- 35
ability? 36
7. Give name and address of physician last consulted 37
When and for what complaint? 38
- 8a. What were your past and what are your present habits in the use 39
of alcoholic or other stimulants? 40
b. In the use of chloral, morphine and other narcotics? 41
9. Have you ever been under treatment at any asylum, cure or 42
sanitarium? If so, when, how long and for what? 43

1 10. Are you now in good health so far as you know or believe?

2 11. Family record of the Applicant.

| | | LIVING. | | DEAD. | | | Name and P. O. address of each living member of family. |
|--|----------------|---------|---------|-------|--------------------------|----------------|---|
| | | Age. | Health. | Age. | Specific cause of death? | How long sick? | |
| FATHER, | | | | | | | |
| FATHER'S FATHER, | | | | | | | |
| FATHER'S MOTHER, | | | | | | | |
| MOTHER, | | | | | | | |
| MOTHER'S FATHER, | | | | | | | |
| MOTHER'S MOTHER, | | | | | | | |
| Note causes of impaired health under title of "Remarks." | BROTHERS. | | | | | | |
| | Number living. | | | | | | |
| | Number dead, | | | | | | |
| | | | | | | | |
| SISTERS. | Number living, | | | | | | |
| | Number dead, | | | | | | |
| | | | | | | | |
| | | | | | | | |

3 Dated at

State of

4 the

day of

1899

5 WITNESS :

6 (Signed),

M.D.

7 I certify that my answers to the foregoing questions are correctly

8 recorded by the Medical Examiner.

9 (Signed),

10

Signature of the person examined.

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